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<sup>2</sup> Appointed to succeed William A. Little, January 13, 1903.

<sup>3</sup> Ceased to be President January 15, 1903.

<sup>4</sup> Became President January 15, 1903.

<sup>5</sup> Became Judge January 15, 1903.

<sup>6</sup> Appointed by Governor January 17, 1903, under constitutional amendment adopted at November election, 1902.



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WESTERN & A. R. CO. v. CLARK.

(Supreme Court of Georgia. April 8, 1903.)

APPEAL—NEW TRIAL—ERRONEOUS INSTRUCTIONS—MORTALITY TABLES—WRONGFUL DEATH.

1. In an action of tort, where the amount of the verdict is, under the facts, large and full, an erroneous charge, calculated to mislead the jury as to the manner in which they should arrive at the damages to be assessed, will require the granting of a new trial.

2. Where an erroneous rule of law is given to the jury on a material issue in the case, and is of such a nature as is calculated to mislead them, a new trial will be granted, notwithstanding the correct rule may have been announced in other portions of the charge.

3. Applying the rules above stated to the facts of the present case, it was error requiring the granting of a new trial for the court to charge the jury as follows: "On page 845 of the mortality table, under the head of 'Age,' you will find the figures '32.' There is no controversy as to the age of the deceased. Opposite that, under the head of 'Expectancy' years, you will find the figures '33.03.' Those are the years of his expectancy."

"Then if you use the annuity table, which would be a shorter calculation than by the mortality table, you may look under the head of 'Age,' and you will find the figures '33.' These are the years of his expectancy. And then opposite and to the right of that you will find under the 7% column the figures '11.448.' Having already found what you believe to be a fair average yearly value of the services of the deceased, you will multiply that by 11.448, and that will give you the amount of your verdict."

The errors thus made were not cured by a proper qualification of the rules stated in another portion of the charge.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Action by Minnie Clark against the Western & Atlantic Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Payne & Tye and J. M. Neel, for plaintiff in error. John W. & Paul F. Akin and C. T. Ladson, for defendant in error.

COBB, J. This was an action by Mrs. Clark against the railway company for the homicide of her husband, who was an employé of the company. The verdict was for \$7,500, and the company assigns error upon

the refusal of the court to grant it a new trial.

The case is, upon its facts, close and doubtful. The motion for a new trial contains numerous grounds. Upon two of these grounds we think the defendant was entitled to a new trial. These grounds assign error upon the charges set forth in the third head-note. It is true the judge charged the jury that they need not use the tables referred to in the above-quoted extracts from his charge, saying to them: "You may or may not use these tables, as you see proper," and "You are not bound to use these tables; you may use them if you see proper"—thus in two parts of the charge emphasizing the fact that the jury were not required to use the tables in arriving at the amount of their verdict. The judge was right, of course, in instructing the jury that they were not bound to use the tables; but the error, it seems to us, in the charges complained of, is that the jury are instructed that, if they do see proper to use the tables, they must use them only in a certain way. They are not instructed that the table of mortality is simply an aid in determining what was the expectancy of the deceased, but they are in effect told that if they use the mortality table, as they have a right to do, the expectancy of the deceased is 33 years. As is well known, mortality tables are compiled from facts learned from observation and experience, taking a large number of persons from all classes of life, and thereby ascertaining the average age that one would probably live. If one is engaged in a dangerous occupation, the probabilities are that his expectancy would not be as long as that indicated by the tables. If one is engaged in an occupation that is almost entirely free from those dangers which imperil life, the probabilities are that his expectancy would be longer than that indicated in the table. In cases where the mortality table is relevant as evidence, the jury should always be told that it was simply an aid to be used along with other evidence in determining what would be the expectancy of a person whose duration of life is under consideration. It will be error in any such case for the court to tell

the jury that the expectancy of an individual would be the age indicated by the table. While the table is a valuable aid to the jury, it is not binding and conclusive upon them in any case.

But it is said that the charge complained of, properly construed, was simply a statement to the jury that 33 years was the expectancy of the deceased according to the table, and not his real expectancy; it being argued that the jury were left to determine from the table and from all other circumstances what was the true expectancy of the deceased. It may be that this was what the judge intended to say, but we think the language was calculated to mislead the jury, and leave them under the impression that when they decided to use the table they must treat as the expectancy of the deceased the number of years stated in the table. In the second charge complained of the judge uses the same language, in effect telling him that 33 years are the years of the expectancy of the deceased. In this charge he tells them, in substance, that, taking these as the years of his expectancy, and finding the figures in the annuity table opposite that number of years, and multiplying this by the fair average yearly value of the services of the deceased, they will obtain a sum which should represent the amount of their verdict. We do not think the charge capable of any other interpretation. The amount of the verdict is fixed by the judge at a sum to be arrived at by taking what the jury believed to be the fair average yearly earnings of the deceased, and multiplying this by the figures given in the annuity table. Mrs. Clark testified that her husband's average earnings were from \$55 to \$60 per month. She said he always paid his board, but he generally brought from \$55 to \$60 home; that some months he brought more than others—it was \$55, \$65, \$75, and \$85—the most he ever brought home being \$88. She then repeats that the average earnings would be, as she supposed, from \$55 to \$60 per month. Taking the average between 55 and 60 as 57½, \$690 would be the amount of the yearly earnings of the deceased. This sum, multiplied by 11.448, gives \$7,899.10, or \$399.10 in excess of the amount of the verdict. Of course, no one knows whether the jury decided to use the annuity table, and we cannot know with certainty what took place in the jury room when they were considering the question as to what should be the amount of their verdict. It is certainly a singular coincidence that the amount of the verdict should be so nearly the amount which the charge of the judge would have required. In a case of a character like the present, we think errors of this kind are such as to require the granting of a new trial. The right of the plaintiff to recover is not by any means free from doubt. If she is, a jury would not, on account of the dangerous occupation in which the deceased was engaged, be compelled to

find that his expectancy was 33 years; and, even if they did find this, they would not be required or even authorized to find that his average earnings throughout this entire period would continue to be between \$55 and \$60. While we do not say, as matter of law, that the verdict found by the jury was excessive, we do hold that the errors in the charge were of such a character as to mislead the jury as to what should be the amount of their verdict, and that, under the peculiar facts of this case, these errors were of such a character as to require the granting of a new trial. In a case where the verdict is full, an error in the charge which is calculated to mislead the jury into finding a larger amount than they might have under the evidence otherwise found will require the granting of a new trial. *Central Railway Co. v. Johnston*, 106 Ga. 130(4), 32 S. E. 78; *Central Railway Co. v. Almand*, 116 Ga. 783, 43 S. E. 67.

It is said, though, that in other portions of the charge the judge gave the jury the correct rules. We do not think this would relieve the error, for it has been repeatedly ruled that where an erroneous rule is given to the jury on a material issue in the case, in such a way as to mislead them, a new trial will be granted, notwithstanding the correct rule may have been announced in another portion of the charge. See cases cited in *Central Railway Company v. Johnston*, *supra*.

We do not deem it necessary to consider in detail the numerous other assignments of error in the motion for a new trial. If any of them were well taken, similar errors will probably not be committed on another trial.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 940)

**EVANS v. PIEDMONT NAT. BLDG. & LOAN ASS'N.**

(Supreme Court of Georgia. April 8, 1903.)  
HOMESTEAD—SUIT TO SET ASIDE—PETITION—DEFENSES—USURY—RES JUDICATA.

1. A petition which sets up that the defendant is indebted to the plaintiff in a named sum of money, to secure the payment of which a deed to described real estate was given; that the debt has been sued to judgment, execution issued, and a levy made "in conformity to the law," whereupon a claim was filed by the wife of the defendant on the ground that she was entitled to the property in dispute under a homestead granted to her and her minor children; that the levy was then dismissed by the plaintiff; that the homestead sought to be set up is, for reasons stated, invalid; and which prays for a decree setting aside the homestead as to the debt due to the plaintiff, and for other appropriate equitable relief—sets out a good equitable cause of action, and is not subject to a general demurrer.

2. Nor is such a petition demurrable on the ground that the plaintiff has a complete and adequate remedy at law.

3. In defense to an equitable petition to set aside as invalid a homestead, and to subject to

a debt land which was given as security therefor, the defendant cannot plead usury in the debt, where it appears that he is concluded as to that defense by a judgment previously rendered by a court of competent jurisdiction.

4. Real estate of more than \$500 value, situated in a city, town, or village, cannot be set apart as a homestead under section 2866, Civ. Code 1895.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the Piedmont National Building & Loan Association against A. A. Evans. Judgment for plaintiff. Defendant brings error. Affirmed.

M. G. Bayne, for plaintiff in error. R. L. Anderson, for defendant in error.

CANDLER, J. The petition of the plaintiff in the court below made substantially the following case: The defendant, A. A. Evans, is the head of a family consisting of his wife and two minor children, all of whom reside in Bibb county. The Central City Loan & Trust Company is a corporation doing business in that county. On May 13, 1896, Evans made written application for a loan of \$350 from the plaintiff; offering as security certain real estate in Bibb county, and representing in his application that the property had never been set apart as a homestead, and that the aggregate value thereof was \$850. Relying upon the truth of the statements in the application, the plaintiff loaned Evans the money applied for by him; taking his warranty deed to the property, and his bond for the payment of certain monthly installments as dues on stock in the association and for interest on the loan. In order to get an unincumbered title to the property, the plaintiff paid off a prior loan to the defendant of \$319 from the Central City Loan & Trust Association, which was secured by a deed to the property. On September 21, 1900, the plaintiff obtained a judgment against Evans in the city court of Macon for \$471.50 principal, besides interest, attorney's fees, and costs, representing the indebtedness secured by his deed to it; the judgment providing especially for the recovery of the said sums of money out of the proceeds of the sale of the land described in the deed mentioned. Execution issued upon this judgment, and was levied upon the property, "in conformity to the law," whereupon Mrs. Evans, wife of the defendant, for herself and as next friend of her two minor children, claimed the land under a homestead exemption. The plaintiff dismissed its levy, and brought the present action, upon the equity side of the court, attacking the homestead upon the following grounds: (1) It purports to have been set apart by the ordinary of Bibb county, under section 2040 of the Code of 1882, upon the application of Mrs. Evans as wife of the defendant, and it nowhere appears that Evans refused to have set apart as a home-

stead the realty sought to be exempted by his wife; (2) it nowhere appears in the exemption proceeding that the real estate sought to be exempted was such as could be exempted in such a proceeding under the laws of force at the time the exemption was sought; (3) the real estate sought to be exempted was not such as could be exempted under the law, not being property valuable chiefly for agricultural purposes, and not being city property of a greater value than \$500; (4) no survey or plat of the property was attached to the homestead proceeding, and none of the requirements of law incident to such a survey were complied with. It was claimed in the petition that, if the exemption was binding, it should not be allowed to prevail against the plaintiff to the exclusion of the entire indebtedness due it by Evans, because \$319 of that indebtedness, besides interest and attorney's fees, was due for money advanced to Evans for the purpose of paying off, and which actually did pay off, his indebtedness to the Central City Loan & Trust Association, as above set out. The prayers of the petition were (1) that the homestead exemption be declared invalid and of no effect as to the plaintiff; (2) that the Central City Loan & Trust Association be made a party to the cause, and the plaintiff subrogated to its rights under the deed of Evans, and judgment rendered in favor of the plaintiff for the amount advanced in paying off the debt of the Central City Association, together with interest and attorney's fees, to be recovered especially out of the land; (3) that the land be sold, and the proceeds applied first to the payment of all the indebtedness of Evans to the plaintiff; (4) for general equitable relief and for process. By amendment the plaintiff alleged, as an additional reason why the homestead was invalid, that it was set apart upon the application of the wife out of her husband's property, without the knowledge or consent of the husband. The defendant, in his answer, denied that the plaintiff had paid the \$319 due by him to the Central City Loan & Trust Association, "but says by his consent the said amount was paid out of the money borrowed by him." He admitted that the plaintiff had levied on the property as set out in the petition, and that his wife had filed a claim thereto, "and says that said claim case was tried, and evidence introduced in said case, and that the court \* \* \* sustained said homestead, \* \* \* whereupon the plaintiff dismissed its levy, and did not except in any way as allowed by law. Wherefore defendant says that the title of said land and the contentions made in this petition have been fully adjudicated in favor of the beneficiaries in said homestead, and he prays the judgment of the court so finding." He admitted that his wife had secured a homestead upon the property, and averred that at the time of securing the loan from the plaintiff he was not advise-

ed that a homestead had been applied for; that step having been taken without his knowledge or consent. He disclaimed any interest in the homestead, though denying that it was invalid. He further averred that the debt sued on by the plaintiff was infected with usury and void. Other than as set out, the answer admitted the material allegations of the petition. The plaintiff demurred specially to so much of the answer as sought to set up the defense of *res adjudicata*, "because it is apparent from the facts therein stated that no judgment has been rendered which should preclude plaintiff from now insisting upon its objection to said homestead"; and to that portion in which the defendant attempted to plead usury, on the ground that a judgment had been rendered in behalf of the plaintiff against the defendant, which was binding upon him and his privies, and "even if said judgment is not binding upon the homestead estate, of which he is the quasi trustee, the defense of usury is a personal one, and cannot be set up by one who is not a party to the contract, or his privy." The defendant also demurred to the petition generally, and on the grounds that the plaintiff had a complete remedy at law, and that there was a misjoinder of parties; the Central City Loan & Trust Company having no interest in the litigation, and not being privy to either the plaintiff or the defendant. The court overruled the demurrer of the defendant, and sustained that of the plaintiff. Certain special issues of fact were submitted to the jury, who found that the house and lot in question were located in a village; that the value of the land was \$125, and that of the improvements \$394; making the aggregate value of the property \$519. The court thereupon rendered a decree setting aside the homestead as to the land therein described, and taxing the costs against the defendant. To the ruling on the demurrers and to the rendition of the decree, the defendant excepted.

1. From the above statement of facts, it seems to us that the judgment overruling the general demurrer to the petition was so manifestly correct as to require no discussion. The petition clearly set forth a cause of action, and it was therefore not error to so hold.

2. It was claimed that the plaintiff had a complete remedy at law, and that by a levy on the property and the trial of a claim, in the event one should be filed, the questions involved could be easily adjudicated. The showing made by the petition, we think, negatives this idea. If, however, the plaintiff had levied on the land, and attempted to sell it under the levy, it would have been difficult to find a purchaser, with the homestead on it outstanding as set forth in the petition. The plaintiff would probably have been compelled to buy the land in order to realize its debt, and, in the end, would doubtless have found it necessary to bring just this sort of suit

to get rid of the homestead and obtain a clear title to the property. Aside from all this, however, the petition does not invoke any of the extraordinary powers of a court of equity, and therefore, since the passage of the uniform procedure act of 1887 (Civ. Code 1895, § 4833 et seq.), it is not necessary, in order to maintain the petition, that the plaintiff should make it appear that it has no remedy at law. *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052; *Georgia Co. v. Etowah Co.*, 104 Ga. 399, 30 S. E. 878; *Ray v. Home Co.*, 106 Ga. 497, 32 S. E. 603; *Teasley v. Bradley*, 110 Ga. 505, 35 S. E. 782, 78 Am. St. Rep. 113; *Brooks v. Stroud*, 111 Ga. 875, 36 S. E. 960.

3. We think the court below was clearly right in sustaining the demurrer to that portion of the defendant's answer which sought to set up the defense of usury in the debt due the plaintiff. It was admitted in the answer that that debt had been reduced to judgment in the city court of Macon. That court and that cause, then, were the ones in which the plea of usury should have been set up. The defendant is concluded by the judgment against him on all questions which were or might have been made at that time. It appears, also, that in this case he is the defendant in his capacity of head of a family; and it is well settled that the beneficiaries of a homestead estate are concluded by a judgment against the head of the family, even where the homestead was set apart on the application of the wife out of the husband's property. *Zimmerman v. Tucker*, 64 Ga. 432; *Barfield v. Jefferson*, 84 Ga. 609, 11 S. E. 149; *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 32 S. E. 898, 73 Am. St. Rep. 109; *Willingham v. Slade*, 112 Ga. 420, 37 S. E. 737. That the defendant, as the head of a family, could not go behind the judgment rendered in the city court of Macon for the purpose sought is clearly settled by the decisions of this court in the cases of *Stewart v. Stisher*, 83 Ga. 297, 9 S. E. 1041; *Ezzard v. Estes*, 95 Ga. 712, 22 S. E. 713; and *Hendrix v. Webb*, 113 Ga. 1090, 39 S. E. 461.

4. Section 2866 of the Civil Code of 1895 provides that real estate in a city, town, or village may be set aside as a homestead, but that it must not exceed \$500 in value. The jury, passing upon the questions of fact submitted to them in this case, found that the value of the property at the time it was set aside was \$519, and that the property was located in a village. In the case of *Piedmont Nat. B. & L. Ass'n v. Bryant*, 115 Ga. 417, 41 S. E. 661, this court held that, under the provisions of the Code section referred to, the setting apart of a homestead is exceedingly informal, but that the law imposes terms and conditions without which the exemption cannot be obtained. "One of these is that the head of a family can exempt land not in a city, town, or village only when the improvements thereon do not exceed \$200 in value. Another is that such land can be set apart only where its chief value is derived from its



adaptation to agricultural purposes. If the applicant claims an exemption on land on which the improvements exceed \$200 in value, this is contrary to law. His act in having the schedule recorded would be invalid, and would not bind creditors. So if he attempt to set apart land which does not derive its chief value from its adaptation to agricultural purposes, and which is not situated within a city, town, or village. \* \* \* The word 'provided' in the section of the Code means 'upon condition.' " What is stated in the case cited is directly applicable to the question presented in the present case. Under the finding of the jury, the property which was included in the schedule was not such as could be exempted under this section of the Code, and the homestead was therefore invalid. It follows that the decree rendered by the court below was not erroneous.

We do not pass upon the question of whether the plaintiff was entitled to be subrogated to the rights of the Central City Loan & Trust Association, because that contention seems to have been abandoned by the plaintiff in the court below, and was not argued in the briefs of counsel here.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 902)

CAIN et al. v. SMITH et al.

(Supreme Court of Georgia. April 8, 1903.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS  
—MUNICIPAL INDEBTEDNESS—SUBMISSION TO VOTERS—INJUNCTION.

1. The power of legislation may be taken away from the lawmaking body by the Constitution, as well by implication as by express prohibition, and prohibitions against legislation which result by implication are equally as effectual as when they are express, and are to be regarded in the one case no less than in the other.

2. It is to be necessarily implied, from the provisions of the Constitution in relation to the incurring of indebtedness by municipalities, that the General Assembly has not the power to provide for the submission of such questions to the qualified voters in connection with other issues entirely foreign to the matter of the debt sought to be incurred.

3. The question as to the establishment of the enterprise or project for which the debt is to be incurred may be submitted in connection with the question of incurring the debt, but the better practice, even in such cases, is to submit these questions separately.

4. If a statute is valid in part and in part invalid, and the objectionable portion is so connected with the general scheme of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the whole statute must fall.

5. Applying the principles above laid down to the facts of the present case, the court erred in not granting the injunction prayed for.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by T. R. Cain and others against C. W. Smith and others. Judgment for de-

fendants, and plaintiffs bring error. Reversed.

King, Spalding & Little and Abbott & Goree, for plaintiffs in error. Arnold & Arnold, for defendants in error.

COBB, J. On December 2, 1902, an act was approved providing for a new charter for the town of Edgewood. Acts 1902, p. 409. The first section of the act repealed the act of 1898 (Acts 1898, p. 175) incorporating the town. The second section declared "that the city of Edgewood, in the county of De Kalb, be, and the same is, hereby incorporated as a city under the name of city of Edgewood." The third section defines the corporate limits of the city, and within the limits thus prescribed is embraced more territory than was embraced within the corporate limits of the town. The following 13 sections of the act confer upon the city authorities many of the usual powers granted to municipal corporations, provide for a form of government, etc. The seventeenth and eighteenth sections relate to the establishment of a system of public instruction in the city. The nineteenth section authorizes the city to issue bonds, not to exceed \$10,000 in amount, the proceeds to be used for the purpose of erecting school buildings and purchasing sites for the same. The twentieth section extends the corporate limits over certain territory for police purposes only. The twenty-first section is in the following words: "This act shall go into effect and become operative upon its adoption by a two thirds vote of the qualified voters of said city of Edgewood, at a special election to be held for that purpose on the first Wednesday in January, 1903, which election shall be held in the same manner and under the same rules as elections for mayor and aldermen under this act; provided, the notice of the intentions to hold said election has been given as required by section 377 of the Code of Georgia, 1895 (volume one); and in said special election those voting for the adoption or ratification of this act shall have upon their ballots the words 'For bonds and adoption,' and those voting against the adoption or ratification of this act shall have the words 'Against bonds and adoption.' In the event that two thirds of the qualified voters of said city of Edgewood shall vote in favor of the adoption of this act, it shall, upon the certificate of such result by the election managers, go into effect and become operative. If this bill shall fail of adoption at the first election, it may be again submitted to a vote at another election, to be held one year from the first election, and thereafter annually if recommended by the mayor and council of the town of Edgewood." An election was held at the time fixed in the section of the charter above quoted, and it is claimed that two-thirds of the qualified voters embraced within the territory described in the act as the city of Edgewood voted "For bonds and adoption."

Certain persons who resided within the limits of the territory above referred to, and would be taxpayers and citizens of the city of Edgewood if the act was adopted, brought their petition praying that the persons claiming to have been elected as mayor and aldermen at the election be enjoined from carrying the act into effect. The judge refused to grant the injunction prayed for, and this ruling is assigned as error.

The Constitution provides that local laws having for their object the establishment of public schools within the limits of municipal corporations shall not "take effect until the same shall have been submitted to a vote of the qualified voters in each county or municipal corporation, and approved by a two-thirds vote of persons qualified to vote at such election"; the General Assembly having authority to prescribe who shall vote on such question. Civ. Code, § 5909. The Constitution also provides that no municipal corporation shall incur any new debt, except for a temporary loan to supply casual deficiencies of revenue, not to exceed one-fifth of 1 per cent. of the assessed value of taxable property therein, "without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law." Id. § 5893. The General Assembly has power to create municipal corporations, and there is no restriction in the Constitution upon this power. The General Assembly may incorporate a town or city by a legislative act simply declaring such town or city to be a municipal corporation. It may declare that the territory embraced within given limits shall be a city or town upon certain conditions named in the act, as that a certain proportion of the people embraced within such territory shall give their assent to the creation of the corporation. If the General Assembly, in its discretion, sees proper to submit this question to the people to be affected, then the number who shall give their assent is also purely within the discretion of the General Assembly. It will thus be seen that the General Assembly has power to authorize a municipal corporation to have an election on the question of the establishment of public schools, to have an election on the subject of incurring a debt, and also to authorize the persons to be affected by the creation of the municipal corporation to determine whether the corporation shall come into existence. The controlling question in the present case is whether the General Assembly has authority to provide that the qualified voters within a given territory shall pass upon all of these questions at one time. Has the General Assembly authority to provide for an election which may result in the creation of a municipal corporation, in the establishment of a system of public schools, and in the incurring of a debt for this purpose, the voters being required to vote at the same time either for or against all of the propositions submitted? The Constitution is

clear in its terms in regard to elections on the subject of incurring debts. It says that an election shall be held "for that purpose," and it is necessarily to be implied that the voters shall be permitted to express their opinion on this question disconnected from any other proposition which may be submitted for their consideration, not related to the subject of incurring the debt. The purpose and scheme of the Constitution is to discourage the incurring of debts by municipal corporations, and such debts are to be incurred only when the assent of two-thirds of the qualified voters has been freely and voluntarily given. The voters are entitled to have this question submitted to them, so that they may pass upon it freely and untrammelled by any other consideration than the question whether the debt shall be incurred for the purpose for which the money to be raised is to be used. It has been held not to be improper to submit to the qualified voters at the same time the question whether schools shall be established, and whether bonds shall be issued for the purpose of maintaining such schools; though it was said, at the time that this ruling was made, that even in such cases the better practice would have been to have provided for separate elections on these questions. *Brand v. Town of Lawrenceville*, 104 Ga. 486, 30 S. E. 954. This is the only ruling this court has ever made upon the subject, and this goes no further than holding that the qualified voters may be called upon to vote at the same time upon the question of whether a debt shall be incurred, and whether the enterprise for which the money to be thus raised is to be used shall be undertaken. Further than this we do not feel justified in going. If the General Assembly was allowed to submit two, three, or more propositions at one time in connection with the question of incurring a debt, and require the citizen to vote for or against all, the question of incurring the debt would no longer be left to the will of the qualified voters of the towns and cities of the state, but would be remitted to the subtlety and ingenuity of those interested and usually influential in passing local legislation, in combining together various matters which might have the effect to bring about a vote in favor of bonds, when it might not have been brought about if the single issue had been submitted to a vote.

It is said, though, that the Constitution does not in terms prohibit the General Assembly from submitting to the qualified voters the question of incurring a debt, along with other questions. The power of legislation may be taken away from the lawmaking body by the Constitution, as well by implication as by express prohibition, and prohibitions against legislation which result from implication are equally as effectual as when they are express, and are to be regarded in the one case no less than in the other. 6 Am. & Eng. Enc. L. (2d Ed.) 934,

note 6, citing *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272. The case just cited was dealing with a law providing for the registration of voters, which made a condition of registry the possession by the voter of certain qualifications additional to those prescribed by the Constitution, there being nothing in the Constitution expressly prohibiting the Legislature from requiring that the voter should have such qualifications. In the opinion of the court by Thompson, C. J., there is the following language: "It is usual, on the part of those who insist on the constitutionality of any given statute, to claim that it must be regarded as constitutional unless expressly prohibited by some provision in the Constitution. In other words, in construing the Constitution of the state, whatever is not expressly denied to the legislative power is possessed by it. The opposite of this rule, I may remark, is the rule of construction of the federal Constitution. I assent to this, but not that the inhibitions of the Constitution must always be express. They are equally effective, and not less to be regarded, when they arise by implication, and this is the case when the legislative provision is repugnant to some provision of the Constitution. *Leff v. Commonwealth*, 9 Watts, 200; *Hill v. Humphreys*, 5 Watts & S. 123, 39 Am. Dec. 117; *Eakin v. Raub*, 12 Serg. & R. 330; *Commonwealth v. Maxwell*, 27 Pa. 444; *Chase v. Miller*, 41 Pa. 403. To illustrate this idea: The executive power of the state, under the Constitution, is lodged in a governor; and the legislative in a senate and house of representatives. It would be manifestly repugnant to these provisions of the Constitution if an act of assembly should provide for the election of two executives, or two senates and houses of representatives, at the same election; yet it would be unconstitutional only by implication, there being no express prohibition on the subject. So in regard to qualification for office. An act which should require a residence in the state for ten years, instead of three, or an age of fifty years, or freehold estate, in order to be eligible to the office of representative, would be void for repugnancy, because differing from the qualification expressed in the Constitution, and would be so only by necessary implication—necessary to keep legislation within the paramount rules of the Constitution." When it is apparent that the policy of the Constitution is against the incurring of municipal indebtedness, and that such indebtedness is to be incurred only with the assent of the qualified voters of the municipality, "at an election for that purpose," is there not necessarily an implication that the General Assembly shall not submit the question of incurring the indebtedness in such a way that the qualified voters will be tempted, even if not constrained, to authorize the creation of the debt, solely in order that other propositions submitted at the same time may succeed? Under the ruling in the *Brand*

*Case*, the General Assembly had authority to submit at the same time to the qualified voters of Edgewood the question of the establishment of schools, and the question as to whether the facilities for the schools should be secured by an issue of bonds. But it did not have authority to submit, at the time these two questions were voted on, the further proposition as to whether the city of Edgewood should come into existence as a municipal corporation. We have therefore, without much difficulty, reached the conclusion that the qualified voters within the territory intended to be embraced within the city of Edgewood have not given their assent to the incurring of the indebtedness in the manner prescribed by the Constitution. So much of the act, therefore, as provided for a submission of this issue to the qualified voters at the same time with the issue of incorporation or no incorporation, is unconstitutional and void.

The question then arises, what effect has this invalid part of the act upon the remainder of it? As stated above, the General Assembly had the right to incorporate the city of Edgewood, and prescribe as a condition precedent to incorporation that the people to be affected by it should consent thereto. Considering the act as a whole, it is apparent that the General Assembly intended that the city of Edgewood should come into existence as a municipal corporation only in the event the election provided for in the twenty-first section of the act should result "For bonds and adoption"; that is, it was intended that this new municipality should not take its place among the municipalities of the state unless two-thirds of the qualified voters in the territory to be affected assented to three propositions—the creation of the municipality, the establishment of schools, and the incurring of a debt of \$10,000 to provide for the same. The question was submitted by the General Assembly in this way, and it is therefore to be inferred that unless this could be done it was not the intention of the General Assembly to create the municipality. The rule applicable in such cases is thus stated by the present Chief Justice in *Elliot v. State*, 91 Ga. 696, 17 S. E. 1004: "When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the Legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose. But if the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it. The courts cannot construct from a defective statute a law which the lawmaking body did not intend to enact, and which it cannot be presumed it would have been willing to enact. See *ley Const. Lim.* (8th Ed.) 209 et seq.;

erland, Stat. Constr. §§ 169-180; Baldwin v. Franks, 120 U. S. 678 [7 Sup. Ct. 656, 32 L. Ed. 766], and cases cited." See, also, Papworth v. State, 103 Ga. 37 (2), 31 S. E. 402. Under the principle stated in the quotation just made, it is apparent that the legislative scheme in the act under consideration cannot be carried out, and therefore the entire act must fall. The court erred in not granting the injunction prayed for.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., disqualified.

(117 Ga. 950)

**HARRIS v. GANO & JENNINGS (two cases).**

(Supreme Court of Georgia. April 8, 1903.)

**ACTIONS—CONSIDERATION—PRACTICE—CROSS-BILL OF EXCEPTIONS.**

1. Where two cases between the same parties are consolidated merely for the purposes of trial, and separate verdicts are returned against the losing party, who thereupon makes in each case an independent motion for a new trial, the proper practice, in the event both of his motions are overruled and he desires to except to the judgments thereon, is to sue out separate writs of error. When this course is pursued, the prevailing party in the trial court cannot, by a single cross-bill of exceptions, bring under review in this court such rulings in the two cases as were adverse to him.

2. So far as the present litigation is concerned, the evidence warranted the findings of the jury in favor of the prevailing party below, and there was no error of commission or of omission by the trial judge of which the losing party could justly complain.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Actions by W. H. Harris, executor, against Gano & Jennings. Actions consolidated. Verdicts rendered for plaintiff. Defendants bring separate writs of error, and plaintiff files cross-bill of exceptions. Judgment affirmed on main bill of exceptions. Cross-bill dismissed.

L. L. Brown and Bacon, Miller & Brunson, for plaintiff. Hardeman & Moore and H. A. Mathews, for defendants.

**SIMMONS, C. J.** On July 3, 1896, W. H. Harris, as executor under the will of H. C. Harris, entered into a written contract with Gano & Jennings, which embraced, among other stipulations, the following: That firm was to be allowed to place its sawmill on a plantation comprising a portion of the estate represented by Harris, and to "cut therefrom all the timber available for lumber, except pine." This timber was to be sawed into lumber, at the expense of Gano & Jennings, "according to the specifications furnished by Harris, and to be stacked on sticks on the yard in such manner as" he might direct. "On 1st Wednesday in each month, Harris" was to "inspect the lumber sawed during the preceding calendar month, and

pay" Gano & Jennings in cash, as per a schedule of prices agreed on, for all the lumber so sawn which came up to the specifications furnished. The lumber which did not meet these specifications was to "be divided equally, Harris taking one-half, and Gano & Jennings taking one-half as their full pay for sawing it and piling it in two separate piles." Harris was to keep that firm "supplied with specifications for sawing full time, not exceeding 200,000 feet per month"; and in the event he should fail, on application, to furnish such specifications, the partnership was to be privileged to "saw the timber into merchantable lumber of customary sizes." Gano & Jennings, on the other hand, agreed "to cut the timber, haul the logs, and \* \* \* saw all the timber on the place available for lumber, except pine," according to the specifications furnished by Harris, and at the prices agreed on, averaging "sawing not under 100 M feet per month"; provided that any "providential occurrence interfering with the operation of the mill" should relieve Gano & Jennings, to the extent of such interference, from this "obligation of averaging 100 M feet of lumber per month." In pursuance of this agreement, Gano & Jennings proceeded to erect a sawmill on the tract of timber above referred to, and commenced sawing some time in August, 1896. Operations were continued from that time up to the summer of 1898, when they were suspended by mutual assent of the parties. In March, 1899, Harris, as executor, instituted against Gano & Jennings two suits, one being an action for damages predicated upon an alleged breach of the contract, and the other being a suit upon an open account for the sum of \$3,465.55, with interest thereon. In defense to the first of these suits, Gano & Jennings filed an answer in which denial was made of all the material allegations of the plaintiff's petition, and in which that firm set up a counterclaim for damages by way of recoupment. In answer to the suit on the account, Gano & Jennings denied all indebtedness to the plaintiff, and also filed a special plea in which it was alleged that the plaintiff was indebted to the partnership in the sum of \$602.60 for lumber sawn for the plaintiff during the months of September, October, and November, 1897, and never paid for. When these cases were called in the superior court, they were, by consent of the parties, consolidated for the purposes of trial, and a separate verdict was returned in each. The losing party, Harris, duly filed separate motions for a new trial, neither of which was granted, and he thereupon brought both cases to this court for review upon separate writs of error. Gano & Jennings filed a cross-bill of exceptions, designed to cover both cases, in which complaint was made of various rulings adverse to that firm.

1. On the hearing before this court, counsel for Gano & Jennings took the position

that, as the two cases were consolidated and tried together in the court below, Harris should have made but a single motion for a new trial; and that, as he failed to pursue this course, but filed an independent motion in each case, and sued out separate writs of error in each, this court was without jurisdiction in the premises. This position is wholly untenable, as will appear from what has been heretofore said by this court with reference to the practice to be followed when two or more cases are consolidated merely for the purposes of trial, separate verdicts being returned in each. See *Western Assurance Co. v. Way*, 98 Ga. 746, 27 S. E. 167; *Dickey v. State*, 101 Ga. 572, 28 S. E. 980; *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444; *Walker v. Conn*, 112 Ga. 814, 37 S. E. 403; *Wells v. Coker Banking Co.*, 113 Ga. 857, 39 S. E. 298; *Purvis v. First's Sons & Co.*, 114 Ga. 689, 40 S. E. 723. Accordingly, we decline to dismiss the bills of exceptions sued out by Harris, and hold that this court is without jurisdiction to entertain the cross-bill, as it applies to and was intended to cover both of the cases tried in the court below.

2. In support of his claim for damages, the plaintiff offered evidence tending to show that Gano & Jennings did not have suitable machinery for sawing hardwood timber, and employed an incompetent sawyer, with the result that much of the timber sawed was ruined and wasted; that the lumber produced was not sawed according to the specifications furnished, and was therefore unfit for market; and that no attempt at all was made by Gano & Jennings to saw certain bills of lumber for which the plaintiff had procured orders, and which he had turned over to the firm to fill under the terms of the contract between them. The items of damage sought to be recovered consisted: (1) Of loss of profits on various orders for lumber received by the plaintiff, but which he was unable to fill for the reasons just mentioned; (2) of expenses to which the plaintiff was put because of the failure of Gano & Jennings to stack the lumber in two separate piles; and (3) of loss incurred by reason of increase in general expenses caused by delay in sawing, and failure to produce an average of 100,000 feet of lumber per month. This alleged increase in general expenses was brought about, the plaintiff insisted, by Gano & Jennings consuming 12 months' time in sawing lumber which, under the contract, should have been sawed in 6 months' time, with the result that he was compelled to keep men and teams at the mill, during the entire period of 12 months, in order to handle the lumber and attend to its shipment, although they could not be constantly and profitably employed during the whole of that time. The evidence offered in behalf of the defendant partnership tended to show full compliance on its part with all its obligations under the contract, both as to selecting suit-

able timber with which to fill special orders, and as to sawing the same, so far as practicable, into lumber of the kind called for by the specifications furnished by the plaintiff; and that the only reason why all the orders for lumber received by him had not been filled, and an average of 100,000 feet of lumber sawn per month, was that there was not, on the entire tract of land, timber of sufficient size, quantity, and quality out of which to saw the lumber called for by such of the bills of lumber furnished by the plaintiff as had not been duly sawed according to specifications.

His honor of the trial bench fully and fairly submitted to the jury the contentions of the respective parties with regard to whether Gano & Jennings had, or had not, complied with the contract as to sawing, according to specifications, all the bills for lumber furnished by the plaintiff, which could have been filled out of the timber growing on the tract of land belonging to the estate he represented. Complaint is made that his honor did not, however, specially direct the attention of the jury to the item of damage which the plaintiff claimed he had sustained by reason of being forced to keep at the mill men and teams during a period of 12 months, when, as he contended, all the sawing done during that period might have been done within 6 months, if the mill had been properly managed and the timber carefully selected and sawed without waste. Doubtless, the plaintiff would have been entitled to recover this item of damage had the jury found in his favor upon the main issue in controversy, viz., whether or not Gano & Jennings had committed a breach of the contract by failing to saw, according to specifications, the bills of lumber furnished by the plaintiff. However, as the jury found against him upon this issue, and their finding was fully warranted by the evidence, the failure of the trial judge to call their attention to this particular item of the damages claimed affords no reason for setting aside their verdict.

It appeared on the trial that Harris never undertook, as provided for in the contract, to inspect on the first Wednesday in each month all lumber sawed during the preceding calendar month. On the contrary, the evidence discloses that he found it impracticable to do so, and that he made no effort to carry out this stipulation of the contract, but went to the piles of lumber from time to time and took therefrom such pieces as he needed in order to fill special orders. The defendant introduced testimony to the effect that the lumber sawed was properly stacked according to contract; that, without attempting to inspect it, with a view to rejecting such of it as failed to come up to specifications, the plaintiff and the men in his service went to the piles in order to get pieces of lumber of certain dimensions which they needed, from time to time, throwing to one side all pieces of other dimensions; that boards thus thrown

off the piles were often split and rendered worthless; that none of this lumber was ever restacked, but was left on the ground in a confused heap, exposed to the weather, where it became stained and warped; and that, in consequence, a considerable portion of the lumber sawed in accordance with the specifications furnished was rendered unmarketable and of little or no value. In charging the jury upon this branch of the defense, his honor told them that, if they believed it was sustained by the evidence introduced in support of the same, they would not be warranted in allowing the plaintiff damages for any loss thus brought about by his own action. It is insisted by counsel for the plaintiff that the court erred in not also instructing the jury, in this connection, "that, under the expressed terms of the contract," Harris "had a right to tear down the stacks of lumber for the purpose of inspecting the same, and that by the terms of the contract" the firm of Gano & Jennings was under a duty "to then restack said lumber into two separate piles for division between the parties." The reply to this contention is that the evidence did not warrant any such instruction, and to have given any charge on the line suggested would have served only to confuse the jury. As stated above, the testimony showed that Harris never undertook to inspect the lumber and reject such part of it as did not meet the specifications furnished by him, so the defendant partnership was under no duty to restack any portion of the lumber to the end that it might be equally divided according to the terms of the contract. This being true, the sole question for determination by the jury was whether or not, in point of fact, as claimed by Gano & Jennings, but denied by Harris, the men in his employ did tear up the piles of lumber in order to get pieces of certain dimensions, throwing such pieces as were not immediately wanted on the ground, and there allowing them to remain until they became damaged and unfit for market.

As to the plaintiff's claim, which was based on the open account sued on, the issue presented was whether or not he had made monthly advances to Gano & Jennings in order to enable that firm to prosecute the business, or had, by way of final settlement, without inspection or measurement of the lumber sawn during each month, accepted as correct the charges for sawing made by Gano & Jennings, and paid the same in full without objection or complaint. With respect to this issue the evidence was conflicting, and the trial judge, in charging thereon, instructed the jury that, if Harris failed to inspect the lumber as provided for in the contract, paid the bills for sawing, when presented at the end of each month, without question or complaint, and, "after paying such bills, treated the lumber as his own, and had it shipped or resawed, or otherwise appropriated it to his own use," then he "would be estopped from afterwards claiming that the money so paid

on the bills was an advance, and not a payment." There is no complaint on the part of Harris that this charge was not fully warranted by the evidence, but he does insist that it was erroneous in that it, "in effect, confined the jury to determining only whether the lumber was properly sawed, and wholly excluded from their consideration the question as to whether the defendants actually furnished to Harris the amount of lumber called for by said bills," which question the court nowhere else in the charge submitted to the jury. We find, on examination of the entire charge of the court, which appears in the record before us, that, immediately after instructing the jury as just indicated, the court further charged them as follows: "On the other hand, I charge you this to be true: If, by agreement between the parties, when, at the end of each month, the bills were presented by Gano & Jennings to Harris, Harris not being able at the time to inspect the lumber for any reason whatever, and by agreement made then between him and Gano & Jennings he advanced to them an amount of money which represented the amount of money due to them for the lumber sawed during the month, and there was an agreement between Harris and Gano & Jennings that inspection should be delayed until subsequent time, and that the payments were to be tentative—that is to say, were not to be in full and final settlements for each month's bill, but was to be treated merely as an advance to them, and settlement and calculation as to the amount due to be had later—then that would not be such a settlement between the parties as to prevent Harris from setting up later, should it turn out [that] he had paid more than was due to Gano & Jennings." This charge, it would seem, left the jury entirely at liberty to consider, not only whether Harris received the kind of lumber for which he had contracted to pay, but also whether he actually received the amount of lumber for the sawing of which he was charged in the bills presented to him by Gano & Jennings. Be this as it may, however, there is absolutely no merit in the attack made upon the charge excepted to, conceding that it did limit the jury to a consideration of the question whether or not Harris, by failing to inspect the lumber and appropriating it to his own use, waived all defects therein caused by improper sawing or otherwise. While testifying as a witness in his own behalf, Harris did undertake to say the account sued on was correct, and that he had therein credited Gano & Jennings with all the lumber which had been sawed during the months covered thereby. But upon cross-examination he admitted he had never, in point of fact, actually measured all of the lumber which had been sawed and stacked by Gano & Jennings, saying, in this connection: "There was not this much lumber there; I know that from my frequent visits there. I measured the lumber to see whether it was there. I measured all that I

got. I never measured Jennings' half of the rejected. I don't know whether he sawed the amount of lumber represented by those papers or not. I never saw that much there. I did not guess at all; I did not measure it; but you can judge of the quantity of lumber without measuring each piece. I measured all that I got; and my estimate— That was merely my judgment. Mr. Jennings did not try to get me there to inspect this lumber represented by these bills. I went several times to inspect it, but I could not do it." Granting that this testimony would warrant the conclusion that the bill rendered by Gano & Jennings did not correctly state the amount of lumber actually sawed, it certainly afforded no basis upon which the jury could estimate the precise amount of lumber sawed during any particular month or other definite period. True, Harris stated the number of feet of different kinds of lumber which he admitted he actually got, but it conclusively appears from his testimony, considered as a whole, that, in referring to the amount of lumber he "got," he meant such lumber as he hauled away from the yard, shipped, and sold, and not to all the lumber which had been stacked in the yard during the period covered by the bills for sawing presented for payment by Gano & Jennings.

The jury found that the plaintiff's claim that he had overpaid that firm was not well founded, and, further, that he was due to it \$352 upon a just and fair accounting between them. We are not prepared to hold that this finding of the jury was without evidence to support it, although there was evidence which might well have warranted a different conclusion.

Judgment in each case affirmed as to main bill of exceptions; cross-bill of exceptions dismissed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 334)

#### HARRIS v. GANO.

(Supreme Court of Georgia. April 8, 1903.)  
JUDGMENT—RES JUDICATA—INJUNCTION—  
NEW TRIAL.

1. A verdict without a judgment will not sustain a plea of res adjudicata. Even if the verdict could be used as evidence establishing the rights of those in whose favor it was rendered, yet, upon due notice by the losing party of an intention to move for a new trial, the judge having jurisdiction of the parties and subject-matter could have granted time in which to move for a new trial, or otherwise stayed or suspended the effect of the verdict as evidence.

2. Where, for the purpose of obtaining an equitable set-off, H. filed a petition to enjoin a judgment against him, held by a member of a firm against which H. had suits then pending, and which suits subsequently resulted in favor of the defendant firm, it was competent, during the same term, on the trial of the petition for permanent injunction, for H. to prove that he expected to move for a new trial.

3. After notice of such intention to move for a new trial, the verdicts should not have been

treated as a final adjudication that H. had no claim which could be set off in equity against the judgment.

4. Notwithstanding such verdicts, if the proof sustained the allegations in the petition, H. would have been entitled to an injunction, with a provision that the same be vacated unless in due time and form he moved for a new trial or excepted, and the judgment of the court below was reversed.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by F. W. Gano against W. H. Harris, executor. Judgment for plaintiff, and defendant brings error. Reversed.

Louis L. Brown and Bacon, Miller & Brunson, for plaintiff in error. H. A. Mathews, for defendant in error.

FISH, J. Gano sued Harris, executor, on a note for \$2,000. The defendant admitted the indebtedness, but filed an equitable petition to enjoin the suit, in order to enable him to obtain the benefit of an equitable set-off, alleging that he had two common-law actions pending in Houston superior court against Gano & Jennings, one for \$3,465, and the other for \$6,569; that these claims arose from the breach of a contract, on the part of Gano & Jennings, to cut, pile, and ship hardwood timber on land belonging to Harris as executor; that Gano was a member of the firm of Gano & Jennings; that the partnership and Jennings were insolvent; that Gano had no property in this state out of which money could be made in case Harris recovered in his suits against the firm; and that, therefore, he was entitled in equity to set off the firm debts against Gano's claim. These allegations were denied. An interlocutory order was taken, restraining the prosecution of Gano's suit against Harris upon Harris' giving bond. A judgment was subsequently rendered in favor of Gano for \$2,000 against Harris, but a transfer or levy of the execution was restrained by virtue of a subsequent order on the equitable petition. At the April term, 1902, of Houston superior court, the two cases of Harris, executor, against Gano & Jennings were tried. In one, a general verdict in favor of the defendants was returned; in the other, the jury found a verdict for \$352 in favor of the defendants against Harris. During the same term the case in which Harris prayed that Gano's judgment should be enjoined was called, with a view of determining whether the facts warranted a permanent injunction. Evidence was introduced sustaining most of the allegations in the petition. The fact that verdicts had been rendered in favor of Gano & Jennings in the two cases above referred to was admitted, and Harris thereupon offered to testify that he intended to make a motion for a new trial in those two suits, and, in case the same were overruled, to sue out bills of exceptions to the Supreme Court. This

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1020, 1163.

evidence was excluded. He also offered to show that Gano had removed to Florida and was insolvent. On the theory that Gano & Jennings had successfully resisted Harris's claim, and that there was then no equity in preventing Gano from proceeding with his execution, the court directed the jury to return a verdict refusing the injunction.

The petition set out facts sufficient to entitle Harris to an equitable set-off, and to an injunction against the enforcement of Gano's judgment until Harris had the opportunity to establish his claim against Gano & Jennings, of which firm Gano was a member. *Hecht v. Snook*, 114 Ga. 924, 41 S. E. 74; *Civ. Code* 1895, § 3996. If the verdicts in favor of Gano & Jennings had finally adjudicated that Harris had no claim against Gano & Jennings, or against Gano as a member of that firm, which could be set off against the latter's individual judgment, the injunction, of course, should have been refused. A plea of *res adjudicata* was not filed; and, conceding that for some purposes a verdict may be evidence, without judgment thereon (*Carstaphen v. Holt*, 96 Ga. 703, 23 N. E. 904), yet these verdicts were not final. Harris still had the right to move for a new trial, and, in case the motion had been granted, the status would have been restored, and thereupon Harris's right to an injunction would have been as complete as it had been before the two cases had been tried. Even if judgments had been entered, there was still the legal right of exception (*Western Union Tel. Co. v. Smith*, 96 Ga. 569, 23 N. E. 899); and while, for fixing a lien and for some other purposes, binding until reversed, no judgment or decree, under our system, can be said to be final until the time prescribed by law for setting aside the same by motion for a new trial or writ of error has expired. *People's Bank of Talbotton v. Merchants' Bank*, 116 Ga. 279, 42 S. E. 490.

The mooted question as to whether a superseded judgment can be used for the purpose of supporting a plea of *res adjudicata* is not raised by this record (2 *Black on Judgments*, §§ 510, 685, 846, 882, 960; *Watson v. Warner*, 31 Ga. 694 [4]; *Tommey v. Finney*, 45 Ga. 155, 158), for only the pleadings and verdicts in favor of Gano & Jennings were offered in evidence. *Mitchell v. Mitchell*, 97 Ga. 796, 25 N. E. 385; *Simmons v. Shaffer*, 49 Ga. 242 (2). Until final judgment, the policy of the law is to preserve the status. While the privilege may have been denied in *Watson v. Warner*, 31 Ga. 694, there are prior and subsequent decisions of this court in which it has been expressly held that, on notice that motion for a new trial will be made, the court will supersede the verdict or judgment, and allow a reasonable time during which the party may move for a new trial, file a bill of exceptions, and obtain a regular super-

sedeas. *Lindsey v. Lindsey*, 14 Ga. 657 (3); *Crawford v. Ross*, 39 Ga. 44 (4); *Holcomb v. Roberts*, 19 Ga. 590. In *Steere v. Stafford*, 12 R. I. 131, where an insolvent plaintiff had recovered judgment, and there was another suit pending by the defendant against the plaintiff, the court stayed the execution until the termination of the latter suit. 20 *Am. & Eng. Enc. Pl. & Pr.* 1265. And the "termination" refers to the expiration of the time in which a motion for a new trial could be filed, or a writ of error sued out and the remittitur returned. If this be the rule as to judgments, it would be much more applicable where a verdict had been obtained but no judgment entered thereon, as here.

Either, then, under the general power of the judge of the superior court as to writs of supersedeas (*Civ. Code* 1895, § 4321, subd. 1), or under the power to grant injunctions and to hear evidence relevant to the issue whether an injunction should issue in this cause, it was competent for the plaintiff to prove that motions for new trials would be made, and that, if the motions were overruled, bills of exceptions would be filed. It was further proper to prove that Gano & Jennings had no partnership assets, that Jennings was insolvent, and that Gano was a nonresident and had no property in the state of Georgia. These were facts tending to show that Harris might be entitled to an injunction to preserve his equitable right of set-off.

The defendants in error insist that the proper practice would have been for Harris to move for a continuance, and that, on a showing that he intended to apply for a new trial, the court would have continued the case; citing *Civ. Code*, § 5138; *Allen v. State*, 112 Ga. 752, 38 S. E. 79; *Long v. McDonald*, 39 Ga. 186; *Roberts v. Moore*, 27 Ga. 411. But both parties may have been ready and anxious to try; and it is not at all certain that the court ought to have granted a continuance had it been resisted by Gano & Jennings, for they might have urged that a continuance would result in maintaining in full force the temporary injunction which had already been granted, whereas, in view of the verdicts which had just been rendered, Harris was only entitled to retain the injunction in case he carried out his purpose of making the motions for new trial. The motions might have failed through inadvertence, or because the papers were not filed and approved in due form, or the bill of exceptions might have been presented too late, or for other reasons the appeal proceedings might have failed, and yet the result of continuing the cause would have been to postpone until the next term of court the hearing as to the right to a permanent injunction. If, as argued, the judge ought to have granted a continuance, thereby leaving the restraining order in full force, for a stronger reason evidence was



competent which only entitled Harris to one so framed as to cease to be operative in case he failed in due time to move for a new trial or to except, or in case the Supreme Court affirmed the judgments. If, by the grant of a continuance, Harris was then entitled to a sweeping injunction, he should have been permitted to introduce evidence on which he could only have obtained partial and restricted restraining orders.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 384)

HEATH v. MILLER et al.

(Supreme Court of Georgia. April 8, 1903.)

CONVEYANCE IN TRUST—POWER OF SALE—REMOVAL OF TRUSTEES—JURISDICTION—VENUE—ATTORNEYS—APPEARANCE—PRESUMPTIONS.

1. Where, in 1845, a deed was made conveying a life estate in specified property to a trustee for the benefit of a married woman, with a legal remainder in fee to her children, and power was given to the trustee to sell the fee, with the consent of the life tenant, and for her benefit, the execution of the trust, so far as the life estate was concerned, by the passage of the "married woman's act" of 1866 (Laws 1866, p. 146), did not extinguish the power of sale; it being the intention of the grantor, derivable from the language of the trust conveyance, that this power should be kept alive, to be exercised for the benefit of the life tenant whenever she and the trustee deemed it wise to do so.

2. The judges of the superior courts of this state have power at chambers to appoint and remove trustees; and applications for this purpose may be entertained at any place within their respective circuits, without reference to the residence of the parties or the location of the property, the proceedings had on such applications being always returned to the clerk of the superior court of the proper county. If the proceedings are otherwise regular, the fact that they were recorded in the wrong county, or were not recorded at all, would not vitiate the judgment. Nor, after the lapse of more than 30 years, would the judgment be invalidated because it appeared on the face of the proceedings that the hearing was had and the order passed at a date later than that on which the rule nisi was returnable. In such a case the presumption is that a proper continuance was had.

3. When attorneys appear in court claiming the right to represent a person named as a party to a cause, there is a strong presumption that they had the authority so to do. This presumption increases in strength with lapse of time, and where, after the expiration of more than 30 years after the judgment, a direct attack is made upon the authority of the attorneys, by a motion to set aside the judgment rendered in the cause, the strongest and most satisfactory evidence is required to overcome the presumption.

4. Even if such a judgment is open to a collateral attack by the party whom the attorneys claimed to represent, the presumption in favor of the validity of the judgment and the authority of the attorneys is even stronger than in case of a direct attack, where the attorneys are given an opportunity to meet the charge that their appearance was wholly gratuitous and unauthorized.

5. Is not an entry of appearance by an attorney, he being an officer of the court, entitled to

as much force as an entry of service by a sheriff, which is binding until traversed and set aside in a direct proceeding brought for this purpose?

(Syllabus by the Court.)

Error from Superior Court, Richmond County; E. L. Brinson, Judge.

Action by Mary Jane Heath against Bates Miller and others. Judgment for defendants, and plaintiff brings error, and defendants assign cross-error. Judgment on main bill of exceptions affirmed; cross-bill dismissed.

F. W. Capers and W. H. Fleming, for plaintiff in error. J. C. C. Black, E. H. Calhaway, C. Henry Cohen, Frank H. Miller, and W. N. Miller, for defendants in error.

COBB, J. This was an action by Mary Jane Heath against Bates Miller and others for the recovery of a described parcel of land. The trial resulted in a judgment for the defendants, and the plaintiff assigns error upon a judgment overruling her motion for a new trial.

On May 20, 1845, Meredith conveyed to McWhorter, as trustee, the land in controversy; that portion of the deed which is material to the present discussion being in the following words: "In trust always, nevertheless, and for the sole and separate use, benefit, and behoof of Mrs. Martha E. Cavender, wife of Philip M. Cavender, of said county, wholly free from the control and not liable for the debts of her present or any future husband, for and during the term of her natural life, and after her death to her children by said Philip M. and their heirs forever, share and share alike. Provided that the said remainder in fee simple may be defeated and said trust estate aliened by deed of said trustee, or his successors, in which said Martha E. Cavender shall join, the proceeds of said sale being held by said party of the second part under the trust and limitations herein set forth. And in the event of the death, resignation, or removal from the state of the said Jacob G. McWhorter, or any of his successors, another trustee may be appointed by said Martha E. Cavender, by instrument in writing under her hand, who shall immediately and ipso facto become vested with all the powers hereby vested in said party of the second part." Sistrunk was appointed as trustee to succeed McWhorter in the manner provided in the trust deed, and upon his resignation Houston was appointed, in the same manner, trustee in his place. Subsequently Mrs. Cavender married Houston, and on July 15, 1867, by an order of the judge of the superior court of the Middle circuit, at chambers, in Richmond county, Houston was removed as trustee, and Heath appointed in his stead. The plaintiff, who was formerly Mary Jane Cavender, the only child of Philip M. and Martha E. Cavender, was born June 1, 1845, attaining her majority on June 1, 1866. She mar-

ried Heath in 1864, while yet a minor. The name of Mary Jane Heath appeared as a party plaintiff in the application above referred to to remove Houston as trustee, and attorneys appeared claiming to represent her. On August 15, 1867, Heath, as trustee, by a deed in which Martha E. Houston (formerly Cavender), the life tenant under the trust deed, joined, conveyed the property in fee to John F. Miller. The defendants claim under Miller. Mrs. Houston (formerly Cavender) died October 1, 1896. This action was brought in 1899.

The question, therefore, to be determined, is whether Heath, as trustee, had authority to make the deed to Miller in 1867. If he did have such authority, as against the rights of his wife, the judgment in favor of the defendants was correct. If he did not have this authority, either because the power of sale did not exist at that time or because his appointment as trustee was, as against his wife, illegal and void, then the plaintiff ought to have prevailed, provided she had a right to attack that appointment in this case. Under the trust deed to McWhorter two estates were created—one a life estate in favor of Mrs. Cavender, and the other a remainder, which inured to the benefit of the plaintiff. The life estate thus created was manifestly an equitable estate, the title to which passed to the trustee for the benefit of the life tenant. Under the view we have taken of the case, it is not absolutely necessary to determine the character of the estate in remainder, whether it was a legal or equitable estate, or a vested or contingent remainder; but the estate thus created would seem, under previous decisions of the court, to be a legal remainder in fee, the title to which did not pass to the trustee. See *Tillman v. Banks*, 116 Ga. 250, 42 S. E. 517, and cases therein cited; *Overstreet v. Sullivan*, 113 Ga. 891, 39 S. E. 431. Treating the trustee as having acquired title to the life estate only, did the power of sale exist in 1867? It is too well settled now to admit of discussion that the effect of the passage of the "married woman's law" of 1866 was to execute a trust previously created for the sole benefit of a married woman. *Overstreet v. Sullivan*, supra; *Trammell v. Inman*, 115 Ga. 874, 42 S. E. 246. There are also a number of earlier decisions to the same effect, which can be found by reference to the two cases cited. It follows that in 1867, when Heath, the trustee, undertook to exercise the power of sale, the legal title to neither of the estates created by the deed to McWhorter was in the trustee; for, even if a trust was created as to the remainder, Mrs. Heath, the sole remainderman, was married, and had attained her majority, when the deed to Miller was executed. The mere fact that the legal title in the trustee was divested by the passage of the act of 1866 would not, however, extinguish the power of sale conferred by the trust deed. Whether the divesting of the

legal title would have this effect in a given instance depends mainly on the intention of the grantor as manifested by the language of the instrument conferring the power. The exercise of a power of sale is not, therefore, absolutely dependent on the existence of a legal title to the property in the trustee. *Headen v. Quillian*, 92 Ga. 220, 18 S. E. 543; *Henderson v. Williams*, 97 Ga. 709, 25 S. E. 395; *Baillie v. Carolina Loan Ass'n*, 100 Ga. 34, 28 S. E. 274; *Simmons v. McKinloch*, 98 Ga. 743, 26 S. E. 88. Where the legal title has been divested, the question whether the power of sale has been thereby extinguished depends upon whether the objects of the trust have been fully accomplished. See 2 *Perry, Trusts* (5th Ed.) § 498; 2 *Beach, Trusts*, § 437, p. 1012. Where a trust has become executed, and all the purposes for which the trustee was appointed have been fully accomplished, the power of sale ceases. As to this class of trusts, see *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866; *McLaughlin v. Hamm*, 84 Ga. 786, 792, 11 S. E. 889; *Lampkin v. Hayden*, 99 Ga. 363, 27 S. E. 764; *Parrott v. Dyer*, 105 Ga. 93, 31 S. E. 417; *City of Rome v. Shropshire*, 112 Ga. 93, 37 S. E. 168. But where a trust is created for a life estate, with a limitation over, under which no trust is created for the remainder, and the trustee is given power to sell the fee for the benefit of and with the consent of the life tenant, as a general rule the power will not be extinguished merely because the trust for the life tenant has become executed, and the legal title is no longer in the trustee. The power remains in existence during the life of the life tenant. The trustee, although the trustee of the power merely, is none the less a trustee. It is in each case important to ascertain the intention of the grantor in the trust conveyance, and this intention, when ascertained, will be controlling. See *Headen v. Quillian*, supra; *Baillie v. Loan Ass'n*, supra. Did the grantor intend that the termination of the legal estate in the trustee should extinguish the power of sale? Or, looking at the whole instrument, and considering its objects and purposes, did he intend that the power should survive the termination of the legal title in the trustee? We think it perfectly clear that Meredith, the grantor in the trust deed involved in the present case, intended that the trustee should have power to sell the fee. Civ. Code, § 3171, which is a codification of the principle of decisions of this court made before the adoption of the Code of 1895, is as follows: "Where a trust deed, or other instrument, limits an estate in fee, for life or with remainders over, and in the same conveyance a power to sell, encumber or otherwise dispose of the property is reserved or created, the power is to be construed to extend to a sale, incumbrance or disposition of the fee unless expressly or by necessary implication limited to a smaller estate." Nothing can be clearer than that the grantor in-

tended to invest the trustee and his successors with power to sell the fee, for he says in so many words that the remainder in fee may be defeated and the trust estate aliened by deed of the trustee, in which the life tenant should join. The language indicates a clear intention that the entire fee in the property should be sold whenever it was to the interest of the life tenant to do so. If no trust was created for the remaindermen, then certainly the power of sale of the fee was given for the exclusive benefit of the life tenant. Whenever a sale was deemed advisable by the trustee and the life tenant, the proceeds of the sale were to be held "under the trust and limitations" set forth in the deed; that is, primarily for the benefit of the life tenant, and to be reinvested in such a manner as would best subserve her interests. The life tenant was given the veto power by refusing to join in a conveyance of the fee, and the conclusion is irresistible that the grantor, when he provided for the power of sale, had in mind primarily the welfare of the life tenant. There was no limitation made upon the trustee and the life tenant as to the character of reinvestment to be made; the main idea being to provide for income-producing property during the life of the life tenant, although it might be property which would deteriorate in value by lapse of time, and thus be worth less to the remaindermen than the property conveyed in the trust deed. If there had been no limitation over in the deed, doubtless the power of sale would have become extinguished upon the termination of the legal title in the trustee. But, the trustee and the life tenant being given absolute power of sale over the entire fee, and it being the clear intention of the grantor that this power should be exercised primarily, if not solely, for the benefit of the life tenant, those entitled to the estate in remainder will not be allowed to defeat the power, although the legal title to the life estate was taken from the trustee by the act of 1866, and although no trust was created for the remainder, or, if so, it too became executed by the passage of that act. It was certainly not intended that the act of 1866 should destroy a power of sale given under such circumstances. To hold otherwise would defeat the plain and manifest intention of the grantor; and no technical construction which would have this effect will be adopted. We do not think there is any decision of this court which requires any such construction. No case has been called to our attention in which a remainderman has been allowed to defeat a power of sale over the fee conferred for the benefit of the life tenant, for whom alone the trust was created. We are satisfied that the grantor in the deed under consideration intended that the power should be kept alive during the life of the life tenant, no matter what contingency might happen. He did not intend that the desires of a remainderman should defeat or hamper the right of the

trustee and life tenant to change the investment whenever, in their opinion, such change was for the benefit of the life tenant. For this reason, the fact that the sole remainderman had become *sui juris* would not destroy the power of sale. Having reached this conclusion from a consideration of the language of the trust deed, this must be an end of the controversy. No law has been passed since the execution of the deed which would defeat this intention, if, indeed, any could be. The judgment in favor of the defendants was right, unless Mrs. Heath was not bound by the appointment of her husband as trustee, and unless, in the event she was not, she can be heard in this case to set this up as a reason for defeating the conveyance made by him.

2-5. The deed provided that in the event of the death, resignation, or removal from the state of the original trustee, or any of his successors, another trustee might be appointed by the life tenant. Houston, the predecessor of Heath, was appointed in this manner. He did not, however, die, resign, or remove from the state, but was charged with having been guilty of such conduct as rendered it no longer proper for him to continue in office. For this reason application was made to a court of equity to remove him. The court certainly had power to do this in a proper case made. We reached the conclusion in the foregoing part of this opinion that it was necessary for the trustee to continue in office to exercise the power of sale conferred in the deed. The judges of the superior courts in this state have now, and had in 1867, power at chambers to appoint and remove trustees. Civ. Code, § 3164; Code 1863, § 2301. It is said, though, that the judge of the superior court of Richmond county had no jurisdiction of the proceeding, because the petition shows on its face that the applicants and the respondent Houston were all residents of Burke county. The fact that the applicants did not reside in Richmond county could, of course, make no difference, if the court had jurisdiction of the respondent. The caption of the petition was "Georgia, Richmond County," and the petition was addressed to the judge of the superior courts of the Middle circuit, of which both Richmond and Burke counties were a part. The rule nisi was returnable in Richmond county on June 22, 1869, and the record shows an entry of service of the rule on Houston in Burke county. The proceedings were ordered to be recorded on the minutes of the superior court, but the order did not say whether of Richmond or Burke county, merely declaring that the recording was to be done "as usual in such cases." The order removing Houston was passed on July 15, 1867, in Richmond county, and recited that Houston had failed to appear in answer to the rule nisi. If the court had no jurisdiction of Houston, the order removing him was void on its face, and can be treated as a nul-

lity. The Constitution provides that "equity cases" shall be tried in the county where the defendant resides against whom substantial relief is prayed. Civ. Code, § 5871. A similar provision was in the Constitution of 1865. See Code 1868, § 4967. The application to remove Houston, addressed to the judge at chambers, was not "a case" within the meaning of these provisions. They relate only to equitable petitions filed in the superior court, and upon which a trial by jury may or must be had. The judge had jurisdiction of this matter at chambers, and he could pass an order at any place in his circuit, binding any resident of his circuit who was duly served, though he may have resided in a county other than that in which the order was passed. While the record of the proceedings upon the minutes of the superior court of Richmond county may have been irregular, it did not make the order removing the trustee invalid. The judge had jurisdiction of the subject-matter and jurisdiction of the person of the trustee, and the order was valid whether the proceedings were ever recorded anywhere. As no such record was required to give validity to the order, it, of course, would make no difference that the proceedings were recorded in the wrong county. It is not necessary in the present case to decide in what county the proceedings to remove and appoint trustees should be filed if returnable in term, or where recorded if returnable at chambers. The Code is silent on the subject, merely declaring that the petition, etc., "shall be returned to the clerk of the superior court, to be recorded in the book of minutes of said court." Civ. Code, § 3164. In ex parte proceedings by beneficiaries praying for the appointment of a trustee it would seem they might be instituted in any county where any of the beneficiaries resided. In proceedings to remove a trustee, as he is the defendant, it would seem that the county of his residence would be the proper county. On the other hand, as in all cases the proceedings for appointment and removal are a part of the muniment of title to the property, it might with great force be maintained that they should be had in the county where the property is located. The fact that the hearing was not had at the date fixed in the rule nisi, but at a later date, would not vitiate the order, as there will be, after the lapse of more than 30 years, a presumption that an order had been passed duly continuing the hearing to July 15th, the time when the final order removing the trustee was passed. The judgment, therefore, removing Houston and appointing Heath as trustee was not void, but was valid and binding on all who were parties to the proceeding; and when Heath was appointed he succeeded to all the rights and powers of, and was bound by all the limitations imposed upon, the original trustee in the trust deed. The power of sale was not a personal trust confided to the original trustee, the deed distinctly providing that it

might be exercised by "his successors"; that is, by any one who should succeed him in any manner authorized by law. In three contingencies the deed provided how the successor was to be appointed. The court of chancery has always had the power to appoint a trustee when the instrument creating the trust did not make provision for the appointment. It is to be presumed that the grantor was fully aware of this authority in the court, and executed the deed in the light thereof. See, in this connection, *Freeman v. Prendergast*, 94 Ga. 369, 21 S. E. 837 (1).

Will Mrs. Heath be heard now to attack the judgment appointing her husband trustee on the ground that she did not authorize any one to make her a party to the proceeding? Let us look at the matter first as if she had brought, in 1899, a direct proceeding to set aside the judgment appointing Heath as trustee. She was of age when the appointment was made. She waited 32 years before calling the judgment in question, long after rights had become vested, and successive transfers of the property had been made by persons resting in fancied security arising from a title authorized by a solemn judgment of the court. Certainly it ought to take a strong case, after so long a lapse of time, to destroy a title made under such circumstances. Mrs. Heath was named as a party in the application, and licensed attorneys appeared, claiming to represent her as well as other persons therein named. The strong presumption is that these attorneys had authority to do so. The entry of appearance by the attorneys was made by them as officers of the court, and in order to set aside that entry "the strongest and most satisfactory evidence" is required. *Davant v. Carlton*, 57 Ga. 489, 492, and cases cited. The evidence of Mrs. Heath on this point is meager and unsatisfactory. She does say in positive terms that she did not authorize the attorneys to represent her. But she does not give any reason for the long delay in attacking the judgment, and she does not show even that she did not know of the proceeding at the time. Indeed, the contrary is inferable from her testimony, for she says she knew nothing of the petition, further than that she was informed that attorneys representing Mrs. Cavender were going to bring proceedings to remove Houston as trustee for misconduct. Knowing this, was it not incumbent on her to appear and object to his removal, or, if she approved of his removal, ask to be heard on the question of his successor? If she had the right to be heard at all on the question, she had a corresponding right to attack the appointment in a direct proceeding after it was rendered. Having this right, she ought to have moved to set aside the entry of appearance by the attorneys in her behalf in a reasonable time after she had notice of such entry. She does not show that she did not know of the appointment, nor that she did not know that the at-

torneys had appeared as representing her; but she does show that she knew enough to put her on inquiry. If she had followed up the information she had, she would have known, and the presumption is, in the absence of a contrary showing, that she did know. While Mrs. Heath could not, until after 1896, bring a suit to recover the land, we do not see why it was necessary for her to wait until after the death of the life tenant to attack the judgment. She was of age. She was vested with the legal title to the remainder; and if, in order to protect the fee, it was necessary to move to set aside the judgment appointing Heath as trustee, she should have done so as soon as she acquired knowledge of his appointment. It will not do to say that she did not know a sale was contemplated, because she was chargeable with knowledge that the power to sell the fee became vested in the trustee by the appointment, and it was her duty to be on her guard, and take steps to protect her interests. When it is remembered that Heath, the trustee, was her husband, the presumption becomes almost conclusive that she knew all about the appointment and the sale long ago, and that the explanation of her long delay lies in the fact that she has but recently concluded that the appointment and sale were invalid as to her. She cannot now be heard to attack the validity of the judgment or the deed made in execution of the power to sell the fee by the trustee and the life tenant. See *Bigham v. Kistler*, 114 Ga. 453 (3), 460, 461, 40 S. E. 303; *Turner v. Jordan*, 67 Ga. 604. The presumption in favor of an appearance by an attorney having been authorized is still stronger where a collateral attack is made upon the judgment rendered in the case in which the attorney appeared, and no direct proceeding to set aside the judgment has been brought. Indeed, many courts have held that in such a case the presumption is conclusive. See, in this connection, 1 *Freem. Judg.* (4th Ed.) § 128; 2 *Freem. Judg.* (4th Ed.) § 499. A judgment absolutely void is open to attack anywhere and by anybody, but no other judgment is open to collateral attack. *Civ. Code*, §§ 5373, 5368. Where a judgment is apparently valid on its face, a direct proceeding to set it aside must be brought. *Dixon v. Baxter*, 106 Ga. 180, 32 S. E. 24. Of course, a judgment rendered against a defendant without service is void, and may be treated as a nullity. But, if the record should show an entry of service by the sheriff, the judgment would be binding so long as this entry stood untraversed. *Davant v. Carlton*, 57 Ga. 489. An attorney is as much an officer of the court as the sheriff, and his entry of appearance ought to be just as sacred as the sheriff's entry of service. Reasoning along this line, it was held in the case just cited that a confession of judgment by an attorney of record, although unauthorized, could not be treated

as a nullity until traversed and found by a jury to have been unauthorized; although in *McBride v. Bryan*, 67 Ga. 584, it was held that an unauthorized confession of judgment by an attorney could be collaterally attacked when the defendants were not served. In the present case the record in the proceeding in which the judgment attacked was rendered recited that Mary J. Heath was a party plaintiff. The judgment was, therefore, not void on its face. That record further shows that attorneys appeared to represent her. The judgment, therefore, bears on its face all the indicia of regularity and validity; and it would seem that such a judgment ought not to be open to collateral attack. See, in this connection, *Clews v. Bondholders*, 51 Ga. 132 (2). Much, however, could be said on the theory that a judgment can never bind a person who is neither a party nor a privy; and that whenever one shows that he was not a party, and had never appeared, either in person or by an authorized representative, the judgment is void as to him. We do not hold in this case that a judgment entered against a person in a proceeding to which he was not in fact a party, although attorneys appeared purporting to have authority to represent him, cannot be collaterally attacked and shown to be void. There is nothing in this case calling for such a ruling, even if it would be correct. But we do hold that the presumption in favor of the authority of the attorneys ought to be stronger where the judgment is collaterally attacked long after its rendition, and when the attorney is given no opportunity to be heard in answer to the claim that his appearance was wholly gratuitous and unauthorized. In such a case there ought to be something more than the mere unsupported testimony of the person making the attack. But the testimony of the plaintiff in this case, even if her unsupported testimony would be sufficient, is, as has been shown, entirely too weak and unsatisfactory to warrant the court in disregarding a solemn judgment, on its face regular and valid, rendered more than 30 years before its validity was called in question. There was no error authorizing the granting of a new trial.

Judgment on the main bill of exceptions affirmed; cross-bill dismissed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LAMAR, J., disqualified.

(117 Ga. 958)

MITCHELL v. TURNER et al.

(Supreme Court of Georgia. April 8, 1903.)  
DEED—CONSTRUCTION—TRUST ESTATE—SALE  
OF MINOR'S INTEREST.

1. A deed conveyed a lot of land to J., "for the benefit of and to belong to all of his children that may survive him and his wife," "to have and to hold the said lot of land to the only proper use, benefit, and behoof of the said J. and wife and children at their death, their

heirs, executors, administrators, and assigns, in fee simple," with warranty to J., "wife and children, their heirs, executors, administrators, and assigns." At the bottom of the deed, and before the attestation clause, was a recital that erasures and interlining were made before signing, "so as to give the use to the wife during life." *Held*, that no trust estate was created by this deed, and that an order of the judge of the superior court, rendered during vacation at chambers, authorizing a sale of the interest of the children during minority, was void for want of jurisdiction in the judge to pass it.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action between L. A. Mitchell and Janie Turner and others. From a judgment, Mitchell brings error. Affirmed.

Hall & Wimberly and J. E. Hall, for plaintiff in error. M. W. Harris and Tom Cochran, for defendants in error.

COBB, J. This case turns mainly upon the proper construction to be placed upon a deed, the material portions of which are as follows: "This indenture, made on the 9th day of February, A. D. 1875, between Methvin S. Thomson, of the county of Bibb, of the one part, and Isaac Johnston, for the benefit of, and to belong to all of his children that may survive him and his wife, of the county of Bibb, of the other part, witnesseth, that the said M. S. Thomson, for and in consideration of the sum of two hundred dollars (\$200.00), in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed and confirmed unto the said Isaac Johnston, for his children, as aforesaid [a described lot of land]. To have and to hold the said lot of land \* \* \* to the only proper use, benefit and behoof of the said Johnston and wife and children at their death, their heirs, executors, administrators and assigns, in fee simple. And the said M. S. Thomson the said bargained premises unto the said Isaac Johnston, wife and children, their heirs, executors, administrators and assigns, against the said M. S. Thomson, his heirs, executors and administrators, \* \* \* shall and will warrant and forever defend." Immediately preceding the signature of the witnesses is the following: "Erasures and interlining so as to give the use to the wife during life made before signing."

The settled rule in this state is that, disregarding all technical rules of construction, effect shall be given to the intention of the maker of the instrument, as far as the same is lawful, and can be gathered from its contents. See, in this connection, *Heath v. Miller*, 117 Ga. —, 44 S. E. 13; *Crumpler v. Barfield*, 114 Ga. 570, 40 S. E. 808. Construing this deed as a whole, it seems to be clear that the grantor intended to create an estate for Johnston and his wife during their

joint lives, with a life estate to the survivor, and a remainder to their children. It is unnecessary to more definitely determine the exact character of the interest in the property each of these persons took. The question is whether the estates created were legal or equitable estates; or, in other words, whether a trust was created for the estate taken by the wife or that taken by the children. There was no legal difficulty to be encountered in creating a legal estate in Johnston and his wife during their lives and a legal remainder in their children, whether vested or contingent. If there were no children in life at the time the deed was executed—which seems from the record to be the fact—there was no legal obstacle to be encountered in the creation of a legal estate in remainder, contingent upon both their birth and their survivorship of their parents. In other words, every estate which was created by the deed could have been a legal estate, and some of them could have been equitable estates. It was not necessary, either for the creation or preservation of any of the estates, that resort should have been had to a trust. Such being the case, it is simply to be determined whether, from all the language of the instrument, it can be inferred that it was the intention of the parties that a trust estate was to be created, either for the life estate of the wife or the remainder estate of the children, as it was competent for the parties to create a trust for a married woman, if at the same time a limitation over was provided for. See, in this connection, *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415 (4). The only language in the paper that can be resorted to as indicating a purpose to create a trust estate are the words "for the benefit of" in the first clause, and the words "to the only proper use, benefit and behoof of," etc., in the habendum and tenendum clause. The words last quoted cannot be looked to in order to determine this question, for the simple reason that they are usually to be found in that clause in all deeds. The case is, therefore, within narrow limits. Do the words "for the benefit of," in the first clause of the deed, convert what would have been otherwise legal estates into equitable estates? While no form of words is necessary to the creation of a trust, the instrument, to have this effect, must set forth the intention clearly and definitely. It must, among other things, indicate the nature and terms of the trust, and the manner in which the trust is to be administered. "If the language is in any degree equivocal, or if it is so vague and indefinite as to leave any of the essential elements of the trust in uncertainty, there is a failure of the trust." 1 Beach, *Trusts*, § 40, pp. 51, 52. See, also, *Underhill, Trusts* (Am. Ed.) p. 19. The words "for the benefit of" are, to say the least, equivocal. Legal estates are created for the benefit of those for whom they are created, and so are

equitable estates. It certainly cannot be said that the use of these words clearly and definitely indicated a purpose to create a trust. On the contrary, when the whole instrument is looked at, they seem merely to have reference to the beneficiaries of the legal estates created in the children of Isaac Johnston and his wife. We think, on the whole, that all of the estates created by the deed were legal estates, and that no trust was intended for any of them.

It appears from the record that two applications were made at different times to the judge of the superior court to sell portions of the property conveyed in the deed under consideration, and that in each instance the judge granted, in vacation, an order authorizing the sale. The title of the defendant in the court below (the plaintiff in error here) depended upon the validity of these orders. The power of a judge of the superior court to authorize in vacation a sale of the legal estate of a minor can be derived only from a statute. As no trust estate was created by the deed, the power of the chancellor to order in vacation a sale of the trust estates of minors cannot be relied on to sustain the orders to sell involved in the present case. It is said that the authority to grant the orders was conferred by the law now contained in Civ. Code, §§ 4863, 4864, which are as follows:

"Sec. 4863. All proceedings *ex parte*, or in the execution of the protective powers of chancery over trust estates, or the estates of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand.

"Sec. 4864. A court of equity is always open, and hence any judge in vacation and at chambers may receive and act upon such petitions, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court."

Among the subjects embraced within the "protective powers of chancery over trust estates, or the estates of wards of chancery," as used in section 4863 of the Civil Code, and determined by this court, is the power, upon petition, to appoint trustees to fill a vacancy (*White v. McKeon*, 92 Ga. 344, 17 S. E. 283); to order the sale of a part of the trust property to relieve the rest from an indebtedness on all (*Iverson v. Saulsbury*, 65 Ga. 724 [5], 728, 729); to order the mortgaging of trust property to protect and preserve the corpus (*Iverson v. Saulsbury*, 68 Ga. 801, per Jackson, J., followed in *Weems v. Coker*, 70 Ga. 746; *Bolles v. Munnerlyn*, 83 Ga. 727, 10 S. E. 365; *Pease v. Wagnon*, 93 Ga. 363, 20 S. E. 637, and *Wagnon v. Pease*, 104 Ga. 417, 30 S. E. 895); to order the sale, in whole or in part, of property of adults and minors, acquired by devise, where the legal title remains in the executors, when it is impossible to carry out the trust provisions of a will (*Sharp v. Findley*, 71 Ga. 654, *Blake v. Black*,

84 Ga. 392, 398, 400, 11 S. E. 494, and *Southern Marble Co. v. Stegall*, 90 Ga. 237, 15 S. E. 806); or when it is necessary for the payment of estate debts and legacies (*McGowan v. Lufburrow*, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178, and *Blake v. Black*, *supra*); and to protect a ward of chancery by compelling a trustee to comply with a prior order of court to pay over money for the support of the ward, arising out of the latter's trust property (*Obear v. Little*, 79 Ga. 386, 4 S. E. 914). And among other powers by proceedings *ex parte* and upon petition, as shown by the cross-references to other parts of the Code, made by the codifiers in the margin of section 4863, is the appointment and removal of trustees (section 3164); the sale of trust property (section 3172); the investment of trust funds in stocks, in which a trustee is not authorized by statute to invest in his own discretion (section 3180); and the passing of interlocutory orders in equitable suits (section 4847), which may include the setting aside of a sum of money for the support of the minor parties. When the judge of the superior court has once obtained jurisdiction of the legal estate of minors by a proceeding properly brought before him, of course the minors, from the moment this regular proceeding is brought, become wards of chancery, and the court has jurisdiction to deal with their property. A minor does not become a ward of chancery unless the judge has jurisdiction to entertain the proceeding which is instituted, and which involves the estate of the minor. It may be safely asserted that there is no reason or authority upon which to base the claim of the plaintiff in error that under Civ. Code, §§ 4863, 4864, the judge of the superior court had jurisdiction at chambers to order a sale of the legal estate of the minors conveyed in the deed under consideration. *Taylor v. Kemp*, 86 Ga. 181, 185, 12 S. E. 296, and cases cited; *Baxter v. Wolfe*, 93 Ga. 334, 20 S. E. 325. The case of *Sharp v. Findley*, 71 Ga. 654, is not, we think, authority for the proposition that the judge of the superior court can authorize in vacation the sale of the legal estate of a minor. While in that case the order was passed in term, there was no regular bill in equity filed and served according to law, and hence the proceeding was dealt with as if it had been one at chambers. It would seem that according to the decision in *McGowan v. Lufburrow*, 82 Ga. 532, 533, 9 S. E. 427, 14 Am. St. Rep. 178, the proceeding in the *Sharp Case* might very well have been treated as one filed in term; and in *Richards v. Railway Company*, 106 Ga. 642, 33 S. E. 193, 45 L. R. A. 712, it was said that the proceeding in the *Sharp Case* was brought in term, and that the statement by Chief Justice Jackson, who delivered the opinion in that case, that the proceeding was really one at chambers, was an inaccuracy. It is certainly true, however, that the court dealt with the proceeding as if it had been brought at chambers, and held



that the decree rendered was valid. An examination of that case will show that the judgment holding the decree to be valid was based mainly upon the law now contained in Civ. Code, § 4856, which provides that, whenever it is impossible to carry out the last will and testament of a testator in whole or in part, the judge of the superior court shall have a right to render at chambers in vacation any order or decree that may be necessary and legal. Chief Justice Jackson said that the ruling made by the court was rendered free from doubt by the provisions of what is now section 4863 of the Civil Code, using this language: "The very minute this petition came before this chancellor and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.' The case was made where these wards were suffering or likely to suffer; where their property must be changed, so as to realize for them the necessities of life; and it was necessary that his protective powers be exercised to make such decree as would relieve that necessity, and at the same time protect the estate by looking to the reinvestment and preservation of the fund. Again, the 'proceeding' to 'be had therein' is to be such 'as the necessity of each case may demand.' Of that necessity he is the judge, and the only judge. If the infant be not safe in his breast, where shall he look for help? If chancery protect not her wards, what guardian, what law, can protect them? I had rather confide an infant to the custody and care of an honest judge than to any jury ever sworn to find facts and apply law." The language just quoted was merely an additional reason given by the chief justice for the ruling made in the case; the main reason, as stated above, being founded upon the law now contained in section 4855 of the Civil Code. In the statement in the opinion that a chancellor can in vacation acquire jurisdiction at chambers to order a sale of the legal estate of a minor we cannot concur. We do not think it warranted by a proper construction of section 4863, and, for the reasons given above, we do not think the decision in *Sharp v. Findley* is binding authority on the point. The language of the chief justice is manifestly sound as applied to applications filed in term, as were those in the *McGowan* and *Richards* Cases, *supra*, and it was with reference to such applications that those cases approved the language used in *Sharp v. Findley*. That language, when applied to proceedings instituted in vacation, is opposed to the rulings made in many cases, both before and after the *Sharp* Case, and it has never been followed in a case where the proceedings were had and the order of sale granted at chambers. We find no error requiring the granting of a new trial.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 908)

**PEOPLE'S NAT. BANK OF SHELBY-  
VILLE, TENN., v. CLEVELAND et al.**

(Supreme Court of Georgia. April 8, 1903.)

**CORPORATIONS—SHARES OF STOCK—SITUATION—FOREIGN CORPORATIONS—SERVICE—DUE PROCESS OF LAW—MISJOINDER OF CAUSES—ABATEMENT OF ACTION—TRUSTS—RIGHTS OF REMAINDERMAN—ASSENT TO LEGACY—TITLE OF EXECUTOR.**

1. Petitioners brought their equitable petition in this state against a domestic and a foreign corporation—the latter having no agency or place for doing business in Georgia—claiming that they were the real owners of certain shares of stock of the domestic corporation, the certificate of which was held by the foreign corporation as transferee, and prayed for a decree canceling the transfer, removing the cloud upon their title to such shares, and adjudging that they were entitled to the same. *Held:*

(a) The shares of stock were personal property, and, for the purposes of this suit, their situs was the domicile of the domestic corporation.

(b) The foreign corporation could be legally served by publication, under Civ. Code, § 4976, providing that in suits brought to remove a cloud from, or to quiet the title to, property in this state to which a nonresident claims title, or an interest therein, such nonresident may be served by publication.

(c) When, in such a suit, service was duly perfected upon the nonresident defendant by publication, the proceeding against him was by due process of law.

2. In an equitable proceeding of this character there was no misjoinder of causes of action; the plaintiffs having one connected interest, centering in the point in issue, or one common point of litigation with the defendant.

3. The shares of stock in question having been bequeathed to a trustee, who, under the provisions of the will, was to pay over to a life tenant the dividends thereon for his support and maintenance—the corpus of the trust estate, upon the death of the cestui que trust, to go to remaindermen—and the original petition having been brought by the trustee during the lifetime of the life tenant, the action did not abate by reason of the death of the cestui que trust pendente lite, but could proceed in the name of the trustee, at least for the recovery of unpaid dividends declared upon the stock during the life of the cestui que trust.

4. The life tenant having died during the pendency of the suit brought by the trustee, the remaindermen, who upon his death intervened as parties plaintiff in the case, were, under the allegations of the petition, entitled to recover unpaid dividends which had been declared after the death of the cestui que trust.

5. The persons who intervened as remaindermen intervened also as the heirs at law of the life tenant, for the purpose of recovering the unpaid dividends which had been declared prior to his death; but neither as remaindermen, nor as such heirs at law, were they entitled to recover such dividends. As remaindermen they had no interest in these dividends, and as heirs at law they could not maintain an action to recover personality; the right to recover personal property which belonged to a decedent being in his administrator or executor, save in a case like the present, where a trustee has the right to recover it as part of the trust estate committed to his keeping.

6. An executor's assent to a legacy divests him of the title to the property embraced therein, and perfects the inchoate title of the legatee, so as to give the latter a right of action to recover such property if held adversely to him.

(Syllabus by the Court.)

¶ 6. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1159.



Error from Superior Court, Richmond County; E. L. Brinson, Judge.

Action by Jesse Cleveland, trustee of Vannoy Cleveland, against the Georgia Railroad & Banking Company and others. Judgment for plaintiff, and defendant the People's National Bank of Shelbyville, Tenn., brings error. Affirmed.

Jas. C. C. Black, for plaintiff in error. Joa. B. & Bryan Cumming, for defendants in error.

FISH, J. An equitable proceeding was brought in the superior court of Richmond county by Jesse Cleveland, as trustee of Vannoy Cleveland, a resident of this state, against the Georgia Railroad & Banking Company, a corporation under the laws of this state, having its principal office and place of business in the county of Richmond, and the People's National Bank of Shelbyville, Tenn., a corporation under the laws of the United States, located and conducting its business in Shelbyville, Tenn. The petition, when finally amended, made the following case: R. M. Cleveland, late of Bedford county, Tenn., died testate in April, 1876. The fifth item of his will was: "I will to my son, William C. Cleveland, trustee for my son, Vannoy Cleveland, one-ninth of all my railroad stock, bonds and notes, to be paid to him by a trustee as hereinafter directed. The interest on said bonds and stock and the interest on said notes as they are paid, to be allowed to him for his maintenance and board and clothing, and at his death, the portion allowed for his maintenance to go to my other children, unless he in the future should have a family and leave children, in that event, I desire it should go to his children." W. C. Cleveland failed to qualify as trustee, and B. F. Cleveland was duly appointed trustee of Vannoy Cleveland, under the provisions of the will, by the court having jurisdiction of such matters in Tennessee. After the payment of the debts and the distribution of the estate of R. M. Cleveland, there were set apart, under the fifth item of his will, in trust, as therein stipulated, for Vannoy Cleveland, certain railroad stock, bonds, and notes, including 36 shares of the capital stock of the Georgia Railroad & Banking Company, which stock stands upon the books of the company in the name of B. F. Cleveland, trustee of Vannoy Cleveland. On June 30, 1896, B. F. Cleveland, having lost all of his estate, and being pressed for money, by persuasion, influence, and importunities induced Vannoy Cleveland to sign a paper by which he authorized and empowered B. F. Cleveland to pledge the 36 shares of stock above mentioned as security for a loan from the People's National Bank of Shelbyville to B. F. Cleveland. Vannoy Cleveland received no consideration whatever for executing such paper, but did it solely for the benefit of B. F. Cleveland, and in compliance with his impor-

tunities, and in consequence of his influence over his cestui que trust. On and before the death of his father, R. M. Cleveland, and during the year 1896 and since, Vannoy was a paralytic, and, by reason of his mental and bodily infirmities, wholly unable to attend to any business touching the management or control of his estate or of the stock referred to. He had no fixed residence, but lived most of the time at the residence of his brother and trustee, B. F. Cleveland, and was entirely subject to the will and control of his trustee, who had overpowering influence over him. "By reason of the said Vannoy's mind, the impairment of his health, and being subject to the will, control, and influence of the said trustee, the said Vannoy was unable to resist doing anything asked, desired, or demanded by the said B. F. Cleveland, however improvident or improper it might be, and any transfer, sale, contract, or agreement signed by the said Vannoy at the instance, request, or command of the said B. F. Cleveland was not the act of the said Vannoy, because he was not a free agent, nor fully capable of understanding the effect of any paper signed by him; and \* \* \* the paper of June 30th, authorizing the pledge of the thirty-six shares of Georgia Railroad & Banking Company stock, \* \* \* physically signed by the said Vannoy, was not binding as his act and deed, but was signed under and by virtue of the influence of B. F. Cleveland, his trustee, with whom he was living, and upon whom he was dependent for care and attention rendered necessary by his mental and bodily impairment." B. F. Cleveland, having secured such nominal authority to pledge such stock with the Shelbyville bank, in violation of his trust deposited the scrip for the 36 shares of stock with such bank as security for an individual debt. The officers and agents of the bank knew of the mental condition, as above stated, of Vannoy Cleveland, and knew that the paper had been signed by him by reason of the persuasion and undue influence exercised over him by his trustee, B. F. Cleveland. The bank continues to hold the certificate of such stock, under the transfer made as above stated, as security for the debt of B. F. Cleveland, and, after demand therefor, has refused to return the same to petitioner. By reason of the facts above stated, the bank has no title or estate in and to such stock. By proper proceedings subsequently had in the circuit court of Bedford county, Tenn., having jurisdiction of the persons and subject-matter, B. F. Cleveland was removed as the trustee of Vannoy Cleveland, and petitioner was appointed in his stead as such trustee. Having subsequently learned of the illegal transfer and pledge of the stock, petitioner duly notified the Georgia Railroad & Banking Company not to recognize the transfer, and not to pay any dividends accruing upon the stock to the People's National Bank of Shelbyville. Petitioner demanded the payment of the dividends which

have accrued upon the stock of the Georgia Railroad & Banking Company, which it refused to pay; because of such transfer, and its inability to determine who was entitled thereto. The Georgia Railroad & Banking Company is indebted to petitioner, as such trustee, the amount of the accrued dividends upon the stock, and judgment is prayed for the same. The paper of June 30, 1896, signed by Vannoy Cleveland, and the transfer of the certificate of stock by B. F. Cleveland, former trustee of Vannoy, to the Shelbyville bank, constitute a cloud upon the title of petitioner, as trustee of Vannoy, to such stock. The prayers of the petition were that the paper signed by Vannoy Cleveland, authorizing B. F. Cleveland to pledge the stock, and the transfer of the scrip or certificate to the People's National Bank of Shelbyville by B. F. Cleveland, be canceled as a cloud upon petitioner's title; that the stock certificate be surrendered, and a new certificate be issued to petitioner in lieu thereof; that the Georgia Railroad & Banking Company pay to petitioner the dividends that may in the future accrue upon such stock; and for general relief.

The Georgia Railroad & Banking Company filed its answer, to which were attached, as exhibits, copies of the paper signed by Vannoy Cleveland, June 30, 1896; letters from the People's National Bank of Shelbyville demanding the payment of the dividends claimed to be due it as transferee of the certificate of stock; and of letters from Jesse Cleveland, as trustee of Vannoy Cleveland, containing notice of his appointment as such trustee, and demanding that the dividends be paid to him. The answer disclaimed any interest in the stock, and averred the defendant's willingness to account to whomsoever was entitled to the stock and dividends thereon, and prayed that the petitioner and the People's National Bank of Shelbyville be required to interplead. Georgia A. Cleveland, Harry B. Cleveland, R. M. Cleveland, Jr., W. C. Cleveland, and B. F. Cleveland, as surviving children of R. M. Cleveland, deceased, and Robert and Jerry Cleveland, both of age, Grace, William, Frederica, Barnett, and Benn Cleveland, minors, by their next friend, Robert Cleveland, all children of Jerry J. Cleveland, deceased, son of the testator, R. M. Cleveland, and W. S. Ryall, husband and sole legatee under the will of Carolina Cleveland, deceased, daughter of the testator, R. M. Cleveland, filed a petition, praying that they be allowed to intervene as parties plaintiff in the cause. Their petition alleged that Vannoy Cleveland had died since the original petition was brought, unmarried and without issue; that he left no debts, and was at the time of his death a citizen and resident of Georgia; that petitioners (except Ryall, who claimed as sole legatee of his wife), as his brothers, sister, nephews, and nieces, were his sole heirs at law, and, as such, were entitled to the accrued dividends on the Georgia Railroad &

Banking Company stock which had not been paid, and, as children and grandchildren of R. M. Cleveland, were, as remaindermen, entitled, under the clause of his will set out in the original petition, to the 36 shares of the capital stock of such company. An order was granted allowing these petitioners to intervene as parties plaintiff, without prejudice to any right of demurrer by the People's National Bank of Shelbyville. The Shelbyville bank was served by publication. It demurred generally and specially, the grounds of which demurrer will be hereinafter considered. The demurrer was overruled, and this judgment of the court is before us for review upon a writ of error sued out by the Shelbyville bank.

1. It is not necessary to discuss the merits of the general demurrer, as it is clearly evident that the petition set forth a cause of action. The point was made by several grounds of the demurrer that the court had no jurisdiction of the Shelbyville bank—it being a foreign corporation, located and conducting its business in the state of Tennessee—and that the court could not acquire jurisdiction of it by service on it made by publication. The Civil Code (section 4975) provides: "If the defendant in equitable proceeding does not reside in the state, service of the petition or any order of the court may be made by publication." In section 4976 it is declared: "Where any non-resident or person unknown claims or owns title to, or an interest, present or contingent, in any real or personal property in this state, service on such non-resident or unknown owner or claimant may be made by publication in cases affecting such property where proceedings are brought—(1) To remove a cloud therefrom or quiet title thereto. (2) To cancel or set aside deeds, mortgages, liens, or incumbrances thereon. \* \* \* (6) To make any decree or order in which the subject of the action is real or personal property in this state, in which a non-resident or unknown person has or may have or claims an interest, actual or contingent, and in which the relief demanded consists wholly or in part in excluding him from an interest therein. (7) Where a non-resident or person unknown has or may have or may claim present, future, or contingent interests in any property in this state." Section 4978 et seq. provides for the method and manner of perfecting service by publication in such cases. It is not disputed that the stock and dividends involved in this case are personality. "Stocks representing shares in an incorporated company holding lands, or a franchise on or over lands, are personality." Civ. Code, § 3070. The disputed question is as to the situs of this property. As a general rule, personal property follows the person of the owner, and has its situs at his domicile; but it may, for some purposes, have a different situs from the domicile of the owner. "A nation within whose territory any personal property is actually situate, has as entire

dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent as it may exert its authority over immovable property." Story, Conflict of Laws, § 550. Our Civil Code (section 5430) provides: "Shares in a bank or other corporation may be levied on and sold, either under attachment or *fi fa.*, in any county where the corporation does business—notice of such levy being given to the defendant, if his residence be known, and also the officers or agent of the corporation in the county where the levy is made. Upon demand by any sheriff, constable, or other levying officer of this state, having in his hands any execution or attachment against any person who is the owner of any shares of stock of said bank or joint-stock company, upon the president, superintendent, manager, or other officer of any corporation or joint-stock company having access to the books thereof, said president, superintendent, manager, or other officer aforesaid shall disclose to said levying officer the number of shares and the par value thereof owned by the defendant in said execution or attachment, and on refusal to do so, shall be considered in contempt of court and punished accordingly." See, also, sections 4163, 4535. It is clear, therefore, that, for the purpose of subjecting corporate stock to attachment and execution, our Code fixes its situs at the domicile of the corporation. In *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300, wherein the bank, whose domicile was in the state of South Carolina, was the complainant in a bill to review and set aside a decree which had been rendered in *Dearing's* favor, in a suit which he had instituted against it and a Georgia corporation, involving certain shares of stock in the latter company, the title to which was claimed both by *Dearing* and the Charleston bank, this court held that, inasmuch as there was no statute law of Georgia which authorized citizens of a foreign state to be made parties to proceedings in our courts without their consent, a judgment rendered against an inhabitant of a foreign state in a case wherein he did not appear, although notice was served upon him, under the second rule in equity, by publication, was "a nullity as to him." But *Nisbet, J.*, who delivered the opinion, referring to the stock, said: "Its situs is in Georgia. The sovereignty of the state is over it, and the jurisdiction of the courts coextensive with its sovereignty." It is apparent from what is said in the opinion that if there had been then in existence a statute similar to that of 1895, contained in section 4976 of the Civil Code, and service on the Bank of Charleston had been duly perfected, in pursuance thereof, by publication, the court would have held it bound by the previous decree. In *Wright v. Southwestern Railroad Co.*, 64 Ga. 790, Jus-

tice Jackson said: "Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part, at least, and taxable by the state in which the road is located." It was held by the Court of Appeals of New York in *Mechanics' Bank v. Railroad*, 13 N. Y. 627, that certificates of stock are simply muniments and evidences of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. To the same effect, see 1 Cook, Stock & Stockholders, § 14. A case directly on the question under consideration is *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. There "a suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties, citizens of other states than Michigan, against a Michigan mining corporation, and certain individual defendants holding shares of stock in that corporation, and being citizens residing in Massachusetts. The plaintiffs claimed that they were the real owners of certain shares of stock of the corporation, the certificates of which were held by the Massachusetts defendants, and sought a decree removing the cloud upon their title to such shares, and adjudging that they were entitled to them." It was held: "(1) That the defendants, citizens of Massachusetts, were necessary parties to the suit. (2) That they could be proceeded against in respect of the stock in question in the mode and for the limited purposes indicated in the eighth section of the act of Congress of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], which authorized proceedings by publication against absent defendants in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district where such suit is brought. (3) That for the purposes of that act the stock held by the citizens of Massachusetts was to be deemed personal property 'within the district' where the suit was brought. The certificates of stock were only evidence of the ownership of the shares, and the interest represented by the shares was held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner." We are of opinion, both upon principle and authority, that the situs of the shares of stock, the subject-matter of the litigation in the present case, was, for the purposes thereof, in Richmond county, Ga. As the property in litigation was located in Georgia and in Richmond county, and the jurisdiction of the courts of this state attaches upon all property within its limits, the superior court of that county had

jurisdiction of the subject-matter of the controversy, and hence of a suit involving its title; and such court could, for the purpose of determining and settling its true ownership, acquire jurisdiction of a nonresident of this state who claimed title to such property, by having service perfected upon such foreign claimant by publication, in accordance with the provisions of the statute applicable in such cases. It follows that when service was thus duly perfected upon the People's National Bank of Shelbyville, Tenn., the proceeding against it was by due process of law.

2. Another ground of the demurrer was that there was a misjoinder of causes of action, in that a cause of action by the petitioners, as remaindermen under the will of R. M. Cleveland, for the shares of stock, was joined with a cause of action by them, as heirs at law of Vannoy Cleveland, for the unpaid dividends which had accrued on such shares during his lifetime. We do not think there is any merit in this ground. The rule is well established that where there is one connected interest, centering in the point in issue, or one common point of litigation, so that the joinder tends to prevent multiplicity of suits, unconnected parties may join in an action. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348. And see *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, and cases cited. In the present case there was one common point of litigation, viz., the validity of the Shelbyville bank's title to the shares of stock in question. Both the remaindermen under the will of R. M. Cleveland and the heirs at law of Vannoy Cleveland were interested in having the cloud upon the title to these shares, which was necessarily a cloud upon the title to the dividends in question, removed. They had one common point of litigation with the Shelbyville bank and the Georgia Railroad & Banking Company, upon the determination of which the rights of the remaindermen and the rights of the heirs at law alike depended. So, if the remaindermen and the heirs at law had been different persons, they would have had the right to join in this suit. As it is, the same persons claim the shares of stock as remaindermen, and the dividends as heirs at law, and surely they ought not to be compelled to resort to separate suits against the same defendants, in order to establish a single contention upon which both their rights as remaindermen and their rights as heirs at law depend.

3. Another contention made by the demurrer was that the plaintiffs could not recover the dividends, because, if any right of action existed therefor, it was in the executor or administrator of Vannoy Cleveland. It will be noted that the original petition was brought by Jesse Cleveland as the trustee of Vannoy Cleveland, in which it was sought to recover the dividends which had accrued since the certificate of stock had been trans-

ferred to the Shelbyville bank by the former trustee, B. F. Cleveland. The trust, having been created in Tennessee, where presumably the common law upon the subject of trusts is in force, would be free from the limitations and restrictions which the law of Georgia imposes upon trusts, and would be valid without reference to Vannoy Cleveland's physical or mental infirmities; but under the ruling made in *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415, the trust was valid under the laws of this state. It was held in that case: "A valid trust can be created in this state for the benefit of a person sui juris, for life, with remainder over in trust for another person sui juris, for life." The trust being valid, the trustee certainly had the right, during the lifetime of Vannoy Cleveland, to sue for the recovery of both the corpus of the trust estate and the dividends accruing thereon during the life of the cestui que trust. Such a suit was for the preservation of the trust estate, and was not, at least so far as these dividends are concerned, abated by the death of the cestui que trust pendente lite, but continued for the same general purposes for which it was instituted, viz., the preservation of the trust estate, and to apply it, if recovered, to those entitled to it. This court has held: "If a trustee in whom the legal title is vested brings suit for real property, and the cestui que trust, who is a married woman, dies pendente lite, and there is no administration on her estate, the action does not abate, but may be continued for the recovery of the property for her heirs. If the action be for personal property, the trustee may recover so that he may be able to deliver it to the administrator, if one be appointed, or, if there be no necessity for administration, then to the distributees, subject in either case to all charges to which it may be liable." *Artope v. Goodall*, 53 Ga. 319; *Findlay v. Artope*, 48 Ga. 537. To the same effect is *Garrett v. Brock*, 27 Ga. 576, where it did not appear whether there was any administration upon the estate of the cestui que trust or not. There can therefore be no question that the trustee had the right to recover at least the dividends which had accrued during the life of Vannoy Cleveland.

4. Taking the allegations of the petition to be true, the intervening petitioners, children and grandchildren of R. M. Cleveland, were, as remaindermen under the fifth item of his will, entitled to recover the shares of stock in controversy; and, having this right, then, of course, they were entitled to recover dividends on the stock accruing after the death of Vannoy Cleveland.

5. The interveners, as remaindermen, had, of course, no right to recover dividends which had accrued during the lifetime of the life tenant, as they, in such capacity, had no interest in such dividends. Nor could they, as heirs at law of Vannoy Cleveland, recover such dividends, as an heir at law cannot maintain an action for the recovery of person-

alty; the right of action being alone in the administrator or executor. *Smith v. Turner*, 112 Ga. 533, 37 S. E. 705, and cases cited. As we have seen, however, this does not affect our ruling upon the merits of the demurrer, as the suit instituted by the trustee during the lifetime of his cestui que trust did not, at least as to these dividends, abate by reason of the death of Vannoy Cleveland, and the trustee therefor could proceed with such suit for their recovery.

6. Another ground of the demurrer was that W. S. Ryall, one of the interveners, could not recover the interest of his deceased wife, who was, before her marriage, Carolina Cleveland, but the right to recover this interest, if such right existed, was in her executor. It appears from the petition that Carolina Cleveland died testate prior to the filing of the original petition in this case, leaving no child or issue of a child; that her husband, W. S. Ryall, is the sole legatee under her will; and that her executor has assented to the legacy. Taking this to be true, we are of opinion that Ryall could recover whatever interest his deceased wife had in the property in question. The assent of an executor to a legacy divests him of the legal title to the property embraced therein, and perfects the inchoate title of the legatee, so as to give the latter a right of action to recover such property. Civ. Code, § 3319; 2 Woerner, Am. Law of Administration, § 453.

In view of the foregoing, the judgment overruling the demurrer is affirmed. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LAMAR, J., disqualified.

(132 N. C. 565)

**GORDON v. SEABOARD AIR LINE RY. CO.**

(Supreme Court of North Carolina. May 5, 1903.)

**CARRIERS—INJURY TO PASSENGER—ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE—INSTRUCTION—SUFFICIENCY.**

1. Where the evidence was conflicting, the verdict as to the weight and credibility of the evidence is conclusive.

2. In an action for injuries sustained in attempting to alight from a moving train at the invitation of the conductor, where the court charged that before defendant could be found guilty of negligence it must be found that the train was not moving faster than a fast walk, that the conductor motioned plaintiff to get off, and that the danger was not apparent to a reasonable man, it was not necessary, in the following charge on the question of contributory negligence, to again tell the jury that they were required to find such facts.

3. The fact that the court, in an instruction on the question of negligence, required the finding of certain facts which pertained more properly to the issue of contributory negligence, was not prejudicial to defendant.

Montgomery, J., dissenting.

Appeal from Superior Court, Union County; Robinson, Judge.

Action by J. F. Gordon against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for the recovery of damages for personal injuries received by the plaintiff in attempting to alight from a moving train at the invitation of the conductor, as alleged by the plaintiff.

The following extracts from the complaint sufficiently present the essential facts involved in the case, to wit: "(5) That on the 8th day of February, A. D. 1901, the plaintiff, at Monroe, N. C., boarded one of the Carolina Central Railroad Company's freight trains as a passenger, which train usually carried passengers, to go to Indian Trail, N. C., and paid the conductor in charge of said train his fare to said Indian Trail, N. C. (6) That a short while after the plaintiff boarded the said train and paid his fare, as hereinbefore set forth, the conductor in charge of said train told the plaintiff that he had a heavy train, it was upgrade, and he did not want to stop at Indian Trail to let plaintiff off, but would carry him to Matthews, in the county of Mecklenburg, and would let him off there, and that his train would not go further than Charlotte, and would return by Matthews in about 45 minutes, and that the plaintiff could wait at Matthews until the conductor returned, and he would bring the plaintiff back to Indian Trail, to which proposition the plaintiff assented, for the accommodation of the defendant. (7) That the defendant's conductor told the plaintiff that he would slow up his train at Matthews to a safe speed for him to alight, and for him to get off the train when it reached a point opposite the express office, when he (the conductor) motioned for him to get off; that upon arriving at Matthews the train did slow up, and the conductor went upon the steps of the rear end of the last car and motioned to the plaintiff to get off, which plaintiff obeyed, and, as he went to alight from the train, the defendant, through and by the negligence of its employes and servants, violently and quickly jerked its train forward, and by said negligence and carelessness of its employes and servants the plaintiff was thrown violently upon and against the ground, and received the great injury hereinafter set forth. (8) That by reason of the negligence and carelessness of the defendant, through and by its agents, employes, and servants, as hereinbefore set forth, the plaintiff was suddenly and violently thrown against and upon the ground, and was painfully and severely injured, to wit, his collar bone was broken, and from which injury he suffered great mental and physical pain, and lost about three months' time of his labor."

The answer denied these allegations, and pleaded contributory negligence. There was testimony tending to sustain the contentions both of the plaintiff and the defendant. The

issues and answers thereto were as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Yes. (2) Did the plaintiff contribute to his injury, as alleged in the answer? No. (3) What damage, if any, is the plaintiff entitled to recover? \$300."

Adams & Jerome and J. D. Shaw, for appellant. Redwine & Stack, for appellee.

DOUGLAS, J. (after stating the case). The defendant made the usual motion for nonsuit, which was properly refused. There was testimony tending to support the contentions of the plaintiff, and while there was equally as strong or stronger testimony for the defense, we must abide by the verdict of the jury, who alone can determine the weight and credibility of the evidence.

The defendant's first, second, and third exceptions as to the admission of testimony cannot be sustained. As they are not even alluded to in the defendant's brief, it would seem unnecessary to further discuss them. Neither does the brief allude to the fourth and sixth exception, which are equally untenable; but, as the fourth exception is to a certain extent involved in the fifth, upon which the defendant seems to rely, we will discuss them together.

The fourth exception is to the following charge of his honor: "If you shall find as a fact from the evidence, and by the greater weight thereof, that the plaintiff was a passenger, then you will consider the issue as whether he was injured by the negligence of the defendant; and if you shall find as a fact from the evidence, and by the greater weight thereof, that after the plaintiff had paid his fare to Indian Trail the train ran past his station, and the conductor promised to slow up at Matthews and let him off, and that he would take him up on his return trip, and let him off at his station, and that while passing Matthews, the train not moving faster than a fast walk, and the danger not being apparent to a reasonable man, and being told by the conductor, that is, if you shall find as a fact from the evidence, and by the greater weight thereof, that the conductor did motion to him or tell him to get off, and you further find as a fact from the evidence that the danger was not apparent to a reasonable man, you will respond 'yes' to the first issue."

The fifth exception is directed to the following part of his honor's charge: "In passing on the second issue as to contributory negligence, the burden is still on the plaintiff to satisfy you by the greater weight of the evidence that, at the time he got off the moving train, the danger was not apparent to a careful, prudent man, and, if he has so satisfied you, you will respond 'no' to the second issue; if he has failed to so satisfy you, you will respond 'yes,' and will not consider the issue as to damages."

The nature of the defendant's fifth excep-

tion—the only one alluded to in its brief—is thus stated: "The appellant's fifth exception should be sustained for failure of the court to instruct the jury, in passing on the second issue as to contributory negligence, in addition to the charge as given on that issue, that it was necessary for them to find as a fact that the conductor promised to slow up at Matthews and let the plaintiff off, and that the conductor did motion to him or tell him to get off at Matthews." This exception cannot be sustained. It does not appear that the defendant asked for any additional instructions. In any event, we think the instruction was sufficient, in view of what was said in the preceding charge on the first issue. His honor charged the jury, in effect, that, before they could find the defendant guilty of negligence, they must find that the train was not moving faster than a fast walk, that the conductor motioned to or told the plaintiff to get off, and that the danger was not apparent to a reasonable man. Having found the defendant guilty of negligence, under the above instructions they must have found these facts. If these facts were already found by the jury before they came to the consideration of the second issue, such facts were evidently still in their minds.

It is contended that some parts of this instruction pertained more properly to the issue of contributory negligence, but, admitting this to be true, they operated more strongly against the plaintiff when given on the first issue than on the second, since the finding against him on the first issue would end his case. The issue of contributory negligence is not an independent issue in the sense of complete isolation, and can never arise until after the first issue is found in favor of the plaintiff. The first essential requisite for recovery is the negligence of the defendant, and, until that is found, the negligence of the plaintiff is utterly immaterial. The nature and relative connection of these issues is discussed in *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848, *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730, and *Curtis v. Railroad*, 130 N. C. 437, 41 S. E. 929.

If the facts stated in the complaint were true, and they have been so found by the jury, we see no substantial difference between this case and that of *Davis v. Railway* (decided at this term) 43 S. E. 840. See, also, *Whitley v. Railroad*, 122 N. C. 987, 29 S. E. 783; *Hodges v. Railway*, 120 N. C. 555, 27 S. E. 128; *Cable v. Railway*, 122 N. C. 892, 29 S. E. 377; *Johnson v. Railroad*, 130 N. C. 488, 41 S. E. 794. In *Railroad v. Ege-land*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82, where the plaintiff, a laborer in the employ of the defendant, was ordered by the conductor to jump off a train going about four miles an hour and was injured in doing so, the court says: "If plaintiff reasonably thought he could with safety obey the order, by taking care and jumping carefully, and if because of the order he did jump, the jury

ought to be at liberty to say whether under such circumstances he was or was not guilty of negligence."

The judgment is affirmed.

MONTGOMERY, J. (dissenting). The plaintiff seeks to recover of defendant damages on account of personal injuries alleged to have been received by the plaintiff through the negligence of defendant. He alleged in his complaint that he boarded defendant's train at Monroe, as a passenger, intending to go to Indian Trail, and paid the conductor in charge his fare; that afterwards it was agreed between him and the conductor, on account of the steep grade at Indian Trail, that the train would not be stopped at that place, but would be moved beyond to Matthews, and that the plaintiff could wait at Matthews until the train returned, when and where the plaintiff would be taken up and carried back to Indian Trail; that the conductor told the plaintiff he would slow up at Matthews to a safe speed for him to alight from the train, and that he should get off, when it reached the point opposite the express office, upon a signal from the conductor; that the train did slow up, on signal given, "and, as he went to alight from the defendant's train, the said defendant, through and by the negligence of its employes and servants, violently and quickly jerked its train forward, and, by said negligence and carelessness of defendant's employes and servants, the plaintiff was thrown violently upon and against the ground, and received great injury herein and afterwards set forth."

Upon the trial, the plaintiff testified to matters supporting his complaint. Amongst other things, he said, concerning his purpose to alight at Matthews, "Then I saw him [conductor] on the step at the rear end of the car. He motioned to me, and told me to get off. I started to step off, and the train gave a sudden jerk, threw me to the ground, and broke my collar bone. \* \* \* I fell because the car gave a sudden jerk as I was on the step. The train was going about the speed of a fast walk." He said, on cross-examination, that he had come down to get off the train before he saw the conductor. The conductor testified that he did not see the plaintiff on the day of the alleged injury, that he was not a passenger on the train, nor did he collect from him any fare; he said the train was going from 10 to 15 miles an hour as it passed Matthews. And other witnesses for the defendant, living in Matthews, testified that the speed of the train through Matthews was 10 or 15 miles an hour.

His honor, in his instructions to the jury, treated the case not as one where the plaintiff had been jerked violently from the defendant's train and had been injured by reason of the jerk or wrench, but he treated it as a case in which the plaintiff got off the

moving train of his own volition. This will be seen from a reading of two paragraphs in the charge, which were excepted to by the defendant, as follows: "If you shall find as a fact from the evidence, and by the greater weight thereof, that the plaintiff was a passenger, then you will consider the issue whether he was injured by the negligence of the defendant; and if you should find as a fact from the evidence, or by the greater weight thereof, that after the plaintiff had paid his fare to Indian Trail the train ran past his station, and the conductor promised to slow up at Matthews and let him off, and that he would take him up on his return trip and let him off at his station, and that while passing Matthews the train was not moving faster than a fast walk, and the danger not being apparent to a reasonable man, and being told by the conductor, that is, if you should find as a fact from the evidence, and by the greater weight thereof, that the conductor did motion to him or tell him to get off, and you further find as a fact from the evidence that the danger was not apparent to a reasonable man, you will respond 'yes' to the first issue." "In passing on the second issue as to contributory negligence, the burden is still on the plaintiff to satisfy you by the greater weight of the evidence that, at the time he got off the moving train, the danger was not apparent to a careful, prudent man, and, if he has so satisfied you, you will respond 'no' to the second issue. If he has failed to so satisfy you, you will respond 'yes,' and will not consider the issue as to damages."

Considering the case, then, from the standpoint of the court below, I think there was error in those parts of his charge to which the plaintiff excepted. It is true the jury believed the plaintiff as to the speed of the train, in preference to the conductor and the disinterested witnesses of the defendant, who lived in Matthews. The plaintiff said the train was going about the speed of a fast walk. The conductor and the other witnesses for the defendant said that its speed was 10 or 15 miles an hour. His honor instructed the jury that if they should find that the train was not moving faster than a fast walk, and the danger not being apparent to a reasonable man, and that if he was told by the conductor, that is, if they should find as a fact from the greater weight of the evidence that the conductor did tell him, to get off, they should answer the first issue (as to the defendant's negligence) "yes." In that I think there was error. The plaintiff's own testimony showed that he contributed to his own injury. His standing on the bottom step of the train, attempting to alight under its speed, as testified to by himself, and being in a position of danger liable to be thrown off by a jerk or wrench of the cars, was in itself contributory negligence, and the getting off under the circumstances was unreasonable.

(132 N. C. 542)

**GRIER v. MUTUAL LIFE INS. CO. OF NEW YORK.**

(Supreme Court of North Carolina. May 5, 1903.)

**LIFE INSURANCE—APPLICATION—ISSUANCE OF POLICY—PAYMENT OF PREMIUM—DATE WHEN POLICY TAKES EFFECT—ESTOPPEL.**

1. Where an insurance policy and the application therefor both provide that, if the application is approved and the policy issued, it shall be in force from the date of the application, the provision in such application that the contract shall not take effect until the first premium is paid, during the applicant's continuance in good health, is only a provisional agreement, authorizing the company to withhold delivery of the policy until such payment in good health; and after actual delivery it is estopped, in the absence of fraud, to assert that the policy is void either on account of nonpayment of premium or ill health.

2. While the acknowledgment in a policy of insurance of payment of the premium, regarded as a receipt for money, is only prima facie—not barring a recovery of the amount—it cannot be contradicted, so far as the acknowledgment is contractual, so as to invalidate the contract.

3. The issuance of a policy of insurance is an acceptance of the application therefor, and should be based on the status at the time such application is made, and is not affected by a subsequent change of health; that being a part of the risk the company assumes, and for which it is paid.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by J. M. Grier, administrator, against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Tillett, for appellant. Burwell & Cansler, for appellee.

CLARK, C. J. On 26th February, 1901, the plaintiff's intestate made out an application for a policy of insurance upon his life, which was sent to the home office of the defendant, where it was accepted, and a policy thereupon was duly executed 9th March, and is dated 26th February. This policy was sent to defendant's agent for delivery, who delivered the same on 14th March. In the meantime the insured had been taken, on 6th March, with a chill from exposure, which was followed by fever. On 12th and 13th March he was free from fever, and the attending physician (witness for defendant) says his condition was not so good the next day (14th), and on the 15th he developed catarrhal pneumonia, and died 18th March. At the time the policy was applied for, the insured said he preferred to pay the premium (\$23.30) in cash, and in presence of the defendant's agent told Mr. Lee, who had money of the insured in hand, to pay that sum to the defendant's agent. On 14th March the defendant's agent told Lee he had the policy, who told him, as the said agent testifies, that the insured was not well, and that he had a cold, or the grippe, and was up at his house, and suggested that the agent go up to his house to see him; but the agent

did not do so, and delivered the policy to Lee, who offered the money to the said agent, who told him that he would get it when he collected the other premiums at that point, and on 16th March the said agent paid the premium on this policy to the district agent at Charlotte. On hearing of the death, the company sent out blanks for proofs of loss, and no offer to return the premium was made till 8th July (after this suit began), though on 26th June the district agent wrote to the plaintiff that "the amount of premium, with interest, paid on 14th March, 1901," had been returned to him by the company, who had declined to pay the loss. There were no averments in the answer of fraud in the application, or in the suppression of facts, or misrepresentation as to the condition of health of the insured 14th March, when the policy was delivered.

The defendant excepts because the court instructed the jury, if they believed there was a material change in the health of the insured between the time of the application and the delivery of the policy, to answer the issue in favor of the defendant, "unless you further find from the evidence that the defendant company, before the delivery of the said policy, received notice of the said changed condition in the health of said Davidson, and waived its right to avoid the policy for this reason." And the defendant further excepted because the court charged that if the company accepted the application on 9th March, and executed its policy, and sent the same to its local agent for delivery, and "if you further find from the evidence that on 14th March, and before the delivery of the policy to said Davidson [the insured], the said Gordon [defendant's agent] received notice of the material change in the condition of the health of said Davidson, if you find there was such a change, and the said Gordon, notwithstanding such notice, delivered said policy to Lee, with instruction to deliver it to Davidson at once, and for the purpose of making it a binding contract on the defendant company, and that Lee did so, and that Lee offered to pay Gordon the premium upon the policy for Davidson, pursuant to instructions from said Davidson, if you find there ever were such instructions, but that Gordon, for his own convenience, requested that the plaintiff's premium be not paid then, but that the same should be paid him in accordance with the usual course of dealing between himself and said Lee, and that this was agreed to between said parties, and that on the 16th of said month Gordon sent the company's part of said premium, in the usual course of business, to the defendant, and upon the death of said Davidson notice thereof was given to the defendant, and that the defendant sent to the administrator of the deceased blank applications for proving the death of said Davidson, with instructions to make out said proofs, then the court instructs you to find that the defendant com-



pany, before delivering said policy, had notice that there had been a material change in the condition of the health of said Davidson since making his application, and before the delivery of the policy, and had waived its right to have the policy avoided for this reason." There is nothing in these instructions of which the defendant could complain, and our disposition of them renders it unnecessary to discuss the other exceptions.

All the points herein raised were considered and decided by a unanimous court in the recent case of *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592. The policy, as well as the application, provides that, if the application is approved and a policy is issued, it shall be in force from the date of the application. When, therefore, the application was accepted and the policy was issued, 9th March, it dated back to 26th February. In fact, the policy certifies that it was signed 26th February. There only remained the delivery of the policy to complete the contract. The provision in the application that the contract shall not take effect until the first premium shall have been paid, during the applicant's continuance in good health, is only a provisional agreement authorizing the company to withhold the delivery of the policy until such payment in good health; but, when the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void, either on account of nonpayment of premium or of ill health, which stipulations were asserted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the policy after it has been delivered. If the premium in fact is not paid, the acknowledgment of payment, so far as it is a receipt for money, is only *prima facie*, and the amount can be recovered; but, so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the contract. See *Kendrick v. Insurance Co.*, *supra*, and cases there cited. The same principle is there shown to apply to deeds and all other contracts under seal. The same rule applies to the stipulations in the application which provide that the contract shall not take effect till the first payment shall have been made during continuance in good health. The application recites that the agent has given the insured a binding receipt, "signed by the secretary of the company, making the insurance in force from this date, provided this application shall be approved and the policy signed by the secretary at the head office of the company and issued." It was agreed thereby that, if the application was accepted and the policy issued, the insurance began from the date of the application. Everything counted from that date, which is the anniversary on which future premiums must be paid, or the policy forfeited for nonpayment. The risk of illness accruing after said date was upon the company from its acceptance

of the application and "issuance" of the policy, but the company reserved to itself the advantage of a provision that the contract shall not go into effect "till payment of premium during the applicant's continuance in good health"; thus giving itself a *locus penitentiae*, and making the insured bear his own risk till payment of premium and issuance of policy. But when the policy is not only issued, but delivered, its delivery, in the absence of fraud, is conclusive that the contract is completed (*Ray v. Ins. Co.*, 126 N. C. 166, 35 S. E. 246), and is an acknowledgment of payment during continuance in good health. If the agent had not delivered the policy, whether the circumstances would have justified the withholding of the delivery, so as to release the company from responsibility, is not a matter before us. He did deliver it, and with full opportunity to see the insured, and with a suggestion that he do so; and there is no allegation of fraud and collusion, as in *Sprinkle v. Indemnity Co.*, 124 N. C. 405, 32 S. E. 734. The delivery of the policy closed the contract, like the delivery of any other deed, and the preliminary provisions in the application for withholding thereof ceased to be of any force. In *Kendrick's Case*, *supra*, the money was not paid till after a lingering illness, and on the very day of the death, and then by a friend, but it was held that the delivery of the policy was conclusive as to the contract being complete.

Numerous authorities can be cited in support of what is here said, but the matter has been sufficiently elaborated in *Kendrick v. Insurance Co.*, *supra*. To same purport, *Life Ass'n v. Findley* (Tex. Civ. App.) 68 S. W. 695; *Indemnity Ass'n v. Grogan's Adm'r* (Ky.) 62 S. W. 959; *Insurance Co. v. Koehler*, 63 Ill. App. 188; *Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795; *Quinn v. Metropolitan Life Ins. Co.* (Sup.) 41 N. Y. Supp. 1060; *McElroy v. Ins. Co.*, 36 C. C. A. 613, 94 Fed. 990. In *Life Ass'n v. Findley* and *Indemnity Co. v. Grogan*, the facts were identical, almost, with those in this case.

There is no stipulation that the policy shall not be delivered unless the insured is in good health, for that would unjustifiably shift off upon the insured any mortal illness accruing after the application, and during the time for which he has paid. But the agreement is that the first premium must be paid during good health, and, in the absence of fraud, the delivery of the policy is conclusive of that fact. It was contemplated by the parties that the payment should be made with the application and that the receipt then given should protect the insured from that date, if the application were accepted. The issuance of the policy is acceptance of the application, and should be based upon the status at the time the application is made, and is not affected by a subsequent change of health, for that is part of the risk the company assumed, and for which it was paid.

When the premium is not paid with the application, the company reserves the right not to complete the contract till payment of the premium while the insured is in good health. But as already said, the actual delivery of the policy concludes the contract, in the absence of fraud. If the local agent were the agent of the insured, the mailing the acceptance—the policy—directed to him, would close the contract. *Adams v. Lindsell*, 1 B. & Ald. 681; *Benj. on Sales*, § 44. Certainly, as he is the agent of the company, the delivery of the policy by him is its delivery.

No error.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

(132 N. C. 573)

**HITCH et al. v. EDGECOMBE COUNTY COM'RS.**

(Supreme Court of North Carolina. May 5, 1903.)

**COUNTIES—LIABILITY FOR TRESPASS—OPENING HIGHWAYS—COMPENSATION—MANNER OF RECOVERY—COMMISSIONERS' INDIVIDUAL LIABILITY—COMPLAINT—WAIVER OF DEFECTS—DEMURRER.**

1. Plaintiff in an action against the commissioners of a county alleged that defendants entered on plaintiff's land to construct a highway, and prayed for damages, but did not allege that the entry was unlawful or wrongful, nor did he allege any injury. *Held*, that the omission to allege that the entry was unlawful or wrongful, and caused injury, was waived by defendant's failure to move for a more specific statement, or to demur on the ground of defective statements.

2. A demurrer was properly sustained to the complaint in an action against the county commissioners for trespass in taking land for the construction of a highway, as a county cannot be sued for trespass on land or for the commission of any other tort, in the absence of a statutory provision giving a right of action against it.

3. Where the land of a property owner has been taken by the county authorities for a public highway, the property owner is entitled to compensation in the manner pointed out by law.

4. If the commissioners of a county have taken land for a highway without authority of law, they are individually liable for their wrongful acts, but are not liable in their official capacity.

Appeal from Superior Court, Edgecombe County; Winston, Judge.

Action by Frank Hitch and others against the Commissioners of Edgecombe County. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

It is only necessary, in order to understand the questions presented, that the second cause of action stated in the complaint and the demurrer thereto should be set out, as the first cause of action was abandoned. They are as follows:

"The plaintiffs, for a second cause of action, allege: (1) That the defendant entered upon and took possession of the said two parcels of land hereinbefore described. (2) That said tracts of land lie adjoining, and contain about

three-quarters of an acre. Defendant dug up said land, and took the earth therefrom, causing deep, dangerous, and unsightly holes in it. The earth so removed was used in constructing an embankment about 25 feet wide at the top and about 12 to 15 feet high on and across said land, on which the defendant opened a highway. That said land is destroyed, and rendered useless for any practical purpose, by reason of the construction and presence of said highway. (3) That said plaintiffs are damaged by reason of the act of defendants as hereinbefore set out to the extent of \$700. Wherefore plaintiffs demand judgment against defendants for \$700 and costs."

The defendant demurs to the second cause of action set out in the complaint for that the facts stated do not constitute a cause of action, in that a trespass upon the lands in the complaint is alleged, for which trespass no statutory right of action exists.

The court sustained the demurrer, and the plaintiffs excepted and appealed.

John L. Bridgers, for appellants. Gilliam & Gilliam and Paul Jones, for appellee.

WALKER, J. (after stating the case). This action was brought to recover damages for entering upon and injuring the plaintiffs' land. The complaint contained two causes of action, to each of which the defendants demurred, but in the argument before us the plaintiffs' counsel abandoned the first cause of action, so that we are confined, in the consideration of the case, to the sufficiency of the second cause of action.

The plaintiffs alleged an entry upon the land, and it must be presumed that they intended to allege an unlawful or wrongful entry, otherwise they would not have been injured in a technical or legal sense. They further allege that they have been "damaged" by the entry and by the other acts committed by the defendants upon the premises. This word "damaged" is evidently intended to be used in the sense of the word "injured," which means in the law "the privation or violation of a right"; something, in other words, for which an action will lie in behalf of the injured person; an actionable wrong. 3 Blk. Com. 2; Black's Dict. 624, "Injuria." Mr. Black says that an injury is "any wrong or damage done to another either in his person, rights, reputation, or property." It seems, therefore, that under the second cause of action the plaintiffs, in an informal way it may be admitted, allege an injury to their property rights, and the allegations will be deemed to constitute a cause of action for trespass, if no motion was made to make them more definite, or if they were not demurred to upon the ground of defectiveness of statement. It is true the plaintiffs do not allege that the entry and other acts were unlawful or wrongful, or in violation of their rights, but those or equivalent words are implied when the defendant either answers to the merits or fails to ask

that the complaint be made more definite and certain, or to demur for defectiveness of statement. It is well settled that in a case where the pleading is not framed with technical accuracy or something is lacking to constitute a good statement of a cause of action, the defect is waived by pleading to the merits, or by not taking advantage of the defect in some proper way, and the defective pleading is aided and the necessary averments will be supplied by the law. This very question was decided in *Garrett v. Trotter*, 65 N. C. 430, which was an action to recover land. The plaintiff in that case failed to allege that the entry was unlawful or wrongful, and this court held that the defendant, by answering, or by not demurring, waived the defect, and under the doctrine of aid the plaintiff might proceed in the case as if the pleading had been correctly drawn. In the case at bar the defendants did not, by demurrer, point out the defect, and, if the complaint is not sufficient in its present form, under the liberal provisions of our present system of pleading, to constitute a good statement of a cause of action for trespass, it has become so by reason of the aid derived from the defendants' pleading. It is to be observed that not only do the defendants not take advantage of the supposed defect in the complaint, namely, that it is not alleged that the entry was unlawful or wrongful, but they expressly waived the defect, if there is any, and elected to treat the second cause of action in the complaint as one for trespass.

It comes, then, to this: That the plaintiffs have sued the defendants in their corporate capacity for an unlawful entry and trespass upon their land, or rather upon the land of the plaintiff company, and demand that they recover damages for the same. The plaintiffs either allege a trespass in the second cause of action, or no cause of action at all is alleged. If the defendants entered unlawfully and wrongfully upon the land, it was a trespass; and if they entered lawfully, they are not liable to the plaintiffs for any damages. If no cause of action is alleged, the demurrer was properly sustained; and, if the plaintiffs allege a cause of action for trespass, the judgment of the court was also right, because this court has recently held that counties cannot be sued for trespass upon land, or for the commission of any other tort, in the absence of a statutory provision giving a right of action against them in such cases. This is no new principle, as will appear by reference to the cases cited in the opinion of this court. The reasons for the doctrine are therein fully and clearly set out, and need not be repeated. *Jones v. Commissioners*, 130 N. C. 451, 42 S. E. 144.

The plaintiffs do not allege that there has been any condemnation of the land for the purpose of constructing a public road, and an assessment of damages, which, by the statute (Code 1883, § 2040), are made a county charge. If the county authorities have

taken the land of the plaintiff company for public purposes, it should be compensated, but in the way pointed out by the law. If there has been a condemnation of the land, the plaintiff can recover the amount assessed in its favor, and, if the defendants have entered upon the land without authority of law, the members of the board are individually liable for their wrongful acts. In any view of the case, as now presented to us, we think the judge below was right in sustaining the demurrer.

No error.

MONTGOMERY, J. (concurring in result). It is difficult for me to understand from a reading of the complaint the grounds upon which the plaintiff relies to recover the judgment which he demands. Two causes of action are set forth. In the first there are allegations that the plaintiff was the owner of two small tracts of land near Tarboro, and that the chairman of the defendant board of commissioners inquired of the plaintiff if he would sell the same, and for what price; that the plaintiff answered the inquiry, stating that \$700 was the price asked for the land; that the defendants made no reply, and not long thereafter they went upon the land and constructed a highway across and through it. There was then a prayer that the defendants "comply with their said agreement as hereinbefore stated, and pay said sum, which was refused," the plaintiff alleging at the same time that "he was ready, able, and willing to convey a clear title for said land to the said defendants for the price named and agreed upon." The second cause of action is stated in the following words: "(1) That the said defendants entered upon and took possession of the said two parcels of land hereinbefore described and set out. (2) That said tracts of land lie adjoining, and they contain about three-quarters of an acre. That said defendants dug up said land, and took the earth therefrom, causing deep, dangerous, and unsightly holes in it. The earth so removed was used in constructing an embankment about 25 feet wide at the top, and about 12 to 15 feet high, on and across said land, on which the defendants opened a highway. That said land is destroyed, and rendered useless for any practical purpose, by reason of the construction and presence of said highway." There followed a prayer for damages for \$700. The defendants demurred to both causes of action. The demurrers were sustained by the court below. There was no appeal from the judgment on the demurrer in the first cause of action. The ground upon which the demurrer to the second cause of action was interposed was stated by the pleader to be that "the facts stated therein [the complaint] do not constitute a cause of action, in that a trespass upon the lands described in the complaint is alleged, for which trespass no statutory right of action is alleged, or exists." It looks to me that

the complaint does not contain an allegation of trespass upon the part of the defendants. The allegation is that they entered upon the land, and built upon it a highway; that is, a public road. There is no allegation that they entered unlawfully upon the land, and built and opened the highway. The county commissioners of Edgecombe, under chapter 50 of the first volume of the Code of 1883, were authorized to have laid out and constructed public roads and highways. The particular manner in which they should act is set forth in that chapter of the Code. The allegation having been made in the complaint that the defendants had laid off a public road over the plaintiff's land, the presumption would be that they proceeded according to law, that there was a petition for the laying off of the road, the appointment of commissioners for that purpose, the action of the commissioners, their report, and compensation ordered by the defendants. Such proceedings on the part of county commissioners are entirely judicial, and there is a presumption that everything was done in an orderly and proper method. As we have said, the complaint does not state that the defendants unlawfully entered the plaintiff's possessions, and without authority of law condemned them to the public use; and it would, indeed, appear strange if such a thing should have been done. It seems to me, therefore, that it ought not to be concluded that the defendants have acted in such a manner without a direct allegation to that effect. It may be that condemnation of the plaintiff's land for public purposes has been made, and that the compensation fixed by the commissioners was not satisfactory to the plaintiff. If so, relief cannot be had in the present action. The demurrer may have been sustained on the wrong ground, but it can be seen from the complaint that the plaintiff has stated no cause of action, and the same should be dismissed.

(132 N. C. 1053)

#### STATE v. CROOK.

(Supreme Court of North Carolina. April 28, 1903.)

**LANDLORD AND TENANT—LANDLORD'S LIEN—CROPS—WHAT CONSTITUTE—NATURAL GRASSES—UNAUTHORIZED REMOVAL—CRIMINAL LIABILITY—INTENT OF TENANT—APPEAL—HARMLESS ERROR—COSTS—DISALLOWANCE—INCOMPLETE RECORD—SUPREME COURT—SUPERVISORY JURISDICTION.**

1. Under Code 1883, § 1759, making it a misdemeanor for a lessee to remove a crop from land without the consent of and notice to the lessor, and before satisfying all liens of the lessor on the crop, subrenting did not release the landlord's lien on the crop, so as to exempt the tenant from responsibility for the act of the sublessee.

2. Under Code 1883, § 1759, making it a misdemeanor for a lessee to remove a crop from land without the consent of and notice to the lessor, and before satisfying all liens of the lessor on the crop, the intent of the tenant in making the removal is immaterial.

3. In a prosecution for removing a crop, under Code, § 1759, making it a misdemeanor for a lessee to remove a crop without the consent of and notice to the lessor, and before satisfy-

ing all liens of the lessor on the crop, an instruction that defendant would be guilty if he removed hay from the land was, if error, harmless, where the jury found him guilty of removing both cotton and hay.

4. No costs will be allowed to the clerk for making and sending up a transcript of the record when he failed to incorporate the judgment therein.

5. Const. art. 4, § 8, by its express terms gives the Supreme Court general supervision and control of proceedings of the inferior courts.

Appeal from Superior Court, Union County; Robinson, Judge.

Joshua W. Crook was convicted of removing a crop, under Code 1883, § 1759, and appeals. Affirmed.

Redwine & Stack, for appellant. The Attorney General, for the State.

CLARK, C. J. Indictment for removing crop under Code 1883, § 1759. There was no conflict of evidence that the rent agreed was a 450-pound bale of lint cotton; that the cotton land was subrented by the defendant to one Bogan; that the defendant rented the land mainly for the meadow, which he himself mowed; that he carried off the hay therefrom, and that the cotton was removed by Bogan; that no rent has been paid, and no notice of removal was given. Bogan testified that he removed the cotton by order of the defendant, and the landlord testified that he never gave any consent to the removal of any part of the crop, and, on the contrary, notified the defendant not to remove anything until the rent was paid. The defendant testified he did not tell Bogan to remove the cotton, and that the landlord agreed beforehand he might remove the cotton.

The court instructed the jury, among other things, that if they should find from the evidence that the defendant removed the hay or the cotton from the land without giving the landlord or his agents or assigns five days' notice, and without the consent of the landlord or his assigns, and before discharging all the liens held by the landlord or his assigns, or if he aided and abetted any one else in so removing the crop from the land, then he would be guilty. The court requested the jury that, if they should find the defendant guilty at all under the charge of the court, they would say, in returning their verdict, whether they found him guilty of removing the hay or the cotton, or whether they found him guilty of removing both hay and cotton. The jury returned a verdict of guilty of removing both the hay and the cotton. The defendant was fined \$5, and appealed.

The defendant excepted to the charge that the defendant would be guilty if he aided or abetted the subtenant in removing the cotton from the land. In this there was no error, for subrenting did not release the landlord's lien upon the cotton. *Montague v. Mial*, 89 N. C. 137; *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169. The intent in making the removal was immaterial (*State v. Williams*, 106 N. C. 646, 10 S. E. 901), and there is no

exception on that ground. The jury having found the defendant guilty of unlawfully removing the cotton, even if there had been error as to the charge for removing the hay, it would have been harmless error. But as the matter is one of considerable interest to those engaged in agriculture, whether as landlords or tenants, that part of the case is also considered by us.

We pass by, as needing no comment, the refusal to charge that there was no evidence, and come to the two remaining exceptions. First, that the court refused to charge, as requested, "hay not being a cultivated crop, if the jury should find that the defendant did not remove any article but the hay, your verdict should be not guilty." This was properly refused, both because it ignored the fact that if the landlord directed the tenant to remove the cotton the jury could not find "not guilty," and because it is not true, as a proposition either of law or fact, that "hay is not a cultivated crop." By the census of 1900 it appears that the value of the hay crop of this country exceeds by more than \$100,000,000 the total value of our cotton crop, and, notwithstanding the large yield from the vast unsown prairies of the West, that more than three-fourths of the hay crop is raised on cultivated land. The same census shows that six out of every seven tons of hay cut in this state are cultivated grass, only one-seventh being natural grass. Hay is not cultivated like cotton, any more than wheat is cultivated in the sense that corn is, but the court could not therefore lay down the proposition that either wheat or hay is "not a cultivated crop."

The other exception is that the court charged that "grass was subject to the landlord's lien, and that the defendant would be guilty if he removed the hay from the land." There is no presumption and no evidence that this was uncultivated hay, and the presumption of law is that the proceedings below were correct. Neither the word "meadow" nor the word "hay," *ex vi termini*, import that this was an unsown meadow, or that it was natural grass. Indeed, the general usage is that both rather indicate cultivation than the contrary. In *Reg. v. Good*, 17 Ont. 725, it is said that the word "hay" does not import whether it was hay from natural grass or from grass sown and cultivated, and from the census, as above stated, it appears that the great bulk of hay is in fact cultivated grass. As to "meadow," John Milton, that great master of our English tongue, understood its ordinary meaning to be a cultivated and tended grass plot, for in *L'Allegro* he speaks of

"Meadows trim, with daisies pied,"

—and the law writers take the same view. *Black's Law Dictionary* defines "meadow" as "a tract of low or level land producing grass, which is mowed for hay—Webster." In *Barrows v. McDermott*, 73 Me. at page 452, the court hold that the word "meadow,"

44 S.E.—3

in the absence of evidence, means cultivated land growing grass sowed thereon.

But take it that the evidence showed that this was hay mown on a natural meadow, the landlord's lien clearly attached, both within the language and intent of the statute. It would be very singular if it were not so when the defendant testified that he rented the land, and told the landlord so, mainly for the purpose of mowing the hay on this meadow. It was the "crop" he had in anticipation. That the rent was to be paid in cotton did not release the lien given by the statute (Code 1933, § 1754) "on any and all crops raised on said lands" any more than if the rent had been payable in money. The words "crop raised" means simply the crop grown or gathered during the year. The word "raised" appears nowhere else in that section, nor in section 1755, nor in succeeding sections, only the word "crop" being used. The Legislature had in mind no distinction between *fructus industriales* and *fructus naturales*, and there was no need of any. The word "crop" covers both, says 8 Am. & Eng. Enc. 302. Webster defines "crop: That which is cropped, cut, or gathered in a single season." In *Goodrich v. Stevens*, 5 Lans. 231, the court says "a crop is primarily some product of the soil gathered during a single year." And in *Emerson v. Hedrick*, 42 Ark. 265, it is held that wild prairie grass, when cut, is a "product," which is subject to the laborer's lien for moving it.

In 8 Am. & Eng. Enc. 302, it is said that crops are divided into two kinds, *fructus industriales* and *fructus naturales*, the material difference being that the latter are the part of the crop which does not go to the outgoing tenant as "emblems," nor to the personal representative, as against the heir. This division is one made in favor of the landlord, and not against him. Our statute gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut, or gathered" in that season from his land, and there can be no rule of construction which would deprive him of a lien on that very part of the crop which by reason of public policy has always been held so closely vested in the landlord that the tenant can neither claim them as emblems, nor the personal representative. See *Black's Law Dict. "Emblems,"* and *Bouvier, ditto*. In *Reiff v. Reiff*, 64 Pa. 134, it was held in favor of the landowner that, when tenant for life died during the year, the grass uncut, even when cultivated grass and ready for cutting, went to the owner of the reversion, and not as emblems to the lessees of the land, the court adding: "The learned judge in the court below is a practical farmer, thoroughly acquainted with the established usages of our state, and we have no hesitation in agreeing with him that this crop of hay was not emblems, and belonged to the executors of the testator [the landlord]." The cases cited by defendant's counsel (*Brittain v. McKay*,

23 N. C. 265, 35 Am. Dec. 738; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Walton v. Jordan*, 65 N. C., at p. 172; and *Bond v. Coke*, 71 N. C. 100, so far as they apply at all, are directly against him, in that they hold that the fructus naturales inhere in the owner of the land, the tenant or personal representative having a claim only on the fructus industriales. The distinction, however, has no bearing here, as the law says, and plainly intends, that what crop a tenant raises, gathers, or gets in any way out of the land is subject to the lien of the landlord till his rent is paid, and the tenant is forbidden to remove any part thereof without payment of the rent, unless there is notice to the landlord and his consent to the removal. The landlord's lien attaches to all the crop, and hence applies to hay, whether grown from natural or cultivated grass. Nothing in this opinion has reference to an ordinary grass or hay patch, the spontaneous growth of the soil, as a volunteer stand of crab grass; for that state of facts is not presented. On the contrary, the evidence of the defendant and of the prosecutor concurred, as above set out, that the land was rented by the defendant chiefly for the purpose of mowing this meadow, and this was stated when the land was rented.

There was a failure at first to send up the judgment in the transcript, but instead of dismissing the appeal, as might have been done (*Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667; *State v. Hazell*, 95 N. C. 623; and other cases cited in *Clark's Code* [3d Ed.] p. 734), the court ex mero motu sent down a certiorari to obtain it, as was done in *Foster v. Hackett*, 112 N. C. 556, 17 S. E. 426, and other cases.

In *State v. Cameron*, 122 N. C. 1074, 29 S. E. 418, by reason of the failure of the clerk to send up, as in this case, an important part of the record, it was ordered that he should be "allowed no costs for the making and sending up the transcript of the record," the court saying: "The omission to send up that part of the record is too grave a matter to be passed over by this court." The same order of disallowance is made in this case. The Constitution, art. 4, § 8, gives this court general supervision and control of proceedings in the lower courts.

No error.

**MONTGOMERY, J.** (concurring). I cannot concur in that part of the opinion of the court where it is held that the ordinary grass or hay patch, the natural and spontaneous growth of the soil on the rented premises, is embraced in the word "crops" in section 1754 of the Code of 1883, unless it be shown that such was a part of the rental consideration, if the rent was to be paid in money, or unless the tenant was by the contract required to cut the grass or hay and deliver a part of the same to the landlord as rent. The criminal law has already been invoked by legislation, as a redress for civil injuries growing out of this subject, as far as it ought to go, in my

opinion, and I, as a judge, am not willing to extend its jurisdiction; otherwise I concur in the opinion.

**WALKER and CONNOR, JJ.**, concur in the opinion of **MONTGOMERY, J.**

**DOUGLAS, J.** (concurring). I concur in the opinion of the court, understanding that it applies only to regular meadows, or to crops such as clover or cultivated grasses. In the absence of contract, or of such established usage as would raise an implied contract in law, I cannot suppose that a mere volunteer stand of crab grass, for instance, that should happen to grow during an unusually wet season, could possibly come within the scope of this opinion.

(122 N. C. 510)

**McNEILL v. DURHAM & C. R. CO.**

(Supreme Court of North Carolina. April 28, 1903.)

**CARRIERS—PASSES—UNJUST DISCRIMINATION—INJURIES TO PASSENGER—PARTIES IN PARI DELICTO—DEFENSES.**

1. Laws 1891, p. 277, c. 320, § 4, provides that if a common carrier subject to the act shall, by any special rate or other device, charge or receive from any person a greater or less compensation for any service rendered in the transportation of passengers than it charges or receives from any other person for a like service under substantially similar conditions, such carrier shall be deemed guilty of unjust discrimination. Section 25 contains exceptions authorizing carriers to give reduced rates to certain persons, not including newspaper editors, and a violation of such act is made punishable by a fine not exceeding \$5,000 for each offense. *Held*, that an agreement by a railroad company by which it gave a newspaper editor an annual pass over its lines in consideration of a publication of the company's schedule in his paper constituted an illegal discrimination, within such statute, inasmuch as it does not appear that the value of the advertisement would be exactly equal to the value of the free pass, and also because it was a sale to the editor of his transportation on credit, and not payable in money.

2. Where a railroad company issues a newspaper editor an annual pass in violation of Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, and the editor, while riding on the pass, is injured by the company's negligence, he and the company being *pari delicto*, he could not recover for the injuries sustained.

**Douglas, J.**, dissenting.

Appeal from Superior Court, Moore County; **O. H. Allen**, Judge.

Action by **W. H. McNeill** against the **Durham & Charlotte Railroad Company**. From a judgment in favor of plaintiff, defendant appeals. Reversed.

**Guthrie & Guthrie**, **Murchison & Johnson**, and **H. F. Seawell**, for appellant. **U. L. Spence**, **W. J. Adams**, and **Douglass & Simms**, for appellee.

**CLARK, C. J.** This is an action of tort, arising out of contract, for personal injuries alleged to have been received by the plaintiff April 6, 1900, by negligence of the defendant, while traveling on its road. The com-

plaint avers that the plaintiff was a passenger on said railroad under a contract by it to carry the plaintiff for a valuable consideration. The defendant, in its answer, among other things, avers that the plaintiff was a "trespasser on its train, having tendered to defendant no ticket, money, or compensation whatever for its fare—only a free pass, which had expired 1st January previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person, or loss or damage to his baggage. The plaintiff testified that he was "editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper, as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900." It is true, he said he told the conductor he would pay the fare; but, upon his making the above statement, the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not willfully and wantonly injure him. *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925. The General Assembly (Laws 1891, p. 277, c. 320, § 4) provided that "if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands or receives from any other person or persons for doing for him or them, a like and contemporaneous service in the transportation of a like kind of traffic under substantial similar circumstances and conditions such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter (page 286) contains the exceptions which permit handling free and at reduced rates property of the United States, state or municipal governments, or for charitable purposes, or to or from fairs, and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the free transportation of persons traveling in the interest of orphan asylums or any department thereof, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers and of soldiers' and sail-

ors' orphan homes, including those about to enter and those returning home after discharge, under arrangement with the boards of managers of said homes: nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employees." These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine "not exceeding five thousand dollars" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but, let it be what it may, it could not amount exactly—"neither more nor less"—to the value of a free pass to travel ad libitum an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit, and not payable in money.

This statute was before this court, and the clear meaning of the statute, and the duty of the court to enforce the public policy indicated by its unequivocal terms were stated in an exhaustive and able opinion by Mr. Justice Montgomery. *State v. Railway Co.*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246. In the opinion of Mr. Justice Douglas in that case it was stated that the number of free passes issued in this state per year was understood to be over 100,000, and, after deducting the free passes issued in the cases allowed by the act, over \$250,000 of transportation was given away each year, mostly to the classes best able to pay, and that this quarter of a million dollars was perforce added to the fares of those who paid their way. This was to show the public policy which required that such discriminations should be forbidden. Sections 4 and 25 of the act of 1891, above quoted, were copied from the act of Congress forbidding such discriminations, and the rulings of the Interstate Commerce Commission and of the federal courts thereon have been to the same effect as our own; many of those decisions being cited by Justice Montgomery in *State v. Railway*, 122 N. C. 1063-1067, 30 S. E. 133, 41 L. R. A. 246. At page 1060, 122 N. C., page 135, 30 S. E., 41 L. R. A. 246, it is well said: "The thing which was de-

nounced by the statute, and for which the defendant is indicted, is not the act of giving the free pass—the mere handing to the passenger the piece of paper on which was written the privilege of riding free—but the actual transporting the favored passenger without charge or the payment of fare. The law would be violated when no pass was actually issued, if the passenger was carried free. The favored passenger might be known to the conductor, or be known to him by preconceived signs, or mileage books distributed gratis or sold at reduced rates, and in other ways."

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than one thousand nor more than five thousand dollars." While the plaintiff was not himself made indictable, as in some states, he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are in *pari delicto*, and the court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law. In *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 41 L. R. A. 316, a boy had jumped on a switching train, and was riding thereon, contrary to the town ordinance. The court held that the company was liable in such cases only for any willful or wanton injury inflicted by the employees of the company. Here the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy, or the stealing of a ride by a tramp. To same purport, *Richmond & D. R. Co. v. Burnsed* (Miss.) 35 Am. St. Rep. 656, and notes; *Hendryx v. R. Co.*, 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated, reputable gentleman—a member of an honorable profession; but, being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the statute, his rights as against the company are the same as those others who were also riding contrary to law. He neither shows nor avers willful, wanton, or malicious injury, and cannot recover. In *State v. Railway*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246, the defendant set up the plea of ignorance of the law, but the court said every one was fixed with knowledge of the law. The plaintiff has had the additional advantage of the no-

tice given by the construction of the statute in that case. In a subsequent case (*State v. Railway*, 125 N. C. 670, 34 S. E. 527) the court repeated that free transportation, or reduced rates, except in cases allowed by the statute, "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the fact of discrimination, and not the method by which it is done, which constitutes the offense." Subsequent to these decisions, the General Assembly re-enacted these sections as sections 13 and 22, c. 164, pp. 301, 304, Laws 1899, with no substantial change, though some other sections were repealed. The Constitutions of 11 states—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington, and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the Legislature or other officeholder whatever; and some of these Constitutions, like the federal statute and our statute, and the statutes of yet other states, as Colorado, Massachusetts, North Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to any one whatever, with exceptions similar to those enumerated in our statute above set out. Indeed, the Constitutions of four states—New York, Missouri, California, and the recently adopted Constitution of Virginia—make the acceptance by any officeholder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy of equality in treatment by quasi public corporations, whose infringement our statute punishes with a fine "not exceeding five thousand dollars," and whose observance it is the duty of all courts to enforce.

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliott, R. R. § 1608), and can only be considered when the pass is issued in one of the cases permitted by our statute. They have no application to a case like this, where the contract of free carriage is illegal, and the parties are in *pari delicto*.

This is a stronger case for the defendant than *Turner v. Railroad*, 63 N. C. 522, in which, a soldier contracted with a railroad company for transportation to Johnston's army to serve against the United States, and was injured en route by negligence of the company, and it was held that he could not recover damages; Reade, J., saying that, the contract of carriage being illegal, the parties "were in *pari delicto*," and the court "would consult its dignity and not interfere in their dispute." To same purport: *Martin v. Wal-*



laca 40 Ga. 52; Redd v. Railroad, 48 Ga. 102; Railroad v. Redd, 54 Ga. 33.

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations.

In refusing to grant judgment as of nonsuit, there was error.

DOUGLAS, J. (dissenting). I am inclined to think that the plea in *pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

(132 N. C. 418)

**PHARR v. ATLANTA & C. AIR LINE RY. CO.**

(Supreme Court of North Carolina. April 28, 1903.)

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SETTING ASIDE VERDICT—DENIAL OF MOTION—PRESUMPTION.**

1. Where, in an action for the death of a brakeman, there was evidence introduced by defendant to sustain a plea of contributory negligence, it was for the jury to pass on the credibility of the witnesses and the weight of the testimony, though plaintiff offered no evidence on the issue.

2. Evidence examined, and held sufficient to justify a finding that a brakeman, in stepping between two sections of a train to put the air on the rear section, which was slowly moving away, was not guilty of contributory negligence.

3. Where the evidence as to whether a juror was asleep during the trial was conflicting, it must be presumed that facts were found to warrant the decision of the court in denying a motion to set aside the verdict.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by H. N. Pharr, administrator, against the Atlanta & Charlotte Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. F. Bason, for appellant. Jones & Tillott, for appellee.

WALKER, J. The plaintiff's intestate was a brakeman in the employment of the defendant's lessee, the Southern Railway Company, at the time he is alleged to have been killed by the negligence of the latter. A freight train on its way from Spencer to Charlotte had reached a point on the line of the lessee's railway, called the "Junction," and it was the duty of the intestate at that place to uncouple the train between cars 20 and 21 for the purpose of having the cars of the rear section transferred to another track. In order to do so, it was necessary for the engineer to move the train back, and slack on the pin, so that it could be removed; and the intestate gave a signal to the engineer to come back, which he did, and the pin was removed with the lever. The intestate signaled the engineer to go forward, and then stepped between the cars "to

put the air" on the rear section, which had started down the grade; and, just as he "reached over the drawbar" for this purpose, he was caught between the cars and thrown under the wheels of car 20 and killed.

The principal exception in the case relates to the charge of the court upon the second issue, there being no exception to the charge upon the first issue. The disputed question arising between the parties on the second issue was whether, at the time the intestate went between the cars to apply the brakes to the rear section, the rear car of the first section was standing still or moving; it being conceded that, if it was not moving at the time, the intestate was not guilty of negligence in going between the cars to apply the brakes and stop the rear section, which was then moving down the grade in a northerly direction. In the consideration of this question, it must be remembered that contributory negligence is an affirmative defense—expressly made so by statute—and consequently the burden is always on the defendant to establish it. It follows that, if there is any evidence introduced by the defendant to sustain the plea, the jury must pass upon the credibility of the witnesses and the weight of the testimony; and this is true, even though the defendant introduced proof tending to show contributory negligence, and the plaintiff offered no proof at all upon the issue. The law does not presume the existence of negligence or contributory negligence, and requires the party with whom is the affirmative of the issue to prove it by the greater weight of the evidence. In this case, therefore, if the defendant's evidence tended to show that the first section of the train was moving when the intestate went between the cars to apply the brakes, it was for the jury to pass upon this evidence, and to accept or reject it. The jury were not bound to believe the witnesses of the defendant, or required to find that there was contributory negligence, until the defendant, by the proof in the case, had satisfied them that it did exist; and the plaintiff was not called upon to prove the negative of that issue. The laboring oar was with the defendant.

The witness Russell was asked whether the front section of the train stopped, and replied that he did not know and could not say whether it did or not. In *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730, this court ruled that the testimony of a witness that he did not hear the bell or whistle of an engine as it approached a crossing—he being in hearing distance—was proper evidence to be submitted to the jury upon the question whether the bell was rung or the whistle sounded, and was sufficient to establish a verdict in favor of the plaintiff, as it tended to establish the fact in issue in his favor. The testimony of the witness in that case was not essentially different from that of the witness Russell in this case. The latter was standing within a few feet of the train, assisting

the intestate, and in full view of the cars, and testified that the rear section had moved back and down the grade, but that he did not know whether the front section moved or not. He had as good opportunity to know whether the front section was moving or not, when the intestate was between the cars, as he had with regard to the rear section; and the jury could well infer from this evidence either that the front section was not moving at the time, or that the motion was so imperceptible as not to be observed by Russell and the intestate.

Without commenting upon the evidence in detail, we think that the separation of the cars at that part of the train where they were uncoupled, and the distance between the cars 20 and 21 when the intestate stepped between them "to put the air on," and the testimony of the engineer that the brakes were stuck 10 or 12 cars from the engine (there being 30 or 40 cars in the train), and that he had to go forward to take up the slack, in order to come back again and move the cars so as to loosen the pin, was at least some evidence upon which it might reasonably be argued, and from which the jury might fairly conclude, that the rear car of the front section was standing still at the time the intestate went between the cars.

The question whether the front section of the train had stopped was submitted to the jury in the charge upon the first issue, to which no exception was taken; and the jury, by answering the first issue "Yes," necessarily found that the front section was not moving at the time the intestate stepped between the cars. An affirmative answer to the first issue would therefore necessarily call for a negative answer to the second.

The engineer knew that he was required to stop at the switch for the purpose of cutting off the rear section of his train so that it could be transferred to the side track, for the intestate, he says, had told him so at Newell's; and there was evidence tending to show that, after the pin had been drawn and the cars uncoupled, the intestate signaled him to go forward, and, instead of doing so, he moved the front section of the train backward. Two inferences might have been made by the jury from this evidence: First, that the engineer, knowing full well what was to be done, did not move back any farther than was necessary to loosen the pin, or "ease up on it," and then stopped, as he should have done; and, second, that the intestate, who had given him the signal to go forward, had the right to suppose that he would do so, and was not required to anticipate his negligence in disregarding the signal, if he saw it, or to presume that he did not see it; and, this being so, the intestate might well have thought, as a prudent man, that he could go between the cars with perfect safety.

The question upon the second issue was not whether there was any evidence that the rear car of the front section had stopped, but whether there was any evidence that it was

moving at the time the intestate attempted to set the brakes on the rear section; and, unless the evidence was sufficient to satisfy the jury that the car was moving, the defendant failed, of course, to sustain its contention, and was not entitled to a favorable finding upon that issue, without reference to the question whether the plaintiff offered any evidence to show that it had stopped. This is clear, upon reason and authority.

Upon a careful review of the case, we are of the opinion that the state of the evidence was such as to fully justify the charge of the court and the finding of the jury upon the second issue. The objection of the defendant cannot be sustained, even if it had been made before verdict. *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684.

We see no merit in the defendant's motion to set aside the verdict because the juror Brown was asleep during the trial. The evidence whether the juror was asleep was conflicting, and, when the court denied the motion, it must be presumed that the facts were found in accordance with the affidavit of the juror that he was not asleep, or at least that the facts were so found as to warrant the decision of the court. *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892. This court cannot pass upon the affidavits, but, in order to entitle the moving party to a review here of the ruling below, the facts must be found and spread upon the record, and the court must always find the facts when requested to do so. *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320; *Albertson v. Terry*, supra. It is well settled that this court cannot find facts or review them, as a general rule, but can only pass upon "matters of law or legal inference." *Love v. Moody*, 68 N. C. 200; *State v. Best*, 111 N. C. 643, 15 S. E. 930. Motions of this sort must be made in apt time. The knowledge of the alleged fact upon which the defendant bases its motion was acquired during the trial, and before a verdict was rendered, and the matter should at the earliest opportunity have been brought to the attention of the court. It has been said by this court that, after a defendant has taken chances for a favorable verdict, the purposes of justice are not subserved by listening too readily to objections not taken in apt time. *State v. Perkins*, 66 N. C. 128; *Spicer v. Fulghum*, 67 N. C. 18. There was a way in which the defendant could have the juror aroused, if he was asleep, without serious, if any, prejudice to its interest, and a proper reminder or warning from the court would probably have been sufficient to keep him awake until the end of the trial. The motion, under the circumstances of this case, was within the sound discretion of the court, and we do not see that it was improperly exercised. *State v. Miller*, 18 N. C. 500; *State v. Fuller*, 114 N. C. 885, 19 S. E. 797.

We have been unable to discover any error in the rulings of the court below. Judgment affirmed.

(132 N. C. 517)

## SHEPARD'S POINT LAND CO. v. ATLANTIC HOTEL.

(Supreme Court of North Carolina. May 5, 1903.)

## NAVIGABLE WATERS — HARBORS — TITLE OF STATE — GRANT BY STATE — TITLE OF GRANTEE.

1. The policy of the state, as evidenced by the course of legislation (Entry Law, Acts 1777, c. 114, § 15; revisal of 1836; Laws 1848, c. 36), was to retain the title of navigable waters in trust for the people. Code, § 2751 (Acts 1854-55, p. 45, c. 21), provided that lands covered by navigable waters should be subject to entry by riparian proprietors "for the purpose of erecting wharves on the side of deep waters next to their lands." The state in 1856 granted to certain riparian owners on a harbor a lot in the harbor in front of their lands between high-water mark and deep water. *Held* that, in view of the course of legislation, and the provision of the Code that such land should be subject to entry for the "purpose of erecting wharves," the grantees took only an easement as riparian owners to erect wharves, etc., and took no title to the bed of the harbor.

Appeal from Superior Court, Carteret County; Geo. H. Brown, Judge.

Action by the Shepard's Point Land Company against Atlantic Hotel. From a judgment for plaintiff, defendant appeals. Reversed.

O. L. Abernethy, Simmons & Ward, and Armistead, Jones & Son, for appellant. W. W. Clark and Lindsay Patterson, for appellee.

CONNOR, J. The plaintiff brings this action for recovery of possession of a tract of land described in the complaint as "lying and being situate in the county of Carteret, in Morehead City, adjoining the square on which the hotel building of the defendant is located, and known and described as 'Square No. 83' in the plan of Morehead City." It alleges that the defendant is in possession of the above-described lot, "upon which there has been erected certain walks, wharves, bathhouses, pavilion, etc., and that such possession is unlawful and wrongful."

The defendant denies that the plaintiff is the owner of the property described in the complaint, and denies that it is in possession thereof, except that it has a wharf, walkway, and two bathhouses leading from the rear of said hotel over and into the waters of Bogue Sound. It avers "that Bogue Sound is an arm of the sea, navigable for sea vessels and other ships, and the said hotel is about a mile from the Atlantic Ocean; the tide from said ocean ebbs and flows daily in said sound and upon the shore whereon the said hotel is located, and the space between the said hotel and bathhouses and where the walkway and wharf are situated is covered by the waters of said sound, and the defendant is advised that the plaintiff has no title thereto."

The plaintiff claims the land, which is covered by water, described in the complaint,

and known in the plan and on the map of Morehead City as "Square No. 83," under the following chain of title, to wit: Grant from the state to John M. Morehead and W. L. Arendell, bearing date May 2, 1856. The grant is made to said grantees, "owners and riparian proprietors of the lands known as the 'Shepard's Point Lands' on Beaufort Harbor." It includes the tract or parcel of land lying around Shepard's Point lands, and between high-water mark and the deep water of Bogue Sound, Newport river, and Calico creek. The description in the grant covers 502 acres of land, and surrounds the lands known as the "Shepard's Point Lands," which by the charter of Morehead City embraces the entire water front of the said city, and runs out from high-water mark on the shores of said lands to the deep water of said sound, river, and creek. The Shepard's Point Land Company was chartered by chapter 186, p. 164, Laws 1856-57. The charter was extended by chapter 50, p. 100, Acts 1887. The town of Morehead City was incorporated by chapter 172, p. 203, Laws 1860-61. Section 6 provided "that the corporate limits of said city shall embrace the entire plan of the city of Morehead as published by the Shepard's Point Land Company, and from the terminus of the Atlantic & North Carolina Railroad Company to Fifteenth street."

The plaintiff introduced deeds tending to show that at the time of issuing the grant, May 24, 1856, the grantees were the owners of square No. 1, and that said square was abutting square No. 83, the latter being the water front covered by water and extending out into Bogue Sound. The plaintiff offered deeds tending to show that the defendant company had acquired title by direct chain from John M. Morehead and W. H. Arendell through the plaintiff, who owned squares No. 1 and 83 at the time of the conveyance of square No. 1, upon which the Atlantic Hotel is located. The plaintiff introduced a deed from the Shepard's Point Land Company to John M. Morehead, dated August 19, 1859, conveying square No. 1, "bounded on the north by Arendell street, on the east by Third street, on the south by Evans street, and on the west by Fourth street." The plaintiff introduced chain of title to square No. 1 from John M. Morehead to the defendant, and also introduced a map of Morehead City. It will appear by reference to that map that Evans street for a considerable distance, and especially between squares No. 1 and No. 83, "is covered by the tide water at high tide, and has never been opened between squares Nos. 1 and 83, and is not used as a public street."

W. L. Arendell, a witness for the plaintiff, testified: "The hotel is on square No. 1, and is known as the 'Atlantic Hotel.' The water front is square No. 83, and is covered by water. At low tide a small portion of it is not covered by water. The wharves and

bathhouses on square 83 were built in the latter part of 1880 by the Morehead City Hotel Company, under whom the defendant claims. There are two wharves or piers. They are about 8 feet wide, and one is about 200 feet long, and is connected with the hotel, and extends out into Bogue Sound; about 50 feet from the end of it is the gentlemen's bathhouse. The other pier extends out into the sound about 80 feet, and is connected with the other wing of the hotel, and at the end of it is the ladies' bathhouse. These wharves and bathhouses are in the waters of Bogue Sound, and on square 83. The depth of water at the end of the long pier is from 6 to 8 feet, sometimes more, sometimes less, according to the tide. The depth of the water at the end of the ladies' pier is about 5 feet, varying according to the tide. The tide water at high tide washes up to square No. 1, and within a few inches of the brick foundation of two of the wings of the hotel. Square No. 83 is south of square No. 1, and is generally covered by water. There was a street leading off, upon the plan of said town, between square 83 and square 1. This street is called 'Evans Street,' and is 60 feet wide, but it has not been opened between squares 1 and 83, and is not used as a public street of Morehead City. At high tide it would be very nearly covered by water. The grant to John M. Morehead and W. H. Arendell covers square 83. Evans street was laid off on the plan of the town after the issuing of said grant. Square 83 is always covered by the tide at any ordinary high tide, and the greater part of it is covered at low tide. The ocean tide comes in at the inlet, which is about two miles off, and ebbs and flows over square 83; this square is a part of Bogue Sound. Boats sail from the ocean and on the ocean and back to the hotel, and sail over and about square 83, and tie up and anchor all along the long pier from its end up to 75 or 100 feet towards the hotel, according to the state of the tide. Square 83 covers the deepest part of that part of Bogue Sound, and that part is connected with the balance of the sound by navigable waters for small vessels, both to the eastward and to the westward. The Shepard's Point Land Company and Morehead never did build any wharves or piers on square 83."

His honor submitted to the jury the following issues: "(1) Is the plaintiff the owner and entitled to the possession of the land described in the complaint as square 83? (2) Is the defendant in possession of any part thereof?" The court instructed the jury that if they believed the evidence they should answer the first issue "yes," and the second issue "yes," and the defendant excepted. It is agreed that the court answer the issues accordingly. Judgment was rendered thereupon, and the defendant appealed.

The plaintiff's title and right to recover are dependent upon the construction of section 2751 of the Code, being chapter 21, p. 45,

Acts 1854-55, in the following language: "All vacant and unappropriated land belonging to the state shall be subject to entry except lands covered by navigable streams, provided that persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof next to their lands, may make entries of the lands covered by water adjacent to their own as far as deep water of such sound, river, creek or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. And when any such entry shall be made in front of the lands of any incorporated town, the town corporation shall regulate the line of deep water to which entry shall be made."

The question presented for decision is of great importance, and by no means free from difficulty. It will be well, before entering into an examination of the principles and authorities by which we shall be guided in reaching a conclusion, to note the history of the legislation in North Carolina in regard to the control and disposition of our navigable waters. It was held in *Tatum v. Sawyer*, 9 N. C. 226, that lands covered by navigable waters were not subject to entry under the entry law of 1777, "not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature."

Ruffin, J., in *Ward v. Willis*, 51 N. C. 183, 72 Am. Dec. 570, said: "It happened, however, that in the revival of 1836 those parts of the previous act were omitted, and therefore the court felt bound to hold, in *Hatfield v. Grimstead*, 29 N. C. 139, that entries of land in Currituck Sound were good after it ceased to have a tide or be navigable by reason of the closing of the inlet, or rather of such parts of the sound as frequently were not covered by water. When the omissions of the revival were discovered in 1848, the Legislature, by an act of that year, chapter 36, revived the provision omitted by enacting that entries of land lying on any navigable water should be surveyed in such manner that the water should form one side of the survey, and the land laid off back from the water, and proceeded further to enact that it should not be lawful to enter land covered by any navigable sound, river, or creek." The court in that case held "that land lying between the high and low water lines of the tide of the ocean or a navigable stream is not subject to private appropriation under the acts authorizing the entry and grant of lands by the state."

This continued to be the law until 1854, when the act, section 2751 of the Code, was enacted. In 1889 (Laws 1889, p. 517, c. 555) this act was amended by adding, after the

word "navigation," the following: "Provided further that no land covered by water shall be subject to entry within 30 feet of any wharf, pier or stand used as a wharf already in existence, or which may hereafter be erected by any person on his own land or land under his control or on an extended line thereof; but land covered by water as aforesaid for the space of 30 feet from the landing place or line of any wharf, pier or stand used as a wharf as aforesaid, shall remain open for the free ingress and egress of said owner and other persons to and from said wharf, pier or stand." By Laws 1891, p. 585, c. 532, the section is so amended as to read: "Lands covered by navigable waters, provided that persons owning lands on any navigable water for the purpose of erecting wharves or fish houses or for fishing in said waters in front of their lands, may make entries of the land covered by said water and obtain title as in other cases, but persons making such entries shall be confined to straight lines, including only the fronts of their own lands, and shall in no case extend a greater distance from the shore than one fifth of the width of the stream, and shall in no respect obstruct or impair navigation provided nothing in this act shall apply to Currituck county."

By the act of 1898, chapter 17, p. 41, section 2751 of the Code is amended by striking out the words, "to which entries may be made," and inserting instead thereof the words, "to which wharves may be built."

It is noted in the plaintiff's brief, and known in connection with the history of the state, that, at or about the time that the act of 1854 was passed, the Atlantic & North Carolina Railroad, having its terminus at what was to be Morehead City, although projected, had not been completed to that point.

The plaintiff's title is dependent upon maintaining three propositions: (1) That the title to navigable waters, sounds, arms of the sea, etc., is vested in the state, and may be granted by the state to private individuals; (2) that by the grant issued to Morehead and Arendell, pursuant to the act of 1854, they became the absolute owners of the soil covered by the navigable waters of Bogue Sound, Newport river, and Calico creek, described in the said grant, and containing 502 acres; and (3) that such title as they acquired passed to and vested in the plaintiff corporation, separate and distinct from its ownership of the soil theretofore granted by the state, upon which is located the town of Morehead City, including the defendant's lot No. 1, upon which is built the Atlantic Hotel, and that its ownership is in no respect dependent upon the use to which the land in controversy is to be put, or its riparian ownership of the shore.

It is abundantly settled by the courts of this state and the United States that after the Revolutionary War the states became the owners of and retained the title to the lands

covered by navigable waters, and that they have the power to grant those lands to private individuals. This has been the well-settled doctrine in this country since the case of *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997. "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running." *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248.

Ruffin, J., in *Ward v. Willis*, supra, says: "It seems thus to be clear that whatever soil is at any time covered by any navigable water in its natural state is deemed to be in the same state as if it were in the bed of the water; in other words, that it is all one whether it be under the channel or the margin between the high and low water lines. The same public purposes require that here, as in England, the state should reserve lands in that situation from private appropriation, and, although it may please the Legislature to dispose of that by special grant for the promotion of trade and the growth of a commercial town accessible to vessels, it rationally accounts for the restriction upon the common mode of granting other public lands, and enables us to discover the extent of the restriction imposed, and understand the terms in which it is imposed."

Mr. Justice Field, in *Illinois Central Railroad v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, thus defines the status of lands covered by tide waters: "It is a settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof when that could be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties"—citing *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 505; *Weber v. Harbor Com'rs*, 18 Wall. 57, 21 L. Ed. 798.

For the purpose of this discussion, we treat the first proposition as settled. There has been, however, some discussion and conflict of opinion in respect to the extent of the right of the state to grant the soil under its navigable waters, held in trust for the use of all of the citizens, to private persons.

Mr. Justice Field, in a very able opinion in the *Illinois Central Railroad Case*, supra, in discussing the character of the title which the state holds in her navigable waters, uses

the following language: "The question, therefore, to be considered, is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters, by the grant, against any future exercise of power over them by the state. That the state holds the title to the lands under Lake Michigan, within its limits, in the same manner that the state holds its title to soil under tide water by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in various instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged land, and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in the aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power, consistently with the trust to the public, upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of

such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in the opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular case. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and the use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state. \* \* \* We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of a private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The plaintiff contends that this court has construed section 2751, and that the grantees, Morehead and Arendell, by the grant issued to them pursuant thereto, acquired the absolute ownership of the soil under the water, subject only to the right of navigation by the citizens of the state. If this contention be well founded, it must be conceded that the plaintiff may bring a possessory action and remove the defendant from any occupancy thereof. If the question has been decided by this court, we would feel compelled to follow such decision as a rule of property,

without regard to our own views. The first case in which the question came before the court is *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541. An examination of the original record on file in this court shows that the plaintiff, a riparian owner, desiring to erect a wharf in the waters of North river, obtained a grant from the state for the lands adjacent thereto, "for the purpose of erecting a wharf connecting with the shore, under the provisions of section 2751 of the Code." The plaintiff averred that the defendant, who was not a riparian owner, had erected and is using a wharf on the lands embraced in the grant, and that the plaintiff was thereby prevented from erecting his wharf. The defendant set up a lease from the county commissioners, etc. The plaintiff, after showing title to the shore line, introduced a grant from the state to "the water-covered land in front of the shore." The survey, after giving boundaries of 24 acres, annexes the qualifying words, "for wharf purposes." Smith, C. J., says: "As the owner of the shore, the plaintiff had a right under the law to enter the water front up to deep water, so as not to obstruct navigation, and thus acquire property in the soil. The survey, and we assume the entry which it must follow, expressly declares that it is for wharf purposes, and this is the only use for which the grant could issue. \* \* \* And for our present purpose the grant is operative. Inasmuch as the state can only issue a grant for land covered with navigable water for the purpose of erecting a wharf, and this only to the riparian owner, we are unable to see how the right claimed by the defendant could be conferred by the county commissioners to a stranger, like the defendant." The court below having held upon the plaintiff's showing that he was not entitled to recover, the court simply decided that "the case was a proper one for them to pass upon." In our opinion this case falls very far short of sustaining the position of the plaintiff in this action. We note the careful restriction which the chief justice places upon the words of the grant. It is sufficient to note now that it is only for our "present purpose that the grant is operative." As shown by Mr. Munroe's very accurate and valuable "Marginal Annotations," the case is not cited in our Reports.

The next case in which the court expresses an opinion in regard to the construction of section 2751 is *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281. This was a controversy between two riparian owners, neither having any grant under the section of the Code referred to, but relying entirely upon their rights as riparian owners. The plaintiff sought to enjoin the defendant from interfering with his fishhouse by a threatened erection of a wharf in front of the defendant's land. The construction of section 2751 was not in any way involved in the discussion or the decision of the case. The court held that,

"leaving our Legislature out of view, the plaintiff, or H. A. Bond, Sr., under whom he claims, is, at least in the discussion of this appeal, to be considered as holding, as an incident to the ownership of lot No. 187, the right to build fishhouses over the water at any point east of the dotted line, \* \* \* and in front of the said lot between the land and the navigable water, etc. But the defendant Wool has, if his interest is not affected by our statute, the very same right," etc. It is true that the court proceeds to cite the statute and comment upon it, noting that the riparian owner was restricted by the act of 1777, c. 114, § 15, to the water mark, etc., saying: "The act of 1854-55 (Code, § 2751) made an exception in favor of riparian owners on any navigable sound, river, creek, or arm of the sea, by giving to them the exclusive privilege of acquiring the absolute fee in the precise territory on their fronts, in which they already held, as incidents to the original grant, the qualified property or appurtenant right which we have defined."

In *Holley v. Smith*, 130 N. C. 85, 40 S. E. 847, Clark, J., says: "The land here in question, as was admitted on the trial, is covered by the navigable waters of Chowan river, and therefore it was not subject to entry, except for wharves, by the adjacent riparian owner in front of his own property, and even then subject to restrictions." No other cases in our Reports construe this section of the Code.

In *State v. Glen*, 52 N. C. 321, Battle, J., says: "We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for navigation of sea vessels, are navigable waters, the soil under which is not subject of entry and grant under our entry law." This case was decided in 1859. No reference is made to the act of 1854-55, p. 45, c. 21.

The authorities bearing upon this subject in other states are conflicting, and it is difficult to thread our way through the divergent decisions. To some extent this conflict may be explained by noting the distinction between the title to flats and marshes over which the tide ebbs and flows, but which are not in any sense of the term navigable waters, and those cases in which the land sought to be recovered is covered by navigable water. The learned counsel for the plaintiff frankly concedes that the question presented is, "Who owns the soil covered by Bogue Sound, Newport river, and Calico creek?" Newport river is navigable some distance above Morehead City. *Doughty v. Railroad*, 78 N. C. 22.

In *Chisholm v. Caines* (C. C.) 67 Fed. 285, Simonton, Circuit Judge, says: "It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers, and highways of commerce, and these mud shores cast up by the currents on the sides of the harbors and streams. The former must always be kept open for public use, commerce, trade, and

pleasure; the latter can be separated from any public use, and can be vested in individuals."

A correct decision of this case involves an inquiry as to the extent to which the state has parted with the title to the land described in the grant under which the plaintiff claims, and what effect shall be given to the words, "for the purpose of erecting wharves in the side of the deep waters thereof next to their lands." The grant must be read and construed as if these words were written into it. The plaintiff insists that the absolute ownership of the soil passed under the grant; that by it the grantees, although described as "riparian owners and proprietors," became the owners of square 83, independent of their ownership of the shore; that whatever rights they had incident to their riparian ownership were destroyed, or at least merged into their separate and independent ownership under the grant; that when the land company conveyed to John M. Morehead square No. 1, by deed bearing date August 19, 1859, he took title to the lot stripped of any riparian rights in respect to the navigable waters upon which it abutted; that the defendant took its title from persons claiming through Morehead in the same plight and condition. In this connection the plaintiff calls attention to the fact that Evans street, 60 feet wide, separates square 1 from square 83, and that therefore the defendant does not abut upon square 83. The evidence in regard to the street is that of W. L. Arendell, who says: "This street is called Evans street and is 60 feet wide, but it has not been opened between squares 1 and 83, and is not used as a public street of Morehead City; at high tide it would very nearly be covered by water. Evans street was laid off on the plan of said town after issuing of the grant." In the absence of any evidence that there was a dedication to or acceptance or use of the street by the town, in the view which we take of the title which Morehead and Arendell acquired by the grant, we do not think the so-called street can be considered as affecting the rights of either party to this controversy. The plat seems to have been made prior to 1860, and during all these years no one has ever claimed, used, or treated these 60 feet as a street. It is incapable of being so used. We therefore dismiss this phase of the case from further consideration.

The defendant contends that the grant conferred upon the grantees only an easement, giving the right to build wharves out to deep water. Certainly some force and effect must be given to the limitation put upon the use to which the thing granted may be put. The policy of the state from 1777 until 1854 was, as we have seen, to preserve its title to the navigable waters, as the same had been held by the king of England, in trust for the free use of all of its citizens. As said by Ruffin, J., in *Ward v. Willis*, supra, when it was found that in the revisal of the statutes the

prohibition against entry and appropriation had been omitted, 'as pointed out in *Hatfield v. Grimstead*, 29 N. C. 139, the Legislature immediately re-enacted the omitted sections. Prior to 1854, the owners of lands abutting upon navigable waters had, as incident thereto, certain riparian rights, the extent and stability of which were not very well settled either in this or other states of the Union. The state had, on December 27, 1852, chartered the Atlantic & North Carolina Railroad Company, which was to have its eastern terminus at a point afterwards known as "Morehead City." The state aided liberally in building this road, as did the counties through which it runs. This road was to be the completion of a system of railroads connecting the western portion of the state with the ocean, and thereby making a North Carolina system of travel and transportation. It was the conception of a wise and patriotic statesmanship. Bynum, J., in his very able dissenting opinion in *State v. Railroad*, 72 N. C. 645, says: "No railroad scheme was ever devised by more of the wisdom and patriotism of the state. It was intended to be in fact what it was in name, the North Carolina Railroad, which, when completed from the Atlantic to the Tennessee line, would radiate a uniform system of lateral roads connecting all parts of the state in a common brotherhood by an easy and convenient intercommunication of trade and travel." Beaufort Harbor was to be the haven for vessels and steamships which were to bring to and carry from the state its imports and exports. It was expected that a great seaport city was to grow up. It is interesting to note that by chapter 136, p. 164, Acts 1856-57, the plaintiff corporation was chartered, one of the powers conferred being to "erect wharves"; and that on February 16, 1855 (chapter 21, p. 45, Laws 1854-55), the act was passed on which the plaintiff bases its claim. In 1860, Morehead City was chartered, the boundaries of which, as we have seen, corresponded with those of the Shepard's Point Land Company. Considered in the light of the then existing conditions, it is difficult to believe that the policy of the state for nearly a century was to be reversed, and the growth of the prospective seaport was to be hampered, by the grant of the absolute ownership of the entire water front thereof, separate and distinct from the ownership of the abutting lands; that the state was to part with this property, which it held in trust for all of its citizens. Nothing, save a clear declaration of such purpose, would justify this conclusion. At that time the rights of riparian owners, while defined, were not settled in respect to their freedom from state interference. Lewis on Eminent Domain says: "The older, and perhaps more numerous, authorities hold that such an owner has no private rights in the stream or body of water which is appurtenant to his land, and, in short, no rights beyond that of any other member of the public; and that the only difference is that he is



more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the water over his land, and the public has not. \* \* \* Access to the use of the stream by the riparian owner is regarded as merely permissive on the part of the public, and liable to be cut off absolutely if the public see fit to do so." Volume 1, § 77.

The courts had very generally held, both in this country and England, that such was the extent of his rights. Wood on Nuisances thus stated the law: "He does not, from the mere fact that he is the owner of the bank, acquire any special or particular interest in the stream over any other member of the public, except by his proximity thereto he enjoys greater convenience than the public generally. \* \* \* But this is a mere convenience arising from his ownership of the lands adjacent to the high-water mark, and does not prevent the state from depriving him entirely of this convenience by itself making erections upon the shore, or authorizing the use of the shore by others in such a way as to deprive him of this convenience altogether; and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria*." 1 Wood on Nuisances (1st Ed.) 592. This doctrine has been held by the New York courts in 1852. In *Gould v. Hudson River R. Co.*, 6 N. Y. 522. The Supreme Court of the United States has so held in *Hoboken v. Pennsylvania Railroad Co.*, 124 U. S. 690, 8 Sup. Ct. 643, 31 L. Ed. 543. This court, in *Collins v. Benbury*, 27 N. C. 118, 42 Am. Dec. 155, held that the riparian owner did not have the exclusive right of fishing, "unless such right be derived from an express grant by the sovereign power."

We can readily understand that Governor Morehead, a man of great sagacity and wisdom, recognized the necessity of securing the permanency as well as the extent of the riparian rights which had been acquired by the grant of the Shepard's Point lands. It is evident that it was its purpose to sell the lots which the map in evidence shows had been laid off, and encourage persons to buy and build upon them. Certainly he did not intend to secure the absolute ownership of the entire water front of the prospective city, and hold it separate and apart from the ownership of the land which he, as president of the land company, was conveying to purchasers. He certainly did not contemplate controlling the gateway to the channel, and cutting off the fishing and other privileges incident to the ownership of the abutting land, such as building wharves, etc. To have done so would have been destructive of its growth and prosperity, and would have reversed the policy of the state for so many years. If the construction contended for by the plaintiff is correct, no purchaser of a town lot fronting on the waters could have erected a wharf, pier, or bathhouse, or enjoyed many other

privileges incident to his riparian ownership, without the consent of the owners of the navigable waters, and the Shepard's Point Land Company could now levy tribute upon the commerce, business, and pleasure of the citizens of the town. The right of navigation would be of little value if a corporation, after selling the lots with water fronts, could prevent the building of wharves and enjoying other privileges. If this were the purpose and policy of the Legislature, why restrict the grant to the purpose of "erecting wharves on the side of deep water thereof next to their lands"? and why restrict the privilege to "persons owning land on any navigable waters"?

It has been held in recent years, both in this country and in England, that the riparian rights which vest in the grantee of lands are vested rights, and cannot be taken or separated from the ownership of the land, except for public purposes, and then by paying compensation therefor.

The case of *Gould v. Railroad*, supra, was expressly overruled by *Rumsey v. N. Y. & N. E. Railroad*, 133 N. Y. 79, 80 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600, in which it was held that the owner of land upon a public river is entitled to such damages as he may have sustained against the railroad company which constructs its road across its water front, and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. The riparian rights which the grantee acquires by virtue of the grant of the abutting soil are stated by Mr. Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984: "Whether the title in the owner of such lot extends beyond the dry land or not, he is certainly entitled to all the rights of the riparian proprietor whose land is bounded by a navigable stream, and amongst those rights are access to the navigable parts of the river from the front of his land, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. \* \* \* This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

In the case of the *Duke of Buccleuch v. Board of Works*, L. R. 5 H. & L. Appeals, 418, and 41 L. J. Ex. 187, Lord Cairns says: "It has appeared to me throughout that the property of the plaintiff in error in this case was what is commonly called 'riparian property.' The meaning of that is that it had a

water frontage. The meaning of its having a water frontage is this, that he had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with the right which the plaintiff in error possessed, was taken for the purposes of the act. Beyond a doubt, this water right was a property belonging to the plaintiff, for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the plaintiff was entitled upon that footing."

In *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 670, it is held that a riparian property owner on the River Thames, and the owner of lands near a public dock upon the river, were entitled to compensation in respect to their lands being injuriously affected by being deprived of access to the river and dock.

Lewis on Eminent Domain, § 83, says: "The following rights may be enumerated as appurtenant to property upon public waters: (1) The right to be and remain a riparian proprietor, and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water. (2) The right of access to the water, including a right of way to and from the navigable parts. (3) The right to build a pier or wharf out to the navigable water, subject to any regulations by the state. (4) The right to accretions or alluvium. (5) To make a reasonable use of the water as it flows past or laves the shore." He says it follows that any injury to riparian rights sufficient to be used is a taking, for which compensation must be made.

Thus we see, when the soil was granted by the state, that certain riparian rights passed as incidents thereto, and that these rights were vested; and the state could not itself nor permit others to interfere therewith, except for public purposes, and then only by making compensation. It would seem to follow from this conclusion that the original grantees of the Shepard's Point lands acquired rights in the navigable waters which the subsequent grant could not affect injuriously, and that those rights passed, as appurtenant to such lands, to the purchasers thereof.

The Legislature of Florida in 1856 (Laws 1856, p. 25, c. 791) passed an act reciting that: "Whereas it is for the benefit of commerce that wharves be built and warehouses erected \* \* \*; and whereas, the state being the proprietor of all submerged lands and water privileges, within its boundaries, which prevents the riparian owners from improving their water lots," it is thereupon enacted that the state, "for the consideration above mentioned divests herself of all right, title etc. in lands covered by water in front of any tract of land. \* \* \*" The Supreme Court of that state, in *State v. Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189, said: "In con-

struing this act, not only are we to keep in view the real nature of the subject-matter, but it is to be judged in the light of the rule applicable to all grants by the government, which is, that they are to be strictly construed, or to be taken most beneficially in favor of the state and against the grantee. \* \* \*

The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses and purposes." The state, "for the consideration above mentioned," divests herself, and invests the riparian owner, with the title to the land. "These considerations" are for the purpose and end that commerce may be benefited by the building of wharves, piers, etc. And the grant in this case is one of the class in which the subject of the grant, as long as it is of that character to be used or built for the benefit of commerce, is apparent and controlling. The court held that the right acquired was confined to the purposes set forth in the act.

In *Gregory v. Forbes*, supra, Smith, C. J., says: "The survey, and, we assume, the entry which it must follow, declare that it is for wharf purposes, and this is the only use for which the grant could issue."

It is elementary learning that, in construing a grant, every part thereof must be given effect, unless absolutely inconsistent with other parts. Thus, in *Robinson v. Railroad*, 59 Vt. 426, 10 Atl. 522, land had been conveyed for the "use of a plank road." The description of the land was complete without these words. The court said: "This clause can have no force as a description of the premises conveyed, and no force at all unless as qualifying and limiting the grant. It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning, and if, construing the whole instrument one way, meaning is given to every word and clause, while, construing it another way, some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule, to prevail. This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto. Again, when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used. \* \* \* We think this clause was intended as a limitation upon the grant, reducing, from a grant of the fee to a grant of an easement for the use of a plank road, all that the grantee cared to acquire, and all that the grantor would be likely to desire to part with."

In *Flaten v. City of Moorhead*, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195, it was held that in a grant or deed conveying a tract of land, immediately following the description of which were these words, "Said tract

of land hereby conveyed to be forever held and used as a public park," upon the face of the instrument, the grantee municipality did not acquire an absolute title to the fee in the premises. The court says: "It is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a new easement was acquired by the village, or an estate on condition or in trust. But we are obliged to consider the clause in connection with the remainder of the deed, and to give it the effect intended, if that can be discovered and is reconcilable with the main purpose of the parties."

This court has held that "riparian rights, being incident to land abutting on navigable waters, cannot be conveyed without a conveyance of such land, and such lands covered by navigable waters are subject to entry only by the owner of land abutting thereon." *Zimmermon v. Robinson*, 114 N. C. 39, 19 S. E. 102.

We are of the opinion that the grant to Morehead and Arendell of square 83 operated to give to them an exclusive right or easement therein, as riparian owners and proprietors, to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the Shepard's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to square No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable water as entitles it to maintain this action.

We are aware that this opinion is in conflict with many cases cited from other states, but we have given them careful consideration, and, in the absence of any controlling authority in this state, we think the conclusion to which we have arrived is consistent with the terms of the grant and the well-settled policy of this state.

There must be a new trial.

(123 N. C. 476)

**BAPTIST FEMALE UNIVERSITY OF  
NORTH CAROLINA et al.  
v. BORDEN.**

(Supreme Court of North Carolina. April 28, 1908.)

**WILLS—CONSTRUCTION—DISSENT OF WIDOW—EFFECT—REMAINDER—ACCELERATION—ALLOTMENT OF DOWER—DEMONSTRATIVE LEGACIES—PRIORITY—DEFICIENCY OF PERSONAL PROPERTY—PAYMENT OF DEBTS—ABATEMENT OF LEGACIES—SUBSCRIPTIONS—CONSIDERATION—DEBTS—DEVICES TO CREDITOR—ADEMPTION—WIDOW'S ALLOWANCE—DETERMINATION—DELIVERY OF SECURITIES IN SPECIE—RIGHTS OF LEGATEES.**

1. Where testator devised to a university and their successors certain real estate described after the death of his wife, and the wife dissented to the provisions made for her in the will and elected to take her distributive share, such election accelerated the devise to the university, and entitled it to immediate enjoyment of the property devised.

2. Where a testator devised his mansion house to his wife for life, and after her death to his niece, and on the widow's dissent to the will such mansion house was set off to her as dower, such election and set-off did not affect the right of the niece to the house on the death of the widow.

3. Where a testator devised to his wife for life rents and profits of certain real estate, remainder to another, and on the widow's election to take her distributive share of the estate such property was allotted to her as a portion of her dower, the enjoyment of the remainder was thereupon postponed until the widow's death.

4. Where a widow's election to take her distributive share in her husband's estate operated to accelerate the time of enjoyment of certain real estate devised to her for life, remainder to other devisees, the rent which accrued after testator's death passed with the property from which it was derived to the devisees entitled thereto.

5. Bequests to certain legatees of \$4,000 each, to be paid by turning over to the legatees any of testator's stocks, bonds, notes, or other evidences of debt at their market value, and, if those were not sufficient, the balance to be paid in money, were demonstrative legacies, and, while subject to the payment of debts and the widow's distributive share of the personal estate on her dissent to the will, they were entitled to priority over general legacies.

6. Where a will showed no intention of testator to charge the payment of legacies on real estate devised, the legatees were not entitled to compel a sale of real estate to pay such legacies on a deficiency of personal property arising by reason of widow's dissent to the will and election to take her distributive share.

7. Where a testator bequeathed legacies to be paid from his bonds, stocks, notes, and other evidences of debt, and, if they were insufficient, the balance to be paid in money, and on the widow's dissent to the will there was a deficiency of personal property after setting apart the widow's share thereof to pay such legacies and testator's debts, a contention that the bonds, stocks, and notes in the hands of the executor must be applied to the payment of such legacies, and that provision must be made for the payment of debts from real property of the deceased, was unsustainable.

8. Where a testator directed that certain real estate be sold, and the proceeds divided between two devisees, such sale constituted a conversion for the purposes of division only, and did not change the character of the property with respect to its liability for debts or legacies.

9. Where a deficiency of personal property to pay debts and legacies was caused solely by the widow's dissent to the will and election to take her distributive share, a contention that demonstrative and specific legacies were not intended to have priority over general legacies, but that the loss should be apportioned ratably on all the legacies, could not be sustained.

10. Where testator's personal estate was sufficient for the payment of his debts, a liability arising from a contract between testator and the federal government relating to the use of certain of testator's real estate was payable from the personal estate, and not from the rents derived from such realty.

11. Where testator subscribed for the purpose of aiding in the payment of the indebtedness of a university in which he was interested, and verbally authorized the president to announce such subscription at a public convention, where others subscribed, and testator's subscription was announced in his presence, and on faith of such subscription the university employed others to solicit subscriptions and incurred liability for the services performed, testator's subscription was based on a valid consideration, and was a valid claim against his estate.

12. Where, about a month prior to his death, testator subscribed to the payment of an indebtedness of a university, which subscription was payable at once, and his will tended to disclose a general purpose, after providing for his relatives, to divide his estate, after his wife's death, between the university and an orphanage, devises made to the university, to take effect after his wife's death, did not constitute a satisfaction of the debt due on the subscription.

13. Where a widow dissented to the will, and elected to take her distributive share, her share of the personal estate should be determined by deducting the debts and expenses of administration from the total value of the personality, exclusive of specific legacies, and paying to her one-half of the remainder, less the amount paid for her year's support.

14. Where a widow dissented from a will, and elected to take her distributive share, real estate devised to her was subject to the payment of debts before real estate specifically devised.

15. Where the exigencies of an estate and its administration did not require the sale of securities representing advantageous investments, the widow was entitled to receive such securities in specie in making up her distributive share of the personal estate on her dissent to the will.

Clark, O. J., and Douglas, J., dissenting.

Appeal from Superior Court, Wayne County; Robinson, Judge.

Submission of controversy between the Baptist Female University of North Carolina and others and E. B. Borden, as executor of the estate of W. T. Faircloth, deceased, and others. From a decree settling the rights of the parties, both sides appeal. Modified.

W. N. Jones and Battle & Mordecai, for plaintiff. F. A. Daniels, for defendant. John E. Woodard and W. T. Dortch, for legatees. W. C. Munroe, for defendant Faircloth.

CONNOR, J. This is a controversy submitted without action under the Code by the plaintiffs, the Baptist Female University and the Trustees of The Thomasville Baptist Orphanage and the Trustees of Wake Forest College against E. B. Borden, executor of W. T. Faircloth, deceased, and E. E. Faircloth, widow of said deceased, and other devisees and legatees named in the will of the said testator, for the purpose of obtaining a construction of the will of the testator, and direction to the executor in regard to the administration of his trust.

The facts necessary to a decision of the case are:

(1) That W. T. Faircloth died in the county of Wayne on the 29th day of December, 1900, leaving no children or issue of such, leaving, him surviving, his widow, E. E. Faircloth.

(2) That the defendants Frank W. Faircloth, Douglas B. Faircloth, Samuel L. Faircloth, and Callie Faircloth, Clara A. Lane, Susan E. Woodard, Fannie M. Faircloth, are the nephews and nieces of the said W. T. Faircloth, and are also his heirs at law.

(3) That the said W. T. Faircloth left a will, which was duly admitted to probate, and the executor therein named, the defendant E. B. Borden, duly qualified.

(4) That since the death of W. T. Faircloth and the probate of said will, his widow, E. E. Faircloth, has duly filed her dissent thereto, and claims such share of the estate of her husband as she would have been entitled to if he had died intestate. Her year's support, amounting to \$2,000, has been duly allotted to her.

(5) In addition to such claims, the estate of said testator is indebted to her in the sum of \$10,342.07, with interest thereon from the 12th of February, 1900, which has been reduced to judgment.

(6) That on or about the 1st day of December, 1900, said testator made a subscription of \$1,000 to the Baptist Female University of North Carolina for the purpose of aiding in the payment of certain indebtedness already created, amounting to more than \$40,000, of said University. That said University is a school under the control of the Baptist denomination, of which the said testator was a member. That such subscription was made or given to Dr. R. T. Vann, president of said institution, a part of whose duty it is to solicit subscriptions for the payment of said debt. The said testator verbally authorized the said Dr. R. T. Vann to announce the said subscription in a public convention of the Baptists of North Carolina at one of its sessions where other amounts were subscribed by various parties, and the same was announced in the presence of said testator. That said subscription was published in the public prints. That most of the said subscriptions are paid. That the said university, being indebted as aforesaid, employed agents to solicit subscriptions for the payment of said indebtedness, and in securing said subscriptions it incurred liability to said agents. That, after said subscription was made as aforesaid, the said testator executed his will, which is hereto attached, and made the devises to the university set out in the same.

(7) That the estate of the said W. T. Faircloth, at the time of his death, was worth about \$70,000, of which about \$30,000 consisted of real estate and about \$40,000 of personality.

(8) That of the personal estate about \$3,000 was money in bank, subject to check, and the remainder of said personal estate consisted of notes, stocks, and bonds, his library and household furniture, the said library and household furniture not exceeding in value \$1,000, and of said stocks and bonds some have market value and others no market value, and some of which are above and some below par.

(9) That the real estate described in item 7 of said will is worth from \$7,000 to \$8,000, the real estate described in item 13 of said will is worth from \$13,000 to \$17,000, and the real estate described in item 14 of said will is worth from \$5,000 to \$8,000.

(10) That after the payment of debts, except the debt claimed by Mrs. Faircloth and

the expenses of administering the estate, there will be in the hands of the executor for distribution under the said will or as the law directs about \$34,000 of personal estate.

(11) That there will not be a sufficiency of said personal estate to pay the legacies provided for in item 6 of the will after the payment to Mrs. E. E. Faircloth of her distributive share of the estate and her claim of \$10,342.07.

(12) That after the payment of the share of personal estate of which Mrs. Faircloth will be entitled and her claim of \$10,342.07 there will not be sufficient to pay the legacies provided for in item 6 of the will, if the value of the property in item 7 is added to the remainder of the personal estate.

(13) That after the payment of the share of the personal estate to which Mrs. E. E. Faircloth is entitled and her claim of \$10,342.07 there will not be sufficient to pay the legacies given in items 1, 2, 3, 4, 5, 6, 10, and 11 of said will, if the value of the property devised in item 7 is added to the remainder of the personal estate.

(14) That since the death of said W. T. Faircloth, by consent, the defendant J. W. Gardner has rented out the real estate, and has received rents and profits thereof, and he now has in hand of said rents and profits the sum of \$——, to be disposed of as the court may direct.

(15) That the dower of Mrs. Faircloth has been duly allotted to her, and covers the following property devised in said will: The house and lot in which the said W. T. Faircloth lived at the time of his death, fronting on George street, being the lot referred to in item 8, section 5, of the will of said testator, and also the two-story brick store on Walnut street, mentioned in item 8, section 2, of said will.

(16) That the said testator prior to his death leased a part of the property mentioned in item 7 of said will to the United States government by deed registered in the county of Wayne. That since his death, in accordance with said contract, liabilities to the amount of \$—— have been incurred for equipments for free delivery in Goldsboro, \$—— for coal, \$—— for water and repairs upon property embraced in said lease.

The portions of said will necessary to be set out for the purpose of disposing of this cause are as follows:

In items 1, 2, and 3 general legacies are given to persons therein named of \$100 each.

In item 4 the testator gives to Frank W. Faircloth his watch and chain, and also certain real estate situated in the state of Virginia.

In item 5 he gives to the Trustees of Thomasville Baptist Orphanage \$1,000 in money.

In item 6: "I give and bequeath absolutely to my nephews and nieces, Douglas B. Faircloth, Samuel S. Faircloth, Clara A. Lane (wife of B. F. Lane), Susan E. Woodward (wife of Calvin Woodward), Fannie N.

Faircloth, Frank W. Faircloth and Callie Faircloth (wife of said Frank W. Faircloth) each \$4,000 to be paid by my personal representative to said legatees by turning over any of my bonds, stocks, notes or other evidences of debt, at their market value, and if these are not sufficient then the balance of said \$4,000 each to be paid in money."

In item 7: "I give and devise to my widow E. E. Faircloth and her heirs my three story brick building in the North East intersection of John and Walnut streets in said city and the land on which it stands, (called the Law Building), also the single story brick store and lot on the East side of said Law Building, including ten feet right-of-way on the East side of single story store, all fronting on Walnut Street. This devise is in lieu of all moneys I received from her properties in Onslow County, North Carolina. I also give her \$500 in cash in lieu of her year's allowance."

In item 8: "I loan and give to my wife E. E. Faircloth, during her life, the rents, use, profits and incomes of the following real estate in Wayne County, viz.:

"(1) Two resident lots fronting on James Street, lying between Walnut and Chestnut streets.

"(2) My two story brick store, fronting on Walnut street and lying in the Northwest intersection of John and Walnut streets.

"(3) My two story brick stores on the South side of and fronting on Walnut street, between L. D. Giddens and John Slaughter's stores.

"(4) My Buckhorn plantation and farm on the South side of Neuse River in Wayne County, on which Rigdon Kornegay and Ely Cobb now live as tenants.

"(5) My house and lot on which I now reside, fronting on George Street in the city of Goldsboro. These rents, incomes etc. mentioned in this Item, I intend to belong to my said wife absolutely and to be at her disposal absolutely."

In item 9 he disposes of his household and kitchen furniture, which has been allotted to the widow.

In item 10: "I give and bequeath to the Trustees of Wake Forest College my entire law library, for the use of the Law Department of said college."

In item 11: "I give and bequeath to 'The Trustees of the First Missionary Baptist Church,' at Goldsboro, and their successors, one thousand dollars for the use and benefit of said church, as said trustees may deem proper."

In item 12: "After the death of my wife E. E. Faircloth, I give and devise to my niece Clara A. Lane, (wife of B. F. Lane) and her heirs in fee my house and lot on which I now reside, fronting on George Street in said city of Goldsboro."

In item 13: "After the death of my said wife, I give and devise in fee to the Trustees of the Baptist Female University of

North Carolina' and their successors, situated in the city of Raleigh, N. C., the following real estate in the city of Goldsboro, N. C. hereinbefore referred to, viz: my two residence lots fronting on James street between Walnut and Chestnut Streets, my two story brick store in the North west intersection of John and Walnut Streets, and my single story brick building on the south side of and fronting on Walnut street, between the stores of L. D. Giddens and John Slaughter, to be used for the benefit of said University in such manner as said board of trustees may think best."

In item 14: "I direct that after the death of my said wife, my Buckhorn plantation on the south side of Neuse River in Wayne County be sold at public auction in the court house door in Goldsboro, after due advertisement, to the highest bidder, by my personal representative, and pay the net proceeds equally to the trustees of the Baptist Female University of North Carolina at Raleigh, N. C. and to the trustees of the Thomasville Baptist Orphanage at Thomasville, N. C. and said moneys in this item to be used as said board of trustees may think best for their respective corporations."

In item 15: "After the above provisions have been served, I devise and bequeath any residue of my estate, real, personal or mixed, to my nephews and nieces hereinbefore named, to be equally divided between them share and share alike, the children of any one or more of said nephews and nieces who may have died to take the share that their parents would take if alive."

The first question presented upon the appeal for our consideration is raised by the contention of the plaintiffs the trustees of the Baptist Female University, that the dissent of Mrs. E. E. Faircloth accelerated the devises provided in item 13 of the will, and that they are now entitled to the possession of the property described in said item not included in the dower, and to the rents and profits thereon. Upon this question his honor ruled against the contention of the trustees of the Baptist Female University. In this, we think, there was error. Mrs. Faircloth having dissented from the will, and claimed her dower in the realty, and her distributive share in the personalty, we are of the opinion that there was an acceleration of the devises, the enjoyment of which, under the will, was postponed at the time of her death. The will, in so far as provision was therein made for her, operates in the same manner, as to the time of enjoyment by those entitled after her death, as if she had died prior to her husband. In *Adams v. Gillespie*, 55 N. C. 244, the testator gives to his wife the house and lot on which he lived, to have during her life, and "after her death" to her daughter. The widow dissented. *Battle, J.*, says: "The dissent of the widow has removed her life estate from all of the property given to her by the will, and which she

does not take independently, and the effect of it is to hasten the enjoyment of the life estate devised to her daughters." In *Holderby v. Walker*, 56 N. C. 46, the testator gave his entire estate to his wife for and during her natural life, and provided that "after the death of my beloved wife, I desire all of the estate devised to her" to go to certain persons, naming them. The widow dissented. *Battle, J.*, again speaking for the court, says: "It is further admitted that, as the life estate intended for the widow is removed out of the way as to all of the property which has not been assigned to her, such property is, or will by the consent of the executor become, vested in possession." See, also, *Wilson v. Stafford*, 60 N. C. 647. We find the same principle announced by other courts. In *Brown v. Hunt*, 59 Tenn. (12 Helsk.) 404, it is held: "That where a particular estate is devised to the widow with limitation over and the widow dissented to the will, that thereupon the limitation over took effect at once, except so far as affected by the widow's right to her dower and distributive share." The only case to which our attention has been called which would seem to militate against this view is *Beddard v. Harrington*, 124 N. C. 51, 32 S. E. 377. In that case land was given to the wife "for and during her natural life or widowhood," with the following provision, "After the death of my said wife" the land was given to the granddaughter of the testator. In an action by the plaintiff against the granddaughter the court held that she could not recover, for that upon her marriage her estate determined. The court says: "The widow, having remarried, cannot maintain the action to recover possession. The devise to the granddaughter, the defendant, 'after the death of my said wife,' cannot take effect until that event, but that cannot avail the plaintiff, who must recover upon the strength of her own title, not upon defects in that of the defendant." The only question before the court was the right of the plaintiff to recover possession, and, as her title had determined, it was clear that she could not maintain the action. That was the only point decided in this case. It is true that the court stated that until the death of the wife the devise to the granddaughter could not take effect, and the title to the land until that time vested in the heirs at law. This language, however, was not necessary for the decision of this case, and, in so far as it conflicts with the uniform current of authority as applied to the facts in the case before us, we do not regard it as binding upon the court in the disposition of this appeal. 20 Am. & Eng. Enc. (1st Ed.) p. 895, § 5. This ruling does not affect the right of the remainderman named in item 12, as the dwelling house is given to Mrs. Faircloth for her life, and at her death to Mrs. Clara A. Lane. It having been allotted to her as a portion of her dower, the status is not changed by the dissent. The

two-story brick store fronting on Walnut street, mentioned in item 8 (2) having been allotted to Mrs. Faircloth as a portion of her dower, the enjoyment of it is thereby postponed until her death. The title to the other real estate given to Mrs. Faircloth in item 8 for life, and after her death to the trustees of the Baptist Female University, vests in the trustees at once, and they are entitled to the immediate possession thereof. The Buckhorn plantation, given to Mrs. Faircloth for life in item 8 (4), and disposed of in item 14, must be sold at once by the executor, and the proceeds paid over to the trustees of the Baptist Female University and the Thomasville Baptist Orphanage, as directed therein.

The result of this ruling in respect to the real estate disposes of contention No. 9, in regard to the rents accruing from this property. The rent which has accrued since the death of Judge Faircloth passes with the property, and must be paid to those to whom the real estate belongs. This principle applies also to the rents accruing from the Buckhorn plantation, directed to be sold.

His honor's ruling in regard to the rents of the property referred to in items 13 and 14 is reversed. *Rogers v. McKenzie*, 65 N. C. 218. This disposes of contentions Nos. 1, 2, and 9 (except as to property described in item 7).

The contentions No. 4, 5, and 6 of the legatees named in item 6 of the record may be considered together. They are: First, from an inspection of the whole will it appears that it was the intention of the testator that they should have the legacies, and that other parts of the will must yield, if necessary to give effect to this intention; second, that, if necessary to pay the legacies, it is the duty of the executor to sell the real estate devised in other parts of the will; third, that the bonds, stocks, notes, etc., in the hands of the executor must be applied under the will to the payment of their legacies, and that provision must be made for the payment of debts out of other property of the deceased. The will contains a plan or scheme for the disposition of the testator's property entirely consistent and harmonious in all its parts. There would be no difficulty in executing the provisions of the will but for the derangement of the plan caused by the dissent of the widow. The result of this action on her part, followed by the establishment of an indebtedness in her favor, materially changes in many respects and prevents the execution of the plan of the testator. We fully recognize the well-settled principle adopted by the courts that the will shall be so construed that the dissent of the widow shall affect the devisees and legatees to as small degree as possible, and that the general scope or plan of distribution be carried out and effectuated so far as possible. "The dissent may defeat some of the arrangements made by the will and accelerate the time of enjoyment of some of the legacies and devisees, but it does not affect the construction of the will." *Pritchard*

on Wills, § 776. We are unable to see, from an inspection of the whole will, that it was the intention or within the contemplation of the testator that any part of his will would fail to be executed, or that upon his death there would be any necessity that one part should yield in favor of another. It is a holograph will; bears date December 28, 1900. The death of the testator occurring the next day, being the 29th of the same month. The will is drawn with care, and is free from ambiguity. The condition of the estate, as shown to us by the case agreed, was such that, but for the dissent of the widow, the executor would have found no difficulty in executing every provision thereof. We cannot, therefore, undertake to say what the testator would have done, or desired to be done, in the condition into which his estate has been placed by the unexpected contingency which has arisen. We must, by an adherence to the rules and precedents laid down by the courts, direct the disposition of the estate as near as may be in accordance with the directions of the testator as set forth in his will.

The legacies given his nephews and nieces in item 6 fall within the class known as "demonstrative." Mr. Jarman, in his work on Wills, chapter 523, in speaking of general and specific legacies, says: "But, besides these two classes of legacies already mentioned, there is a third or intermediate class, where there is a separate or independent gift to the legatees, and then a particular fund or estate is pointed out as that which is to be primarily liable." "A demonstrative legacy is a bequest of a certain sum of money, stock or other like, payable out of a particular fund or security. \* \* \* A demonstrative partakes of the nature of a general legacy by bequeathing a specific amount, and also of the nature of a specific legacy by pointing out the fund from which payment is to be made, but differs from a specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, recourse will be had to the general assets of the estate." *Crawford v. McCarthy*, 159 N. Y. 515, 54 N. E. 278. "Such a legacy is so far specific that it will not be liable to abate with the general legacies upon a deficiency of assets, except to the extent that it is to be treated as a general legacy after the application of the fund designated for its payment." *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247. Of course, all legacies are subject to the payment of debts, and, when the widow dissents, of her distributive share of the personal estate. The general legacies must give way or be postponed in favor of specific and demonstrative legacies. The contention of the legatees in item 6 that, if necessary to pay the legacies, it is the duty of the executor to compel the sale of real estate, cannot be sustained. It is well settled that, unless it clearly appears from the will that it is the intention of the testator to

charge the payment of debts upon his real estate, the law will not do so. The personality must be applied to the payment of debts, and exhausted, before the realty can be subjected. *Shaw v. McBride*, 56 N. C. 173. "The personality in the hands of the executor or administrator, whether it be specifically bequeathed or otherwise, is first liable to the payment of debts unless specifically exempted; and the real estate belonging to the deceased, no matter in what condition it is found, whether descended or devised, is not liable until the former is exhausted." *Knight v. Knight*, 59 N. C. 134; *Graham v. Little*, 40 N. C. 408. "It is safe to say that, in the absence of any controlling direction of the testator to the contrary, the personal estate is primarily liable for the debts of the deceased." *Pate v. Oliver*, 104 N. C. 458, 10 S. E. 709; *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 394. We fail to find in the will any indication of a purpose to change the order of liability fixed by the law, and we affirm his honor's ruling in that respect.

The sixth contention of the legatees was overruled by his honor, and we concur therein. From the facts stated we are unable to see to what other property of the deceased the legatees in this contention refer. After the payment of the debts and Mrs. Faircloth's distributive share, which, as we have seen, have priority over the legacies, there will be no other personal property in the hands of the executor. In any phase of the question, we sustain his honor's ruling.

The seventh contention of the legatees—that the property devised in item 7, known as the "Law Building," and an adjoining lot, fall into the residuum—was sustained by his honor, and no exception made thereto.

The eighth contention of the legatees—that the property described in item 14 has been converted by the testator into personal estate, and that they are entitled to the proceeds thereof in order to satisfy their legacies—was overruled by his honor, and we concur therein. The direction to sell this property and divide the proceeds between the Thomasville Baptist Orphanage and the Baptist Female University does not change its character in respect to its liability for debts or legacies. Its conversion is for the purpose of division only.

The tenth and eleventh contentions may be considered together. His honor sustains the tenth and overrules the eleventh, and we concur with him in both rulings. As we have seen, the general legacies given in items 1, 2, 3, 5, and 11 must abate or must be postponed until the demonstrative legacies given in item 6 have been paid in full.

The contention No. 11½—that it was the intention of the testator, as expressed in his will, that all legacies and devises should be paid in full, and that it has become impossible to carry out this intention by reason of changed conditions since the making of the will, and that a court of equity will not permit the

loss to fall upon any one legatee, but will apportion the loss ratably, and that it was not the intention of the testator to make mock legacies to them—was overruled by his honor, and we concur therein. As we have seen, it was the intention and expectation of the testator that all of the legacies and devises given and made by him were to be effectuated. What he might have done in anticipation of the changed conditions we are not at liberty to conjecture. *Hill v. Toms*, 87 N. C. 492.

The twelfth contention made by the legatees named in items 4 and 10 was sustained by his honor, and no exception made thereto.

The thirteenth contention—that the executor should pay out of the personal estate all liabilities arising out of the contract with the government of the United States, set out in paragraph 16—was sustained by his honor, and the executor excepted. We concur with the ruling of his honor upon this question. As we have seen, rents follow the reversion, and can only be subjected to the payment of debts when there is a failure of personality, and it becomes necessary to subject the land. The amount paid by the executor for debts accruing under the provisions of said contract are the personal liabilities of the testator, accruing, it is true, since his death, but in consequence of the contract made by him prior thereto.

The third contention by the trustees of the Baptist Female University—that the subscription of \$1,000 on the indebtedness of said University, set forth in paragraph 6, is a debt against the estate, and the same was not adeemed by the devises in the will of the testator to said university—may be considered in connection with the fourteenth contention of the legatees in item 6 and the executor that the subscription of \$1,000 is without consideration, and does not create a binding obligation. The facts in regard to these contentions are that the testator made a subscription of \$1,000 to the Baptist Female University of North Carolina for the purpose of aiding in the payment of certain indebtedness already created, amounting to more than \$40,000; that said university is a school in the control of the Baptist denomination, of which the testator was a member; that such subscription was made or given to R. T. Vann, president of said institution, a part of whose duty it is to solicit subscriptions for the payment of said debt; that said testator verbally authorized said Vann to announce the said subscription in a public convention of the Baptists of North Carolina, where other amounts were subscribed by various parties, and the same was announced in the presence of said testator; that said subscription was published in the public prints; that most of the said subscriptions are paid; that said university, being indebted as aforesaid, employed agents to solicit subscriptions for the payment of said indebtedness, and in securing said subscriptions it incurred liability to said agents for their compensation, and expended money in payment of



said agents; that, after said subscription was made as aforesaid, the said testator executed his will, which is herewith attached, and made the devises to said university as set out in the same. The decision of this question is dependent upon the solution of the question whether there be any consideration to support the promise to give \$1,000 to the Baptist Female University. It is well settled by a long line of authorities that "a simple contract is incapable of becoming the subject of an action unless supported by a consideration." Smith on Contracts, 168. This is elementary, and needs no citation.

We find a very satisfactory definition of a valuable consideration in the case of *Currie v. Misa*, L. R. 10 Exch. 153: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." See *Clark on Contracts*, § 64. We find, from a careful examination of the numerous cases which have been decided by the courts of the Union, a division of opinion. Among the earliest is the case of *Stewart v. Trustees of Hamilton College*, 2 Denio, 403. Chancellor Walworth uses the following language: "As a subscription of a single individual agreeing to make a donation to another individual or a corporation for the benefit of the donee merely, I should find great difficulty in finding a valid consideration to sustain a promise to give without any equivalent therefor, and without any binding agreement on the part of the donee to do anything on his part which would be a loss or injury to him. \* \* \* There is no difficulty in my mind in finding a good and sufficient consideration to support a subscription of this kind made by several individuals. Every member of society has an interest in supporting an institution of religion and learning in the community where he resides. And when he consents to become a subscriber, with others, to raise a fund for that purpose, the real consideration for his promise is the promise which others have already made, or which he expects them to make, to contribute to the same object. In other words, the mutual promises of the several subscribers to contribute toward the fund to be raised for the specified object in which all feel an interest are the real consideration of the promise of each. For this purpose, also, the various subscriptions to the same paper, and for the same object, although in fact made at different times, may, in legal contemplation, be considered as having been made simultaneously. The consideration of the promise, therefore, is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration of injury which the payee has sustained or is to sustain, or be put to for his benefit, but the consideration of the promise of each sub-

scriber is the corresponding promise which is made by other subscribers. Mutual promises have always been held sufficient as between the parties to sustain the promise of each. And it has also been the settled law from the time of the decision in the case of *Dutton v. Poole*, Freem. 471, in 1678, down to the present time, that a party for whose benefit a promise is made may sue in assumpsit upon such promise, although the consideration therefor was a consideration between the promisor and a third person."

In the case of the *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, Chief Justice Marshall, speaking of the contributions to the funds of that institution, says: "These gifts were made, not, indeed, to make a profit to the donors or their posterity, but for something, in their opinion, of inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves."

In *Congregational Society v. Perry*, 6 N. H. 164, 25 Am. Dec. 455, it is held: "Where several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of the others."

In *Norton v. Janvier*, 5 Har. 346, Booth, C. J., says: "The law will not enforce a mere gratuitous or voluntary promise, made without consideration. But the question is, what is a merely gratuitous promise? If a subscription be made to a common object on condition that such object is accomplished, or sufficient money be raised to effect that object, and that condition is performed, an obligation to pay would be perfect and may be enforced by a suit at law."

In *Wayne & Ont. Coll. Inst. v. Smith*, 36 Barb. 576, the court uses the following language: "I am by no means satisfied that in this country, where all our religious, educational, and charitable institutions are founded by voluntary associations and dependent upon private liberality, the personal benefit to be derived from the erection of a church edifice for worship by himself and family, or the erection of an academy or other institution of learning in his immediate neighborhood for the education of his children, are not works involving a sufficiency of private interest to every citizen and of pecuniary benefit to maintain a promise expressly and distinctly made, received, and acted upon in the erection of buildings for such purposes." It is conceded by the court in this case that this view has not been adopted in most of the cases, and we quote it for the purpose of showing the line of thought passing through the judicial mind upon this question many years ago.

In *Williams College v. Danforth*, 12 Pick. 541, Chief Justice Shaw, in speaking of a

subscription made by several to a common object, says: "In this case there is an express contract between parties capable of contracting upon mutual stipulations, each having an interest in the stipulations of the others, and these stipulations being such as might be enforced by judicial process. The subscription in the first instance was in the nature of a proposal to the college, by its terms not binding till accepted, and before acceptance revocable. But when the college accepted it they bound themselves to the performance of the conditions. The conditions were that they should apply the money, principal and interest, to the general literary, scientific, and religious purposes of the institution at Williamston, in which the defendant, with the other subscribers, declared that they had an interest. \* \* \* These were, then, mutual and independent promises, and, according to a well-known rule of law, such promises are mutual considerations for each other." This action was brought upon subscription paper signed by the defendant with others. There were certain conditions upon which the money was to be paid.

In *Doyle v. Glasscock*, 24 Tex. 200, the court says: "The case thus disclosed we understand to be this: The plaintiff was one of a committee to raise money for the purchase of a site for the lunatic asylum. He applied to the defendant, and received his subscription, and on the faith of it (or the committee, of which he was one) made the purchase, and he advanced the money, and now calls on the defendant, in consideration of the premises, to pay his subscription." The court held that the plaintiff could recover.

In *Maine Cent. Inst. v. Haskell*, 73 Me. 140, Danforth, J., says: "But we are not prepared to admit that the subscription paper in this case 'is a bare naked promise' without any consideration whatever. It is true, no consideration was actually received at the time of signing, but one is plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose 'to make up the building fund for said institution.' The promise was made to a different payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise, and therefore amenable to law for negligence or abuse of the trust. It is not, of course, binding upon the promisor until accepted by the promisee, and may up to that time be considered as a revocable promise. But, when accepted, and much more when the execution of the trust has been entered upon, where money has been expended in carrying out the object contemplated. It becomes a complete contract, binding upon both parties; the promise to pay or at least an implied promise to execute, each being a consideration for the other."

In *Amherst Academy v. Cowls*, 6 Pick 427, 17 Am. Dec. 387, the court, after reviewing the cases, says: "On this view of the cases which have occurred within this commonwealth analogous in any degree to the case before us, we do not find that it has ever been decided that, when there are proper parties to the contract, and the promisee is capable of carrying into effect the purpose for which the promise is made, and in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration."

In *Ladies' Collegiate Inst. v. French*, 16 Gray, 196, Chapman, J., says: "It is held that by accepting such a subscription, the promisee on his part agrees with the subscribers that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscribers, and these mutual and independent promises are made and constitute a legal and sufficient consideration for each other. They are held to rest upon a well-settled principle in respect to concurrent promises."

In *Johnson v. Wabash College*, 2 Ind. 555, on a promise to pay a subscription of \$50, the court says: "The only objection made to the recovery on the note is that said note was given without consideration. The accomplishment of the object in aid of which the money was promised forms a good and valid consideration for the promise to pay it."

In *Petty v. Trustees of the Church of Christ*, 95 Ind. 278, the court says: "The contract in a case such as this is a peculiar one. The consideration in the contract is not a promise on the part of the religious corporation to build a place of worship, for no such promise is averred, but the consideration is the mutual promises of the respective subscribers each with the other."

In *Peirce v. Ruley*, 5 Ind. 69, it is said: "The consideration for his promise is the promise which others have already made, or which he expects them to make, to contribute to the same object."

In *Irwin v. Lombard University (Ohio)* 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727, the question involved in this appeal was presented for consideration. The court said: "That a promise which does not secure a benefit to him who makes it, or loss or detriment to him to whom it is made, or in any manner influence the conduct of others, is not enforceable, is a recognized general rule of law. \* \* \* By the desire of Gilpin many other persons made donations in money, and executed obligations to the university of like character to his, and his promise was an inducement to their donations and promises. \* \* \* Whether the object of the promisors was to secure the opportunity of educating their own children under such influences as they desired, or more generally to contribute to the general welfare by increasing the facilities for higher education, it has been accomplished by the expenditure

of money and the incurring of obligations in reliance upon their promises and similar promises from others. Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the university is restricted not only by the law of its being, but as well by the obligation arising from its acceptance of the promise. A promise to give money to one to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution, to be used for such designed and public purposes, rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises. \* \* \* It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations, and together constitute the financial support of the enterprise. The cases must be rare, indeed, in which such contributions or promises would be made if others had not been made before, and rarer still in which they would be made but for the belief that others will be made afterwards. The requirements of the law are satisfied, the objects of the parties secured, and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment, through the university, of the purposes for which it was incorporated, and in whose aid the promise was made." These observations appear to be peculiarly appropriate to the consideration of the question presented in this case.

In *Roche v. Roanoke Seminary*, 56 Ind. 198, the Supreme Court held "that the subscription required no further consideration to support it than the accomplishment of the object in aid of which the money was promised," which in that case, as in this, was to go to the endowment fund of an institution of learning.

"A bond payable after the maker's death to a college for its endowment, accepted by the college, rests upon a sufficient consideration, and may be enforced after the maker's death." Beach on Modern Law of Contracts, § 179. That mutual promises constitute sufficient consideration is well settled by numerous decisions in our Reports. In the light of the foregoing authorities and the principles upon which they are based, we are of the opinion that the promise made by Judge Faircloth to pay to the trustees of the Baptist Female University \$1,000 is supported by a sufficient consideration, and constitutes a le-

gal liability upon his estate. We think that this conclusion may be supported upon several views of the testimony.

The University is duly incorporated, with the power to receive such subscriptions. It is under the control of the Baptist Church, of which the testator was a member. Its trustees had appointed agents to solicit subscriptions. It had incurred liabilities for their expenses and payment for their services. The subscription was made to the president of the university, and an announcement thereof made in a Baptist convention. The subscription was thereby accepted, and by its acceptance the university assumed the responsibility, duty, and obligation of applying the money to the purposes for which it was given. Other persons at said time and place made subscriptions for the same purpose. Announcements of each were made in the presence of Judge Faircloth. Most of these subscriptions were paid, and it must be understood, as a reasonable conclusion from the facts stated, that these subscriptions were made at the same time and place, and therefore operated as an inducement for other persons to make subscriptions for the same purpose, which were received by the university, and the duty or trust thereby imposed of expending the money for the purposes for which it was given assumed by the officers of the university. We think that in either of the several points of view and in accordance with the definition of a valuable consideration hereinbefore given the promise was supported by such consideration. We are not inadvertent to the fact that there are a number of authorities holding the contrary. We have carefully examined the cases, and, in the absence of any controlling authority in this court, we have come to the foregoing conclusion.

His honor overruled the third contention of the trustees, and, pursuant thereto, sustained the fourteenth contention of the legatees. The trustees excepted to both rulings. We think his honor was in error. We do not think that the devises made by the testator to the Baptist Female University operate as an ademption of the debt due the university. While we have not been controlled in the consideration of this question by any supposed intention of the testator, we feel assured that we have effectuated the purpose which he had. It will be observed that he made this subscription about one month prior to his death, and that in his will he gives to the trustees of the Thomasville Baptist Orphanage \$1,000 in money. We think that we can see a general purpose running through his mind, after providing for his relatives, to divide his estate, after the death of his wife, between these two institutions, one representing the great educational work for girls of his church, and the other its fostering care of its orphaned children. We do not think that the devises made to the Baptist Female University are a satisfaction of the debt of

\$1,000. As no date of payment is fixed, it was due at once; whereas the devise was not to take effect until the death of Mrs. Faircloth. See Iredell on Executors, 222, § 7.

The fifteenth contention—that for the purpose of ascertaining the distributive share of Mrs. Faircloth the expenses of administration and debts shall be deducted from the value of the personal property, and that all stocks, bonds, etc., as are specifically bequeathed to the legatees in item 6, and that for the purpose of providing a fund for the payment of debts the devisees of real estate and specific legacies shall contribute pro rata according to their value—is sustained by his honor, and exception taken thereto by the trustees of the Baptist Female University and the trustees of the Thomasville Baptist Orphanage and Wake Forest College. We think that his honor was in error. As we have seen, the realty cannot be subjected or called upon for the payment of debts until the personalty is exhausted. We think that the correct rule for the purpose of ascertaining the distributive share of Mrs. Faircloth is that the debts and expenses of administration shall be deducted from the total value of the personalty, exclusive of the specific legacies, and that, after deducting the same, one-half of the remainder will be paid to her for her distributive share, the amount paid her for her year's support, of course, first being deducted. Upon the facts stated in the case agreed, this would leave an amount smaller than the legacies named in item 6 of the will, and, of course, these legacies would absorb the balance of the personalty. *Arrington v. Dortch*, 77 N. C. 367.

The sixteenth contention—that the property mentioned in item 7 of the will is primarily liable for the debts—was sustained by his honor. If by this is meant that it is liable to be subjected before the realty specifically devised, we concur with his honor; and we so construe his ruling upon this contention.

The eighteenth and nineteenth contentions made by Mrs. Faircloth were sustained by his honor, to which there was no exception.

The twentieth contention made by Mrs. Faircloth—that the investment in North Carolina and Atlantic & North Carolina Railroad bonds and the shares in the Bank of Wayne is a wise and advantageous investment, and should not be disturbed, and she contends that she is entitled to one-half thereof in specie—was sustained by his honor, and the executor excepts. We are of the opinion that these securities or investments should not be converted into money, unless the exigencies of the estate demand it, and that Mrs. Faircloth is entitled to have her share thereof in specie, provided the executor does not find it necessary to sell them for the purpose of paying debts. It would seem from the condition of the estate set forth in the case agreed that it would not be necessary so to do, and we can see no good reason why Mrs. Faircloth should not have, as near as may be,

one-half of these securities in specie. We feel quite sure that the executor will be able and will be inclined to comply with her wish in regard to this property. We would not be understood as saying that a distributee has a right to demand investments of this character in specie, unless it is manifest that no necessity exists for converting the investments into money. We can appreciate the difficulty which will be presented in dividing the other one-half of these securities between the seven legatees named in item 6, and such course will be pursued in respect thereto as will promote the interests of the legatees. We cannot perceive how the legatees named in item 6 can be injured by this ruling, because, if these bonds and stocks were sold, Mrs. Faircloth would receive one-half of the proceeds.

His honor directed that, there being a deficiency of the personal estate, after the payment of debts, to pay the legacies provided for in item 6, which was caused by the operation of law by reason of the dissent of Mrs. Faircloth; the court, being of opinion that the entire loss should not fall upon the specific legacies or specific devisees, adjudged that the said deficiency be apportioned ratably between the specific legatees, including the legatees named in item 6 and the specific devisees. He appoints a referee to ascertain the value of the entire personal estate, etc. To this portion of the judgment the trustees of the Baptist Female University and the Thomasville Baptist Orphanage excepted. For the reasons hereinbefore given, we think that the judgment in this respect is erroneous. Applying the principles which we have announced, the executor will first deliver to the legatees of the specific legacies, namely, F. W. Faircloth and the trustees of Wake Forest College, the property specifically bequeathed to them. He will then deduct from the total value of the personalty the debts and charges of administration. One half of the remainder he will pay to Mrs. Faircloth for her distributive share; the other half will be paid to the legatees named in item 6. *Schouler on Executors*, § 490; *Iredell on Executors*, 238. The executor will, if practicable, deliver to Mrs. Faircloth, as a part of her distributive share, one half of the securities hereinbefore mentioned, and the other half will be delivered to the legatees in item 6 of the will. The rents accruing from the several pieces of realty will be paid to the devisees to whom the realty is given. The rents on that portion allotted to Mrs. Faircloth as her dower will be paid to her. The executor will take from the legatees refunding bonds to indemnify him against any claims which may accrue by reason of the contract made by his testator with the United States government in regard to the Law Building.

This case has presented a number of questions of which a court of equity would not take jurisdiction in the exercise of its duty

and power of advising executors and trustees. *Taylor v. Bond*, 45 N. C. 5; *Cozart v. Lyon*, 91 N. C. 282; *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707. This being a controversy without action under the Code, we have found no difficulty in taking jurisdiction and deciding the questions affecting the rights of devisees in connection with advising the executor in discharge of his trust. The costs of the appeal will be paid by the executor out of the funds of the estate.

The judgment of his honor is modified and affirmed.

DOUGLAS, J. (dissenting in part). The unanimous decision of this court that the bequests in item 6 of the will are demonstrative legacies leaves but little in this case beyond the naked principles of law, which, however, are too important to be ignored. It is admitted that under the construction of the court the bequests in items 1, 2, 3, 5, and 11 are utterly valueless. Aside from the bequests of \$1,000 each to the Thomasville Baptist Orphanage, and the First Missionary Baptist Church of Goldsboro, they are legacies of nominal value, mere tokens of affection, intended perhaps to purchase some memento of the testator. It seems a pity that these little gifts from a dying hand to those he loved and to the church in which he worshipped cannot be paid. They were as much the objects of his bounty as those whose larger gifts have been increased by the decision of this court by the process of acceleration. No one can more fully appreciate the benefits of education than I, or more deeply appreciate the noble conduct of those who give or labor for the elevation of others; but these feelings have no room in the consideration of this matter. I am now seeking to find the intention of the testator as expressed in his will. It is his purpose, and not my own, that I am attempting to effectuate. But it is said that the dissent of the widow has defeated the intent of the testator, and that we must now construe his will in accordance with legal principles and judicial decisions. That is true, but judicial decisions are merely the declaration of legal principles, and such principles are, with the single exception of the rule in *Shelley's Case*, rules of construction intended to ascertain the true intent of the instrument under consideration. It is clear that the testator intended his widow to take whatever she might get from the property mentioned in items 7 and 8, because he said so in plain words. This seems to be an appropriation of that property to the claims of the widow, and, while she may get more than the testator intended, and get it in a different way, I see no reason why the property he himself pointed out should not first be exhausted. He did not intend that the devisees to the college and the orphanage should take effect immediately, else he would have said so, and would not have said that they should be postponed to the just claims

of his widow for an adequate support during her few remaining years. The court cites the cases of *Adams v. Gillespie*, 55 N. C. 244, *Holderby v. Walker*, 58 N. C. 46, and *Wilson v. Stafford*, 60 N. C. 647, but they do not support the general principle as enunciated by the court, because they are based upon the particular facts in each case. All of them seek to carry out the intention of the testator, as far as possible, and in none of them are there conflicting legacies which are destroyed by the acceleration. If a man leaves his property to his widow for her life, with remainder to his only child for her life, with a further remainder in fee to her children, of course the daughter's estate is accelerated when the widow dissents, because there is no one else to take the property. If the daughter did not take as devisee, she would take as heir. It is true that this court has said in *Adams v. Gillespie* that "the dissent of the widow has removed her life estate from all the property given to her by the will, and which she does not take independently of it, and the effect of it is to hasten the enjoyment of the life estate devised and bequeathed to the testator's daughter." But the court in the same case further says: "It is unnecessary to decide whether Mrs. Whittington [the daughter] takes the real estate for her life by implication from the will, or by descent, or being undisposed of by the devise. It is certain that she takes it the one way or the other, because the interest of her children in it is expressly postponed until her death." The court further decides in that case that "in allotting the widow's share she must have, as a part of it, half the value of the girl Jane, and, for the purposes of a division, the girl must be sold." The only apparent reason for this ruling is that the will provided that the widow should have half the value of Jane, and it seemed proper that when the widow dissented from the will she should take, as part of her distributive share, the identical property bequeathed to her by the will. What the court really said in *Holderby v. Walker* was that: "It is admitted by the parties to this controversy that the dissent of the widow to the will of her husband discharges the share of his estate, which she takes under the law, from the burden of maintaining and educating the infant defendant, Elizabeth Ellington. It is admitted further that, as the life estate intended by the will for the widow is removed out of the way as to all the property which has not been assigned to her, such property has or will by the assent of the executor become vested in possession"; that is, that upon the facts of that case there was no contention between the parties on that point, and therefore it was not really before the court. In *Beddard v. Harrington*, 124 N. C. 51, 32 S. E. 377, in an opinion concurred in by Chief Justice Faircloth himself, this court directly decided the question against acceleration. Another interesting case is that of *Lassiter v.*

Wood, 63 N. C. 360, in which the testator specifically devised his lands to his sons, and directed that his daughters be paid \$10,000 each out of his estate. The war practically destroyed his personal property. This court held that, as the paramount intent of the testator was the equality of benefit between his children, the pecuniary legacies to the daughters were "chargeable upon the lands devised to the sons so far as is necessary to produce equality among all the children of the testator." These principles may make but little difference in the pecuniary result of this action, but they are of far-reaching importance, and may unjustly affect other cases in the future.

I come now to the last point upon which I dissent. It seems that this mere promise—for I see no element of a contract—to donate \$1,000 has been amply addeemed by a most generous legacy, and should not now come in as a debt to destroy other legacies of equal merit, such as that to his home church. Popular education is one of the noblest objects of a Christian age, but a gift should be the deliberate act of the donor. To construe into a contract a merely voluntary promise made upon the spur of the moment, and perhaps under the influence of religious fervor, would, in my opinion, be subversive of the highest principles of jurisprudence as well as of public policy. In this case the promise was clearly within the ability of the testator, who was a man of clear and deliberate judgment; but in other cases it might not be, and its legal enforcement might be oppressive to the promisor, and unjust to a dependent family. My views are so clearly and strongly expressed by the Supreme Court of Massachusetts in an opinion delivered by Chief Justice Gray, afterwards on the Supreme Court of the United States, in *Cottage St. Methodist Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286, that I will close this opinion by the adoption of its language. Its numerous citations are omitted for the sake of brevity. There are numerous other decisions to the same effect, but this is sufficient to express my views. The court says: "The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble, or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made. A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has sustained an action upon a promise of this description the promisee's acceptance of the defendant's promise was shown either by express vote or contract assuming a liability or obligation, legal or

equitable, or else by some unequivocal act, such as advancing or expending money or erecting a building in accordance with the terms of the contract, and upon the faith of the defendant's promise. \* \* \* Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. \* \* \* The suggestion in *Trustees of Church & Congregation v. Stetson*, 5 Pick. 508, substantially repeated in *Ives v. Sterling*, 6 Metc. 316, and in *Watkins v. Eames*, 9 Cush. 539, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant,' was in each case but obiter dictum, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but, as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him. The facts in the present case show no benefit to the defendant, and no vote or contract by the plaintiff, and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not, therefore, appear that there was any legal consideration upon which this action is brought."

CLARK, C. J., concurs in dissenting opinion.

(66 S. C. 23)

#### STATE v. JOHNSON.

(Supreme Court of South Carolina. April 8, 1903.)

#### CRIMINAL LAW—OBJECTIONS TO JURY—WAIVER—HOMICIDE—EVIDENCE—EXPERT TESTIMONY—INSTRUCTIONS.

1. Objections to the manner of drawing the jury, made after verdict, will not be considered unless accused was injured thereby.

2. Where, on a trial for murder, the action and flow of a river was a question, to ask the witness whether, in his personal experience, he had ever witnessed the floating of any person or any bale of cotton down the main sluice of the river, and, if so, whether it followed the sluice, or was blown off to the Georgia shore, was not objectionable, as leading.

3. The admission of cumulative evidence in reply in a criminal case is within the discretion of the court.

4. Evidence of a physician, based on the examination of a wound, is admissible as expert testimony.

5. That the judge, in his charge to the jury, stated facts agreed on by witnesses for the state and for the accused, was not error.

6. Under the Constitution of 1868, forbidding the court to charge the jury as to matters of fact, a statement of the issues presented, and all the evidence on which the state and the defendant relied to support their respective positions, is authorized.

7. An instruction that circumstantial evidence should be received and considered as other evidence is not a charge on the facts.

8. The jury in a criminal case must consider expert evidence in the same manner as other evidence, and give it such weight as they think fit.

Appeal from General Sessions Circuit Court of Edgefield County.

Tom Johnson was convicted of murder, and appeals. Reversed.

Defendant appeals on the following exceptions:

"(1) Because his honor the presiding judge erred in not arresting the judgment and granting a new trial to the defendant when it appeared that the defendant was convicted by a jury not drawn according to law: First. The sheriff was, contrary to law, allowed to draw the names of jurors from the jury box, and had in his possession the treasurer's key, and acted as jury commissioner as a substitute for the treasurer; thus acting in the capacity of jury commissioner and sheriff, who should be present simply as a witness. Second. The jury commissioners, contrary to law, passed upon the competency of the jurors, and illegally destroyed the ballots containing the names of those jurors deemed incompetent, regardless of whether they were exempt by law or not; and his honor ruled that the jury, as drawn, was a legal jury.

"(2) Because his honor erred in overruling defendant's objection, and allowing T. Hitt to answer the following question propounded by the solicitor: 'Q. Have you seen anything much of Tom Johnson prior to the 21st of September of this year?' Said question being irrelevant and incompetent.

"(3) Because his honor erred in overruling defendant's objection, and allowing John R. Blackwell to answer the following question propounded to him by the solicitor: 'Q. The day when the body was found, any white people there?' The effort of the solicitor being to show that the white people were more interested in connecting Robert Park's death with Tom Johnson than were the black people.

"(4) Because his honor erred in overruling defendant's objection, and allowing Dan Parks to answer 'Yes' or 'No' to the following question; he having answered same on direct examination: 'Q. Tom Johnson testified that he didn't tell you that your son told him it was twenty-five minutes after 4, and that he had a good silver watch on?'

"(5) Because his honor erred in overruling defendant's objection, and allowing John R.

Blackwell to answer on redirect examination question propounded by solicitor: 'Q. What particular experience have you had in carrying anything on the water?'

"(6) Because his honor erred in overruling defendant's objection, and allowing L. G. Harmon to answer on his redirect examination question propounded by solicitor: 'Q. Have you, in your personal experience, ever witnessed the floating of any person or any bale of cotton down the main sluice of that river; and, if so, did it follow the sluice, or was it blown off to the Georgia side; and, if you witnessed such an occurrence, was the wind blowing at the time, or not?' Because his honor erred in overruling defendant's objection, and allowing L. G. Harmon to answer on the redirect examination question propounded by the solicitor—to say 'that he heard some one holler in the river, and saw the men; was attracted by the holler-ing.'

"(7) Because his honor the circuit judge erred in permitting Dr. Bell to testify that it would be impossible for a body in water to have received such a wound as that appearing on the face of the deceased. Such evidence not being expert evidence, but the opinion of a witness giving his conclusion upon what were alleged to be the facts in the case on trial.

"(8) Because the presiding judge erred in defining manslaughter to the jury as follows: 'Manslaughter is the killing in sudden heat and passion, upon sufficient legal provocation, and without malice.' A definition of self-defense, and not manslaughter, and that definition the judge repeated in his charge.

"(9) Because his honor erred in charging the jury: 'The question for you in this case, at the threshold of your examination, is, was Robert Parks, the deceased, murdered, or did he come to his death by drowning, or by some other accident?' Thus taking from the jury the right to say what questions were before them to consider, and whether the homicide was manslaughter.

"(10) Because his honor erred in commenting on the facts, contrary to article 4, and section 28 of the Constitution of South Carolina, by stating to the jury: 'There is no doubt of its being dead. There is no doubt it was found dead at some point in the Savannah river. There seems to be no doubt that Robert Parks died, from some cause or other, in the river.' These being facts for the jury to decide, free from the suggestions and opinion of the presiding judge.

"(11) Because his honor erred in impressing on the jury his conclusions upon the facts and suggesting his opinion as follows: 'What are the marks? Are there marks upon the prominent parts of the body? Are there bruises upon those parts of the body that, as men of common sense, you would expect to come from contact with rocks, or where were the marks? If there is evidence that the worst bruise was breaking of the

bone of the nose under the frontal bone, judging by the rules of common sense, you will ask, was it possible for the drowning body of Robert Parks to have been thrown with such violence against a rock as to break the bone in that particular place, and yet have no marks upon the other parts of the person?"

"(12) Because his honor erred in stating his conclusions upon the evidence as follows: 'For you must decide, first of all, whether or not that bruise described as having broken the bones of the nose, and that mark or bruise over the face from the forehead down to the mouth, whether they were caused by the body being thrown against a rock, or was it a bruise showing the mark of a blow dealt by the hand of a murderer.' Whereas the jury should have had the untrammelled right to say whether there was such an injury as that described by witnesses as being on the face of Robert Parks.

"(13) Because his honor erred in suggesting to the jury his opinion on the evidence, and making an argument against the defendant, as follows: 'The state introduces evidence of what it alleges to be facts, from which it asks you to deduce the theory of guilt, and which the state alleges to be a reasonable theory. It says to you, "We have proved the facts, and this fact—a number of facts—we ask you, as reasonable jurors, to say, "Can all these facts be true, and yet the prisoner be innocent?" "'

"(14) Because his honor erred in stating to the jury 'that circumstantial evidence is not deserving of such denunciation,' whereas the jury should have been left without any suggestion from the presiding judge as to the weight to be given circumstantial evidence.

"(15) Because his honor erred in indicating to the jury his opinions on the evidence, and what weight they should give to the evidence in this case, by that portion of his charge as follows: 'I wish to caution you, however, against imagining that, because it is circumstantial evidence, you must not find the prisoner guilty of murder. That would be to ask you not to act like reasonable beings. If you were to carry that rule into common, everyday life, there would be very little you would do or believe, in religion or morals, or public or private life. \* \* \* It would never do, gentlemen, because some people have been buried alive when they were supposed to be dead, that we should not bury our dead when we believe them to be dead; nor would it do for a jury, if it believed a man to be guilty of murder, to acquit that man because some other jury may have convicted a man on circumstantial evidence, believing him to be guilty, and it was discovered afterwards that he was not guilty.'

"(16) Because the presiding judge erred in misstating the facts and commenting on them as follows: 'Now, the state's theory is that Tom Johnson, getting in that bateau with Robert Parks, to cross the Savannah river, did, at some point in the river not long

after leaving the Carolina bank, strike such a blow upon the face of Robert Parks as to kill him or make him unconscious, and then robbed him and threw him in the river; that his dead body was found three days afterwards, and upon the inquest such facts were developed as would justify the arrest of Tom Johnson, charging him with murder; and that he is now being tried by you, and to be found guilty by you if you so believe.' No witness swore that Tom Johnson did, at some point in the river not long after leaving Carolina bank, strike such a blow upon the face of Robert Parks as to kill him or make him unconscious, and then robbed him and threw him in the river.

"(17) Because his honor erred in indicating to the jury his conclusions upon Dr. Bell's evidence, and charging contrary to the Constitution, as follows: 'If Dr. Bell's testimony be taken as true on that point, is it a fact that the wound must have been inflicted by some blunt instrument, and not by rocks? Was it the butt of a gun or paddle, or any other blunt instrument, in the hands of Tom Johnson?'

"(18) Because his honor the presiding judge erred in charging and making the impression on the jury that Tom Johnson would be guilty of murder if he inflicted the blow on Robert Parks after death, by the following charge: 'Was that wound inflicted before or after death? Of course, if you come to the conclusion that it was a blow dealt by Tom Johnson with malice aforethought, you will not inquire whether it was before or after, if that blow was dealt by Tom Johnson.'

"(19) Because his honor erred in indicating to the jury what weight should be given to the evidence of the respective doctors that testified in the case, and stating to the jury that they might or might not consider the expert testimony, as follows: 'Now, I charge you that all the evidence given by all the witnesses who testified to what relates to the case—the facts in the case—is binding upon you, to be considered by you—you are to weigh it; but as to the expert testimony given by Drs. Hill and Townes, and some given by Dr. Bell, when purely upon hypothetical questions, and not upon the facts of this case, you may, or not, consider, just as you feel the need of it.'

"(20) Because his honor erred in expressing to the jury his opinion of the nature of the evidence rendered, as follows: 'A great deal of the testimony of Dr. Bell was not the testimony of an expert, but that of an eyewitness.'

"(21) Because his honor erred in commenting upon the facts and misstating them to the jury, contrary to article 4, § 28, of the Constitution of the state, by charging the jury as follows: 'The state says that, when Bob Parks got in that bateau with Tom Johnson, he had a good silver watch, and when his body was found the watch was gone, and that only the broken chain was



hanging there.' No witness swore that Robert Parks had a watch when he got into the bateau.

"(22) Because his honor erred in commenting upon the facts to the jury, contrary to the Constitution, by charging: 'If it be true that Tom Johnson called to Hitt, why did he call? Did he call to Hitt for help to help to save the drowning man, or did he call after the man was drowned? If he waited until after the man was drowned before he called out, you will ask why did he wait—was it because he was confused, excited, or was it because he was guilty of the death? If he called to Hitt after he was drowned, you will ask, is that the conduct of an innocent man, or is it the conduct of a guilty man—how is it to be explained?'"

"(23) Because his honor erred in commenting on the facts, contrary to the Constitution, by charging the jury: 'You are to say whether it indicates innocence, or whether it was part of the plan of Tom Johnson to conceal his crime.'"

"(24) Because his honor erred in impressing on the jury his conclusions upon the evidence by charging, 'There is no evidence whatsoever as to any one having seen him strike rocks.'"

"(25) Because his honor erred in misstating the evidence to the jury by charging, 'You are to consider whether it is a fact, or not, that he went several hundred yards upstream through rapid water with the bateau; there being no evidence that he did.'"

J. Wm. Thurmond and Croft & Tillman, for appellant. Asst. Atty. Gen. Gunter, for the State.

WOODS, J. Tom Johnson was convicted of the murder of Robert Parks at the November term, 1894, of the court of general sessions for Edgefield county. Pending his appeal to this court he escaped, and the appeal was suspended until his recent capture. From the record it appears that the dead body of Robert Parks was found in the Savannah river, with marks of violence on the face. Parks was last seen with the defendant going to the river to cross in a bateau, and the state endeavored to prove by circumstantial evidence that the defendant inflicted the violence which resulted in his death. The defendant testified that Parks accidentally fell from the bateau and was drowned, and offered evidence for the purpose of showing the wound was made by the rapid current of the river casting the body violently against a rock. This statement of the issue is necessary to an understanding of the question involved in the appeal. The trial in the court of general sessions proceeded to its end without objection to the jury, but after a verdict of conviction the defendant moved for a new trial on the following grounds: "First, that the sheriff was, contrary to law, allowed to draw the names of jurors from

the jury box; second, that the jury commissioners, contrary to law, passed upon the competency of the jurors as drawn, and illegally destroyed the ballots containing the names of those jurors by them deemed incompetent; third, that it appears from the evidence that the offense, if committed at all, was beyond the jurisdiction of this state."

The motion was refused, and appellant, in this court, insists it should have been granted on the first and second grounds. The act of 1871 (Rev. St. 1893, § 2407) requires objections of this kind to be made before the verdict, unless the party making them was injured by the irregularity. There was no effort in this case to prove injury resulting from the irregularity, nor was there evidence of effort to ascertain before trial whether the jury had been legally drawn. The statute proceeds on the principle that a party shall not be allowed to go to trial, and take for himself the possibilities of a favorable result, and, in case of disappointment, have the verdict set aside upon a bare technical irregularity. *State v. Robertson*, 54 S. C. 153, 31 S. E. 868. The first exception is overruled.

The question asked by the solicitor of the witness Hitt as to whether he had seen much of defendant prior to September, 1894, was merely preliminary to inquiry as to what witness had seen of him in connection with the death of the deceased, and was clearly competent. The witness Blackwell had testified to the presence and interest of the white people at the inquest, and defendant's counsel objected to the question, "The day when the body was found, any black people there?" While reference to distinction of color in courts of justice may well be avoided, we do not see how the answer to this question could possibly have prejudiced the defendant.

The solicitor asked the question of the witness Harmon, who was sworn in reply: "Have you, in your personal experience, ever witnessed the floating of any person or any bale of cotton down the main sluice of that river; and, if so, did it follow the sluice, or was it blown off the Georgia side; and, if you witnessed such an occurrence, was the wind blowing at the time, or not?" The appellant insists the question should have been ruled out because (1) it was leading; (2) the witness was examined as a water expert, and question should have been put hypothetically; (3) it was irrelevant; (4) it was not in reply. The question was not suggestive of the reply, but left it to the witness to state his actual observation of the effect of the current and wind on a floating object at the place where the death occurred. It was manifestly relevant, because the action of the current of the river at this point was one of the most important inquiries in the case. It was competent, because the witness was stating facts he had observed in the action of the water. *Harmon v. R. Co.*, 32 S. C. 129, 10 S. E. 877, 17 Am. St. Rep. 843. In general, the admis-

sion of cumulative evidence in reply is within the discretion of the circuit judge. *State v. Sims*, 16 S. C. 495; *Caldwell v. Wilson*, 2 Spear, 75.

Dr. Bell, who made the examination of the wounds of deceased after death, testified that they could not have been made by the face striking against rocks in the water after death, and that, if the water was 10 to 15 feet deep, it was not reasonable to suppose they could have been made by deceased falling or being thrown from the boat and striking the rocks. All this, it will be observed, was based on his examination of the wound, and his knowledge of the action of water, and it was clearly competent evidence. *State v. Merriman*, 34 S. C. 38, 12 S. E. 619. Besides, no objection was made to its admission. The 2d, 3d, 4th, 5th, 6th, and 7th exceptions, relating to the admission of testimony, are therefore overruled.

The appellant, in his ninth exception, assigns error to the circuit judge in saying to the jury, "Then, gentlemen, the question for you in this case, at the threshold of your examination, is, was Robert Parks, the deceased, murdered, or did he come to his death by drowning, or some other accident?" Thus, as appellant insists, taking from the jury the consideration of manslaughter. At the beginning of the charge, manslaughter had been merely spoken of and defined in general terms. The counsel for the defendant agreed, in response to an inquiry from the presiding judge, that further discussion of manslaughter and self-defense was unnecessary. This left the presiding judge under the inference that counsel had agreed there was no evidence upon any issue except murder and accidental death. If there was any error in this regard, however, or in the definition of manslaughter as "killing in sudden heat and passion, upon sufficient legal provocation, and without malice," it was corrected when the following instruction was given to the jury on the subject, which it requires no argument to show was very favorable to defendant: "Mr. Foreman, something has been said about manslaughter. If you come to the conclusion that Bob Parks came to his death at the hands of Tom Johnson, the deed having been done with a murderous intent, with malice aforethought, but in sudden heat and passion, upon sufficient legal provocation, then, of course, if you take that view of the testimony, you will find him guilty of manslaughter." The eighth and ninth exceptions cannot be sustained.

The tenth exception must fail, because the defendant himself had testified to the death of Robert Parks, and that his dead body had been in the river. There was therefore no issue as to these matters, and the circuit judge had a right to make this statement as one upon which the witnesses agreed.

We do not think the portions of the charge referred to in the 11th, 12th, 13th, 16th, 17th, 20th, 21st, 22d, 23d, and 24th exceptions were in violation of the provision of the Con-

stitution of 1868 forbidding the circuit judge to charge the jury in respect to matters of fact, as that provision has been construed by this court. The presiding judge did make a very lucid statement of the issues presented, and of the evidence upon which the state and the defendant relied to support their respective positions. But it is well established by authority that this is not a violation of the constitutional provisions. Among the many cases on the subject, we refer to *State v. White*, 15 S. C. 392, *State v. Glover*, 27 S. C. 607, 4 S. E. 564, and *State v. Atkinson*, 38 S. C. 101, 11 S. E. 693, as laying down the rule under which this case falls. In the case last cited, the evidence was collated and the issues stated more distinctly than in this case.

The charge on circumstantial evidence was a charge on the law of the case. It was nothing more than an instruction that circumstantial evidence was to be weighed as other evidence, and acted on when it produced conviction, and that to refuse to act upon it when it did produce conviction would be unreasonable. The jury was expressly told that circumstantial evidence, to warrant conviction, must be so strong as to exclude every other conclusion than the guilt of the accused. The fourteenth and fifteenth exceptions are overruled.

In the eighteenth exception, appellant's counsel submits that the court should interpret a portion of the charge as an instruction that, if the blow was inflicted on the body of Parks by defendant after death, it would be murder. Since stress is laid on this point, we quote the portion of the charge referred to: "If Dr. Bell's testimony be taken as true on that point, it is a fact that the wound must have been inflicted by some blunt instrument, and not by rocks. Was it the butt of a gun or paddle, or any other blunt instrument, in the hands of Tom Johnson. Was that wound inflicted before or after death? Of course, if you come to the conclusion that it was a blow dealt by Tom Johnson with malice aforethought, you will not inquire whether it was dealt before or after, if that blow was dealt by Tom Johnson. If you are satisfied that such was the case, by the evidence before you, even though it may not have killed him at the time, but stunned him, rendering him unable, when thrown in the water, to successfully struggle for his life, being unconscious, then you will have to find him guilty of murder." Inaccuracies of language will occur, especially in oral charges, in spite of the utmost care; but it is manifest that the jury, as reasonable men, could not have received from this language the impression that it would be murder to strike a dead body.

The twenty-fifth exception cannot be sustained. There was evidence from the witness Hitt that when he went to get his boat from deceased, who had borrowed it, he walked some distance up the river before he

discovered defendant on the other side with the boat. The state took the position this evidence tended to show the defendant was not so maimed—as the defense insisted he was—that he would not probably be able to strike his companion in the boat a fatal or stunning blow. The presiding judge properly submitted this as an inquiry for the jury.

The nineteenth exception relates to the charge of the circuit judge on the consideration to be given by the jury to expert testimony. On this subject the presiding judge said: "In addition to circumstantial evidence, you have a good deal of expert testimony; that is to say, testimony by witnesses not as to facts in the case, but as to scientific theories and facts. Now, I charge you that all the evidence given by all the witnesses who testified to what relates to the case—the facts in the case—is binding upon you, to be considered by you; you are to weigh it; but as to the expert testimony given by Drs. Hill and Townes, and some given by Dr. Bell, when purely upon hypothetical questions, and not upon the facts of this case, you may, or not, consider, just as you feel the need of it. Expert witnesses are allowed to be examined, not on the facts of the case, to throw light on the facts of the case, if the jury desire light thrown on the facts. If you have any difficulty as to the nature of the wound, whether it was a murderous blow or accidental bruise, then you may or may not call to your recollection what the doctors stated about such wounds—not about that wound, but about such wounds. A great deal of the testimony of Dr. Bell was not the testimony of an expert, but that of an eyewitness, having seen the wound and examined it. So much of his testimony as is on the facts of the case, you must consider. I hope you understand, Mr. Foreman and gentlemen, what I mean. Purely expert, experimental, technical, theoretical testimony, may or may not be considered by you, just as you feel or do not feel the need of it." This clearly meant that the jury was at liberty to come to a conclusion as to the guilt or innocence of the accused, and find a verdict, without giving any consideration to the expert testimony. The record shows the defense relied to a great extent on the expert testimony of Dr. Hill to support the statement of defendant that deceased was drowned. It was therefore of vital interest to him that the force of this evidence should not be impaired. He was entitled to have it considered by the jury just as other evidence. As the charge warranted the jury in finding a verdict on the direct evidence, without any consideration to the expert evidence, it was clearly erroneous. After expert testimony is admitted by the court, it is to be considered by the jury just as other evidence, and given such weight as, in the opinion of the jury, it should receive. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Ry. Co. v. Whitehead*, 71 Miss.

451, 15 South. 890; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; *R. Co. v. Thul*, 82 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484.

The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered.

(65 S. C. 558)

#### SCARBOROUGH v. BASKIN et al.

(Supreme Court of South Carolina. April 7, 1903.)

#### WILLS—COMPETENCY OF TESTATOR—EVIDENCE.

1. A witness who has known testator for 30 years, has often talked with him, has done business with him, and has been at his house frequently, can testify as to his mental capacity.

2. Evidence that a testator rambled in his talk, and that he often went to sleep in the rain beside a stump, went fishing and hunting without any results, could not at all times count his money correctly, whipped his son in bed, and thought his wife was crazy, is insufficient to show testamentary incapacity.

3. Where a contestant seeks to set aside a will, he must show that the ill-feeling which he claims was the basis of his exclusion from any benefit under the will was groundless, so far as testator was concerned.

Appeal from Common Pleas Circuit Court of Sumter County; Dantzier, Judge.

Proceedings by Orlando C. Scarborough against Fannie A. Baskin and others to prove a will. From the decree, defendants appeal. Affirmed.

A. B. Stuckey, Cooper & Fraser, and B. Frank Kelley, for appellants. Purdy & Reynolds and Haynsworth & Haynsworth, for respondent.

POPE, C. J. The contest here is over the testamentary capacity of Thomas Baskin, deceased. Testator's will was executed 20th February, 1899. His death occurred in July, 1900. By the terms of the will, the testator gave his property to Orlando C. Scarborough and Dr. R. E. Dennis, "in trust to collect and hold the rents, income, issues and profits of the same annually and after paying the taxes thereon and any necessary repairs thereto, then to pay over, annually unto my wife, Fannie S. Baskin, one-half of the net residue thereof, for and during her natural life or widowhood and no longer, and that they then do apply the other half thereof to the education, maintenance and support of my son, John S. B. Baskin. Second. Immediately upon the death or remarriage of my said wife, I give, devise and bequeath my entire estate to my said son, John S. B. Baskin, for and during the term of his natural life and no longer, and upon his death leaving issue, then I give and devise the same to such issue in the proportions they would take under the statutes of said state for the distribution of intestates' estates. But in the event that my said son should die leaving no issue alive,

¶ 1 See Evidence, vol. 20, Cent. Dig. § 2128.

then I direct that my said estate be equally divided amongst the children of my friends, Dr. R. E. Dennis and O. C. Scarborough, *per stirpes* and not *per capita*." The contest over the testamentary capacity of Thomas B. Baskin, deceased, came on to be heard before Thomas V. Walsh, Esq., as probate judge of Sumter county. The grandchildren of said Thomas Baskin, deceased, were the only contestants. Much testimony was taken by each side to the controversy. The judge of probate by his decree sustained the will. An appeal was taken to the circuit court, which came on to be heard by his honor Charles G. Dantzler, as presiding judge. He also sustained the will. His decree was an able one. Its text was as follows:

"This case came before me, during the session of the court of common pleas for Sumter county, on appeal from the decree of the probate judge of that county, pronouncing in favor of the validity of the will of Thomas Baskin, deceased. All issues were submitted to me by counsel in open court, a trial of questions of fact by a jury having been waived. The following are the grounds of appeal: '(1) Because his honor the judge of probate erred in allowing the witnesses W. K. Crosswell, L. M. Crosswell, Joseph E. Wilson, and J. F. Woodward, over respondent's objection, to give their opinion as to the mental capacity of the said Thomas Baskin, without showing that they were experts, or requiring them to state the specific facts upon which said opinions were based. (2) Because his honor the judge of probate erred in holding, that the said proposed will was valid, and that at the time of making the same the said Thomas Baskin was of sound and disposing mind, memory, and understanding, whereas it is respectfully submitted that the preponderance of the evidence showed that the said Thomas Baskin had been, and was at the time of the making of said will, of unsound mind, and that said will was the creation of the disorder with which his mind was affected.'

"I heard counsel as fully as they desired to be heard, both orally and on written arguments submitted to me. Their arguments were able and well presented. Counsel for appellants, in their arguments before me, stated that they did not contend that Thomas Baskin, the alleged testator, was insane generally, but argued that he was partially insane; that such partial insanity was exhibited by his dislike to his grandchildren, the appellants herein; that such dislike was an insane delusion, and that, laboring under such insane delusion, he disinherited them; that the will was the direct offspring of such insane delusion, and should therefore be declared void. Counsel for the will contended that, 'at most, nothing beyond some eccentricities have been shown, and that in no case have these eccentricities amounted to a deprivation of the reason or understanding of the testator': that in the case at bar the contestants have not only

conceded that there was no general insanity, but have failed to show want of capacity of the said Thomas Baskin at the time of the execution of the will. And it is urged, therefore, that the decree of the judge of probate, pronouncing in favor of the validity of the will, should be affirmed. In support of their contention, contestants rely upon the will itself, and upon the testimony adduced by them of the following named witnesses: Messrs. Hartwell Crosswell, T. M. Muldrow, E. C. McCoy, J. O. Durant, and Mrs. F. S. Baskin. The portion of that testimony relating to the conduct and declarations of the testator, from which, in connection with the will, contestants conclude that he was incapable of disposing of his property, is, substantially and briefly, as follows: That in the latter years of his life Thomas Baskin was a very peculiar man—so peculiar that, in the opinion of some of the witnesses for contestants, he was crazy, and incapable of disposing of his property. That his mind 'would come and go.' That sometimes he would speak kindly of his grandchildren, the appellants herein, and that at other times, when in his spells or tantrums, he would not. Instances of his peculiarities are stated to have been: That, while walking along and in conversation, he 'would jump up and start and bat his fists' without any apparent reason, and that he 'would be walking slowly, and would step up for about eight or ten steps and bat his fists, as if going to come in contact with something.' That while in conversation he would go to sleep by a stump, and 'was a great man to sit down by a stump and go to sleep,' and would sleep in the rain. That he would put the collar on his horse backwards, and insist that it was all right, and would try to put the crupper of the harness over the horse's head. That he would ring his family bell at night. That before the death of his second wife, during her confinement in the asylum in Columbia, S. C. (one of the witnesses, Mr. Hartwell Crosswell, stated that it was after her death), he went to Columbia, and returned with 'a watch and a plain gold ring,' and asked if they would not 'get him another wife.' That he would sit down on his piazza 'and commence talking, \* \* \* and in a few minutes he would jump up and walk up and down the floor, talking to himself,' and would talk to himself when driving in 'the buggy. That, when told something, in a few minutes he would ask \* \* \* over again.' That he would change unnaturally from one subject to another in conversation. That he would 'start talking, and start cursing and abusing the negroes, or say something about his wife, and then he would say something about going fishing, and, when he would get in that mind, nothing would stop him; he would go.' That he would change his purpose suddenly. That he would charge his wife (now his widow) with being crazy, and would send for his neighbors to come over because he considered her crazy. That he expressed himself at times

as being very fond of his grandchildren, and at other times he said he disliked them, 'Ed. especially.' That he would be found sometimes 'in a glee' and sometimes 'in a stupor or study, as if he was worried,' and that there would be a 'difference in him at times.' That during his latter days he was not the same kind of a man as he had been in previous years and did not behave the same way. That in 1898, up to February, 1899, he would be 'always wanting to go talk politics or fishing, and all of them at the same time.' That not many people would go with him fishing, 'he was so pickayunish.' That on one occasion he was seen to sell a negro boy a piece of meat at one-half of its weight, and when told of his mistake he said: 'Well, let him take it. I want to fatten him.' That he could not count money correctly at times. That soon after his third marriage he expressed a desire 'o his wife to have a chicken dinner, and told her that there would be about 25 or 30 people to dine, and that after the dinner had been prepared for that number it was ascertained that 75 had been invited. That when taking a drive with his wife, on one occasion, she saw him 'roll his eyes back,' and that she, being worried about his conduct, 'cried a good deal,' and that when he found her crying he scolded her and said that she was crazy. That one night he became raving about the absence of his son John, and 'got his gun and said he was going to kill him, and that after John returned' he told John not to go near Mrs. Baskin; that she was crazy. That he would speak of his wife as being crazy, and told some negroes, on one occasion: 'If she runs this way, catch her. She is crazy.' That 'he would take a notion' that his wife was crazy and would follow her and say, 'Oh, my poor crazy wife!' That on another occasion he asked his wife to make him a promise, and, upon being assured that she would promise anything reasonable, said to her: 'Stay in the house, and don't walk around or go anywhere, or people will find out that you are crazy; and if you go out walking you might die, and some one might think I poisoned you.' That his son John, on leaving home in a buggy with Mrs. Baskin for Mr. McCoy's on one occasion, was told by Mr. Baskin: 'Don't let your ma get out of the buggy. She might go away off to Ingram's, and not come back.' That on another occasion he sent John to look 'in the well' for Mrs. Baskin. That one night he waked up between 11 and 12 o'clock, and said to his wife: 'Ma, I am going to whip John; \* \* \* and he took a lamp and went down the back steps, and he went out and cut two or three switches and came back, and he looked strange,' and said: 'I am going to whip him, and, if you say any more, I will give him more.' He tied John with a twine string while he was asleep and commenced whipping him, and he said to Mrs. Baskin: 'When I whip him as much as you think he needs, you come and beg for him.' He did not whip him severely, and said he whipped

him because 'he had nearly drowned two of his mules.' That he was kind to his wife except when he had those spells. That at times he was very fond of his grandchildren, and then again he was not. That 'he would roll up his pants and put them under his pillow, with ten or fifteen cents in his pockets, and he would say some one would rob him; and sometimes there would be fifty dollars, or a check for that amount, in his pockets, and he would hang them in the piazza.' That he would 'take a notion' that his wife was crazy, and would ring the bell, and the hands would come up, and he would tell them that his wife was crazy. He would say: 'She has got one of her spells;' and then he would say: 'You are crazy. When you go anywhere, don't talk, for they will find out you are crazy.' That he would lie with a lamp on his chest, and read that way. Such other of the testimony of the contestants as I may consider relevant and material to the issue will be hereinafter referred to and commented upon.

"The witnesses adduced on behalf of the executor, Mr. Orlando C. Scarborough, and for the will, were Maj. Marion Moise, Col. R. D. Lee, Mr. I. C. Strauss (the witnesses to the execution of the will), Dr. B. E. Dennis, and Messrs. W. K. Crosswell, L. M. Crosswell, Scarborough Barnes, Samuel Bradley, Joseph E. Wilson, T. E. Davis, J. T. Muldrow, and J. F. Woodward.

"One of the grounds of appeal of the contestants is that 'the judge of probate erred in allowing the witnesses W. K. Crosswell, L. M. Crosswell, Joseph E. Wilson, and J. F. Woodward, over respondent's objection, to give their opinion as to the mental capacity of the said Thomas Baskin, without showing that they were experts, or requiring them to state the specified facts upon which said opinions were based.' I cannot agree with counsel. I have examined the testimony of those witnesses carefully, and it seems to me they did base their opinions upon conversations and transactions had with Mr. Baskin; that they testified as to his mental capacity as it appeared to them from those conversations and transactions. The testimony of Maj. Marion Moise, one of the witnesses to the execution of the will, was to the effect that, at the time of the execution of the will, Mr. Thomas Baskin was apparently perfectly sound, physically and mentally, and that there was nothing in his conduct on that occasion to indicate that he had not sufficient mental capacity to make a will; that, for his age, Mr. Baskin was remarkably strong, physically and mentally; that, on the morning the will was made, Mr. Baskin came into his office and discussed the subject at some length; that he had seen Mr. Baskin once or twice a year for a number of years, but not oftener than a few times each year; that he would have discussions with him on different subjects. Col. R. D. Lee, another witness to the execution of the will, testified, substantially: That he had known Mr.

Thomas Baskin well. That he had known him a great many years. That the will was prepared by the directions of Mr. Baskin, 'in full.' 'That the matter was discussed for quite a long time,' and that Mr. Baskin gave him full instructions as to what disposition he desired made of his property and estate. That Mr. Baskin's instructions were 'full and clear,' and that he was 'absolutely competent in every respect.' That after the execution of the will, Mr. Baskin said, 'What will your fee be?' to which he replied, 'About \$15 for a simple will like that.' Then Mr. Baskin said, 'The one I had drawn here before, I only paid \$10 for,' to which Col. Lee replied, 'Very well; whatever is satisfactory to you.' That Mr. Baskin then said, 'I haven't the money with me to-day,' and he then told Mr. Baskin, 'It was a matter of no consequence'; that he 'would just charge him on our ledger accounts.' Mr. Baskin then said, 'No; he preferred to give \* \* \* a duebill,' whereupon a duebill was prepared, which was signed by Mr. Baskin, and at maturity paid. That he regarded Mr. Baskin, on the occasion of the execution of the will, and at all times, as a man of extraordinary mental and physical vigor. That he had never heard of any mental incapacity of Mr. Baskin, except in connection with this case, since this thing started. Mr. I. C. Strauss, the remaining witness to the execution of the will, said, among other things, in substance, that on the day of the execution of the will he regarded Mr. Baskin as sound as he was; that he knew him 'fairly well.' The testimony of the other witnesses will be hereinafter referred to.

"Considering the testimony of witnesses for appellants, Mr. Thomas Baskin was undoubtedly a very peculiar man; but there was nothing in his conduct, considering his age, to indicate that he had wholly lost his capacity to understand his business affairs. Certainly at times he would talk intelligently and act rationally. As most of the witnesses for the appellants say, his mind would come and go. I am satisfied, from testimony of witnesses for contestants, that Mr. Baskin was at times perfectly rational, and fully capable, mentally, of understanding his business affairs. His sudden change of purpose; his sudden 'jumping' from one subject to another in conversation; his going to sleep in the rain by a stump; his failure to adjust the harness on his horse properly; his fishing and hunting proclivities, without accomplishing results; his failure to count money at times, and weigh meat correctly; his putting a lamp on his chest, and reading by the light of it; his whipping his son John at night; his ringing the bell at night for assistance, upon the supposition that his wife was crazy; his persistent declarations to her and to others that she was crazy; and the other instances of his peculiarities, as testified to by witnesses for contestants—were not such evidences of weakness of intellect, when con-

sidered in connection with his rational intervals as testified to by witnesses for contestants; as would, in my opinion, show that he had no such adequate conception of his business interests as would deprive him of knowing of what his property consisted, and of intelligently directing its disposition. Mrs. Baskin herself stated that Mr. Baskin told her he would put her in the asylum 'if he had the money, but he would have to mortgage his place to get the money,' and that 'for a great part of the time' he displayed 'as much sense as anybody.' He was an old man, with very few, if any, of his contemporaries left, and deprived, it seems, of the sympathy and consolation of many people when the infirmities of old age were upon him; but the infirmities of old age, and the peculiarities incident to such a period of life, do not indicate such impairment of the mind as would prevent the exercise of a rational purpose. Mrs. Baskin, in her testimony, charged, substantially, that Mr. Baskin, in the making of his will, was subjected to the influence of Dr. Dennis, unduly exerted. I find and hold that from the testimony that charge is not sustained, and that Mr. Baskin made his will without the exercise of any undue influence. The testimony of Mrs. Baskin, it seems, is a revelation of domestic infelicity resulting, for the most part, from intermarriage of a man of seventy-eight years of age with a woman of the age of thirty-five after an engagement of three or four days. I shall not refer further to her testimony, except to such portion of it as relates to the attitude of Thomas Baskin to his grandchildren, the appellants herein, because further reference is not necessary to a determination of the issues involved.

"What was that attitude? Certain witnesses stated that sometimes he spoke kindly of them, and that, at other times, when in one of his 'tantrums,' 'spells,' or 'crazy whim,' as denominated in the testimony of contestants, he would speak unkindly of them—of 'Ed. especially.' Mr. Baskin evidently considered that he had sufficient cause to warrant him in regarding appellants, his grandchildren, with disfavor. Was that cause real or imaginary? In the cross-examination of Mrs. Baskin, she was asked: 'Is it not true that he took a violent dislike to Mrs. Sallie Baskin, and towards her family?' She answered: 'That was before I knew him. I have heard him tell about the quarrel fifty times.' And the further question was propounded to her: 'Did he not tell you he did not intend to leave any of his property to members of that family?' And she replied, 'Yes, sir.' The only construction of which the above-quoted language is susceptible is this: First. That Mr. Baskin entertained a violent dislike to Mrs. Sallie Baskin and towards her family before his last marriage; that there had been a quarrel. Second. That there had been no real reconciliation between the families, because Mr. Baskin told Mrs.

Baskin after their marriage 'about a quarrel fifty times,' and declared that 'he did not intend to leave any of his property to that family.' On the same subject, Mr. T. M. Muldrow's testimony was to the same effect. He was asked: 'Any unusual amount of trouble with anybody else?' He answered: 'About his grandchildren. He fell out with them.' He was asked further: 'He didn't have any trouble in his immediate family?' In reply he said, 'Yes, sir; he and his wife didn't get on together. He didn't like Ed.; he got on well with all the rest; he always spoke well of Willie. He said he intended to make Willie his executor of his estate, but, after the trouble he had with his family, he wouldn't do it.' And when asked, 'What trouble was it?' he said, 'Just a falling out with Mrs. Sallie Baskin's family.' Mr. E. C. McCoy testified, among other things, that 'Mr. Baskin had some falling out with Mrs. Sallie Baskin, and became dissatisfied with his place, and he wanted to sell out and leave that country.' \* \* \* From this statement of Mr. E. C. McCoy, it is evident that Mr. Baskin became dissatisfied with his place, and he wanted to sell out and leave that country because he 'had some falling out with Mrs. Sallie Baskin.' Here is evidence of the settled purpose on the part of Mr. Baskin—a purpose cherished, doubtless, since the 'quarrel'—to leave none of his property to appellants; that he became aggrieved with Mrs. Sallie Baskin for some cause, and his dislike was engendered to her family, the appellants, which was solemnly expressed by their disinheritance. There does not seem to be any room for doubt as to the reality of the quarrel, and the dislike to his grandchildren consequent upon it. There was no insane delusion as to that. There had been a quarrel, and since that time Mr. Baskin entertained and expressed a dislike to his grandchildren. Who was responsible for this quarrel? Who was right, and who was wrong? Was it occasioned by delusion on the part of Mr. Baskin? Did Mrs. Baskin give him offense, or did he imagine that he had been wronged? Or did he offend Mrs. Sallie Baskin under the spell of a morbid delusion? These questions must remain unanswered; so far as the testimony is concerned. There is no testimony showing or tending to show that the cause of the quarrel was an insane delusion on the part of Mr. Baskin. And there has not been shown any want of capacity on the part of Thomas Baskin at the time of the execution of his will by reason of any insane delusion. It was incumbent on contestants to show such want of capacity. *Black v. Ellis*, 3 Hill, 68. Interpreting the testimony of witnesses for contestants in the light of the witnesses for the execution of the will, I could reach no other conclusion than that Thomas Baskin, the testator, was capable of executing that solemn instrument, and that he did so with a full knowledge of its contents, which embodied a previous ra-

tional purpose to dispose of his property as therein and thereby made. But when the testimony of Dr. R. E. Dennis, W. K. Crosswell, L. M. Crosswell, Samuel Bradley, and J. F. Woodward, witnesses for the will, each of whom had known Thomas Baskin for thirty years, and the testimony of Jos. E. Wilson, who had known him for twenty-five years, that of L. L. Baker, and other witnesses for respondent, is considered, any doubt which might have been entertained in relation to the mental capacity of Thomas Baskin disappears. From a careful consideration of the testimony, and the law applicable thereto, I am convinced that the judge of probate was right in pronouncing in favor of the will in question, and that his decree should be affirmed accordingly. *Lee's Heirs v. Lee's Ex'rs*, 4 McCord, 183, 17 Am. Dec. 722.

"It is therefore ordered and adjudged, that the decree of the said judge of probate, pronouncing in favor of the will of Thomas Baskin, deceased, be, and hereby is, affirmed, and that the appeal herein be, and hereby is, dismissed."

To this decree the grandchildren of the said Thomas Baskin, deceased, filed the following grounds of appeal:

"(1) Because his honor erred in not overruling the judge of probate in allowing the witness W. K. Crosswell, over respondents' objection, to give his opinion as to the mental capacity of the said Thomas Baskin, without showing that he was an expert, or requiring him to state facts upon which said opinion was based.

"(2) Because his honor erred in not overruling the judge of probate in allowing the witness L. M. Crosswell, over respondents' objection, to give his opinion as to the mental capacity of the said Thomas Baskin, without showing that he was an expert, or requiring him to state facts upon which said opinion was based.

"(3) Because his honor erred in not overruling the judge of probate in allowing the witness Joseph E. Wilson, over respondents' objection, to give his opinion as to the mental capacity of the said Thomas Baskin, without showing that he was an expert, or requiring him to state facts upon which said opinion was based.

"(4) Because his honor erred in not overruling the judge of probate in allowing the witness J. F. Woodward, over respondents' objection, to give his opinion as to the mental capacity of the said Thomas Baskin, without showing that he was an expert, or requiring him to state the facts upon which said opinion was based.

"(5) Because his honor erred in not overruling the judge of probate in allowing the witnesses W. K. Crosswell, L. M. Crosswell, Joseph E. Wilson, and J. F. Woodward, over respondents' objection, to give their opinion as to the mental capacity of the said Thomas Baskin, without showing that they were ex-

perts, or requiring them to state the specific facts upon which said opinions were based.

"(6) Because his honor erred in overruling the second exception to the decree of the judge of probate, which was as follows: 'Because his honor the judge of probate erred in holding that the said proposed will was valid, and that at the time of making the same the said Thomas Baskin was of sound and disposing mind, memory, and understanding, whereas it is respectfully submitted that the preponderance of the evidence showed that the said Thomas Baskin had been, and was at the time of the making of said will, of unsound mind, and that said will was the creation of the disorder with which his mind was affected'—in that the preponderance of the evidence showed that the said Thomas Baskin was at times of unsound mind, that the subject upon which he was of unsound mind was his family relations, and that his will, which disinherited his grandchildren in favor of strangers, was the creation of the disorders with which his mind was affected.

"(7) Because his honor erred in not holding that the preponderance of the evidence was in favor of the contestants of said will, in that: (a) Because the witnesses for proponent showed but occasional and imperfect opportunities to observe the manifestations of Mr. Baskin's insanity, while the witnesses for contestants were his near neighbors and intimate acquaintances, and a member of his immediate family. (b) Because the witnesses for the proponent testified only to the general condition of Mr. Baskin's mind, which was not attacked, and that without any statement of specific facts from which the court can draw its own conclusions, while the witnesses for the contestants testified as to the specific condition (the point in issue), and gave the facts upon which their opinions were based, and said facts fully sustain their conclusions of insanity.

"(8) Because his honor erred in holding: 'There is no testimony showing or tending to show that the cause of the quarrel was an insane delusion on the part of Mr. Baskin, and there has not been shown any want of capacity on the part of Thomas Baskin at the time of the execution of his will, by reason of any insane delusion. It was incumbent on contestants to show such want of capacity'—in that: (a) The testimony showed that Mr. Baskin had two sets of grandchildren, to wit, the children of Mrs. Sallie Baskin and of Mrs. De Lorme; that there never had been any quarrel with any except Mrs. Sallie Baskin and Ed. Baskin, and that had been amicably settled some time before the execution of the will; and that after the 'quarrel' he had spoken kindly of them, except when in his spells. (b) The testimony showed that Mr. Baskin was of unsound mind at times before the execution of his will, and it was incumbent on the proponent to show a lucid interval at the time of the execution of the will. (c) It was incumbent

on proponent to show that the cause of the quarrel was founded in reason."

Although there are eight exceptions, yet, as the appellants well state in their argument, these present really three questions: "(1) Can a nonexpert witness state an opinion without stating the facts upon which it is based? (2) Does not the preponderance of evidence show that Mr. Baskin was of unsound mind at the time of the execution of the will? (3) Upon whom is the burden of proof that ill-feeling between a testator and his heirs is well founded and not an insane delusion?"

1. Appellants are right in the law announced. It is the facts that condemn this exception, for every witness examined spoke from practical knowledge of and acquaintance with the testator. We do not know of any better test than such knowledge which each witness possessed. "Over thirty years I knew him, saw him repeatedly, talked with the testator frequently." Some had business with him. Some visited at his house. The probate judge and the circuit judge committed no error here.

2. We have studied the whole testimony, and feel that the circuit judge was correct in holding that the evidence preponderated on the side of the full testamentary capacity of the testator on the 20th February, 1899, the date of the will.

3. It came out as a fact in the testimony on both sides that there was ill feeling between the testator and his grandchildren and his daughter-in-law. It was incumbent upon the contestants to show this ill feeling was groundless, so far as testator was concerned. We have not elaborated our views on these three points because we were so much pleased with Judge Dantzler's decree that at one time we thought of adopting it as the judgment of this court. All the exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(66 S. C. 6)

# HOLCOMBE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 7, 1903.)

## CARRIERS—INJURY TO PERSON ON PLATFORM —EVIDENCE—QUESTION FOR JURY —DEGREE OF CARE.

1. In an action for injuries received by a trunk thrown against plaintiff while defendant's employes were unloading baggage at the depot, it is a question for the jury whether the railroad company was negligent.

2. It is immaterial whether a person injured by an employé of a railroad company in unloading baggage at a depot was a licensee or a passenger.

3. In an action for injuries received by the negligence of employes of defendant railroad company in unloading baggage at a station, an instruction that, if plaintiff was not in the station within a reasonable time before the departure of the train, then defendant did not owe to her so high a duty if such person is not then in law a prospective passenger, and if



she forsakes the station house, and goes to a part of the depot grounds, where she has no legal right to be, then the railroad company was bound only to do no willful injury to such person, was proper.

Appeal from Common Pleas Circuit Court of Anderson County; Gage, Judge.

Action by Ina Holcombe against the Southern Railway Company. From judgment for plaintiff, defendant appeals, affirmed.

T. P. Cothran, for appellant. Breazeale & Rucker, for respondent.

JONES, J. The plaintiff brought this action for damages for personal injury resulting from alleged negligence of defendant in throwing a trunk against her while its servants were unloading baggage at the Anderson Depot October 19, 1900. This appeal comes from the judgment on verdict in favor of plaintiff for \$600, upon exceptions to the refusal of the motion for nonsuit and the charge to the jury.

The nonsuit was properly refused. There was evidence that plaintiff, with her several small children, went to the station at Anderson to take defendant's 9:45 a. m. train to Pelzer, S. C., as passenger, and on arrival at the station found that such train had gone, whereupon she concluded to remain at the station waiting room for ladies for the purpose of becoming a passenger on defendant's 2:45 p. m. train for Pelzer. After the arrival of defendant's 11:15 a. m. train from Belton, plaintiff, according to her testimony, was just outside the waiting-room door, having gone out to get one of her children, who ran out of the waiting room on the approach of the train. The defendant's baggage car was stopped in front of the waiting-room door, about 16 or 17 feet away; and its servants, while unloading several trunks therefrom, according to plaintiff's statement, threw one of the trunks against her leg, and injured her. If the baggage had been handled with the care due under the circumstances, it is not probable that plaintiff could have been injured by collision with a trunk, when she was standing some 16 feet from the baggage car. It was properly left to the jury to say whether the injury was the result of defendant's negligence. Under this view it was immaterial whether plaintiff was a passenger in contemplation of law, or whether she was there as a licensee by permission of the defendant company.

Defendant's counsel requested the court to charge the jury as follows: "A person coming to a railroad station with the intention of taking defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that such coming is within a reasonable time before the time for the departure of said train." To which the court responded as follows: "The Court: That is correct, and I leave it to the jury to say whether or not the plaintiff in this case came to the station in a reasonable time before her

car left, and, if she did, then, in contemplation of law, she was a passenger, and ought to have the rights of a passenger; but, if she did not come there in a reasonable length of time before the departure of the next train, she is, in contemplation of the law, not a passenger." The court refused to charge defendant's second request, as follows: "If the plaintiff arrived at the depot too late to take the 9:45 a. m. train, and concluded to wait there in order to take the 2:45 p. m. train, she was acting for her own convenience, and cannot be considered as a passenger, with the obligations due to her as such." The court charged defendant's third request, after inserting the words in brackets, as follows: "If the defendant allowed the plaintiff to wait in its waiting room for the next train, due to leave in four or five hours [and if, in the opinion of the jury, that was an unreasonable time], plaintiff became thereby a licensee, not a passenger, and was entitled to only such care as is due a licensee." Upon the foregoing appellant excepts as follows: "Error in holding that it was a question of fact for the jury whether the plaintiff went to the depot a reasonable time before the departure of the train, the plaintiff having testified that she went to the depot about 9:45 a. m., found the train she expected to take gone, and concluded to wait until the next train was due to depart, at 2:45 p. m. As matter of law, the court should have held that the plaintiff was not at the depot within a reasonable time before the departure of her train, and was not, therefore, entitled to the extraordinary care due to a passenger." The question as to whether plaintiff was a passenger at the time of her injury, and as to the degree of care which a railroad company should exercise towards her as such, was a matter of appellant's own choosing. The complaint merely alleged that plaintiff, at the time of her injury, was at defendant's station "for the purpose of becoming a passenger," which implies that she was not then a passenger. The real issue, then, was as to the care which a railroad company owed to one at its station waiting to become a passenger. On this issue the jury, at appellant's request, was very plainly instructed: "If defendant exercised ordinary care in handling baggage, and plaintiff was where she had no right to be, the defendant is not liable for injury received by plaintiff." Under this instruction the verdict shows that the defendant did not exercise ordinary care in handling the baggage, and that plaintiff was where she had a right to be. It was, therefore, wholly immaterial whether plaintiff was at the time of the injury a passenger or a licensee, as the defendant failed to observe ordinary care to prevent injuring her. But, assuming that it was in issue whether plaintiff was a passenger, we think there was no error in the court leaving it to the jury to determine from all the circumstances whether the relation of passenger and carrier existed. In the case of Johns

v. R. R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709, the court held that a railroad company owed the duty of exercising extraordinary care in providing safe approaches to one coming to the depot to become a passenger, whether he had a ticket or not. In that case the court quotes from 2 Am. & Eng. Enc. of Law, 744, as follows: "If a person has the bona fide intention of taking passage by a train, and if he goes to a station at a reasonable time, he is entitled to protection as a passenger, not only from the moment he enters upon the carrier's premises, but also while en route to the station in an omnibus run by the railway to take the passengers to their trains." In the case of Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, the court held: "A party coming to a railroad station with the intention of taking defendant's train is, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train." In the case of Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337, the court holds that the right to enter and remain at a railroad station house "extends only so far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars; and what is a reasonable time must depend upon the circumstances of each particular case." In the case at bar there was nothing to show that plaintiff remaining in the waiting room for passengers for several hours in the daytime was contrary to any rule or regulation of the company. The proper inference, under the circumstances, probably would be that, if there was no regulation fixing proper hours for the use of the waiting room, and plaintiff was permitted to use it for the purpose of taking the next train, her use of it for such purpose was for a reasonable time; but it was not prejudicial to appellant, under its requests to charge, to have the matter submitted to the jury.

Appellant's fifth exception assigns "error in refusing the defendant's fourth request to charge, which was as follows: 'If the defendant provided a reasonably safe waiting room for plaintiff's accommodation during her wait, the defendant would not be liable to plaintiff for injuries received, if she abandoned such accommodation, and went upon the station yard unnecessarily, to gratify her curiosity, when a train which she did not expect to take entered the station in the meantime.' Such request contained a legal proposition applicable to the case." In response to this request to charge, the court instructed the jury as follows: "The Court: I refuse to charge you that in this language, but charge the following: 'If any person be not in the station house within a reasonable time before the train's departure, then the railroad does not owe to such person so high a duty, for the person is not then, in law, a

prospective passenger. If, at the time the person forsake the station house, and goes to a place where he or she has no legal right to be, then the railroad was bound only to do no willful injury to such person.'" We see no error in the instructions of which appellant has any right to complain. The jury, under appellant's sixth request, were explicitly instructed: "If the plaintiff was guilty of the least amount of negligence which contributed as a proximate cause to the injury, she is not entitled to any damage."

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(65 S. C. 544)

#### CHANDLER v. FRANKLIN.

FRANKLIN v. GARDNER et al.

(Supreme Court of South Carolina. April 4, 1903.)

#### VENDOR AND PURCHASER—CONTRACT OF SALE—CONSOLIDATION OF CAUSES.

1. Where a vendee of land paid a part of the purchase money to an agent of the owner, and, taking the receipt therefor, was put in possession by the agent after notice that the owner had sold to another, the agent having no authority to accept the money and to put the vendee in possession, there was no contract of sale.

2. Where the court orders two causes, one to recover possession of a tract of land, and the other to enjoin this and for specific performance of a contract for the sale of land, to be consolidated, and the order is unappealed from, the judge properly tries the issues of law and fact in both cases.

Appeal from Common Pleas Circuit Court of Sumter County; Hudson, Special Judge.

Actions by Thomas Duncan Chandler against Samuel Franklin, and by Samuel Franklin against James E. Gardner and others. From the decree, entered after a consolidation of these actions by order of the trial court, Franklin appeals. Affirmed.

A. B. Stuckey and Cooper & Fraser, for appellant. L. D. Jennings and Purdy & Reynolds, for respondents.

POPE, C. J. The first-named action is the ordinary action to recover possession of a tract of seven acres of land, situate near Sumter, S. C. The second-named action is one in equity, whereby the plaintiff seeks the aid of the court to require the cancellation of a deed made by the defendant Gardner to his codefendant Chandler on the 10th day of November, 1900, for the seven acres of land which it is the object of the first suit to recover, relying upon the said deed made on 10th November, 1900, and then afterwards that the defendant, James W. Gardner, be required to specifically perform the contract for the purchase of the plaintiff, Franklin, of the seven acres of land, which contract was made by Gardner's agent, the defendant Hogan. Amid these distracting claims, Judge Watts passed an order by which the plaintiff in the first suit was en-

joined from proceeding in the first-named action until the determination of the second action, but he provided that the two aforesaid actions should be consolidated, and that it be referred to the master for Sumter county to take the testimony and report the same to this court. From this order no appeal was ever taken. The consolidated actions came on to be tried upon the pleadings and the testimony reported by the said master before Hon. J. H. Hudson, as special judge, who thereafter pronounced the following decree:

"These cases came on for trial before me at the special term of court for Sumter county on the 18th day of December, 1901, and were fully argued before me by A. B. Stuckey, Esq., and Cooper & Fraser, for Samuel Franklin, and L. D. Jennings, Esq., and R. O. Purdy, Esq., for Thomas Duncan Chandler.

"In the first case, Thomas Duncan Chandler commenced his action against Samuel Franklin for the recovery of the possession of the parcel of land in dispute. Pending the hearing of this case, the second case was brought by Samuel Franklin against James E. Gardner, Thomas Duncan Chandler, and Eugene Hogan. The object of the second action was to enforce specific performance as against James E. Gardner and Thomas Duncan Chandler as to the said parcel of land, under an agreement said to have been made with Gardner through his alleged agent, Hogan. Hogan was also made a party defendant, and appeared and filed an answer by himself, but the defendant Gardner has not appeared. His honor, Judge R. O. Watts, enjoined Chandler from proceeding in his first action, and ordered that both cases be consolidated by his order dated April 12th, 1901, and made an order of reference to the master to take the testimony. The cases came on to be heard upon the testimony reported by the master and the pleadings and proceedings in the case, from which I find as matters of fact:

"That while Franklin sets up in his complaint that there was a written contract in his favor for the purchase of the parcel of land referred to, made by him with Gardner through Hogan, no such contract was produced or appears to have been in existence, but that he relies on a receipt taken by him from Hogan, dated November 8d, 1900, and the letters from Gardner to Hogan, dated June 25th, 1900, and October 23d, 1900, respectively, to sustain such allegation. But if these together could be termed a contract, the receipt was not given until after Chandler had completed and closed the trade for the said parcel of land with Gardner by letter or letters.

"I further find that Gardner had made, executed, and delivered his deed to the said parcel of land to Chandler before Franklin took possession of the premises, and I also find that before Franklin took the receipt

from Hogan—which receipt, I find, was the result of his negotiations with Hogan for the purchase of the land—that he, Franklin, had full notice that Chandler had already closed the trade with Gardner for the land.

"I further find that Gardner had no knowledge of any attempted sale to Franklin before the close of the trade with Chandler, and that Chandler had closed the trade with Gardner before he had any knowledge of Franklin's proposed purchase of the premises from Gardner through Hogan.

"I further find that, before the commencement of the action of Franklin against Chandler and others, that title had passed out of Gardner to Chandler, which fact was known to Franklin; and I further find that before Franklin took possession of the premises the deed to Chandler had been made, executed, and delivered by Gardner.

"I therefore conclude, as a matter of law, that Samuel Franklin is not entitled to the specific performance, and it is ordered and adjudged that the complaint against Thomas Duncan Chandler and others be, and the same is hereby, dismissed, with costs.

"The attorneys for Chandler filed a demurrer to the complaint of Franklin, and also moved to dismiss it, upon grounds stated in the demurrer and motion; but I concluded that it was better to hear argument on the whole case, and having done so, and having considered the case, and having decided to dismiss it upon the grounds above set forth, I have deemed it unnecessary to formally pass upon the demurrer and motion to dismiss, as the question raised in these matters largely involved matters affecting the merits of the case.

"This necessarily brings us to consider the first case of Chandler against Franklin, and, from the terms of the order, this comes up to be heard before me, sitting as judge and jury; and from the conclusions already announced it necessarily follows that Chandler is entitled to recover the possession of the premises referred to, and I therefore find and adjudge that he is entitled to judgment accordingly, and leave is hereby given him to enter up same with costs.

"Samuel Franklin, styled as plaintiff in one of the cases above stated, and as defendant in the other, excepts to the decree of his honor, J. H. Hudson, special judge herein, as follows:

"(1) Because his honor erred in not finding, as matter of fact, that Samuel Franklin obtained a valid contract in writing for the purchase of the land in question from James E. Gardner through Eugene Hogan, Gardner's agent, by and through the receipt of Eugene Hogan, as such agent, of date November 3, 1900, and the letters of Gardner to Hogan, of dates June 25, 1900, and October 23, 1900, and that such contract was prior to any contract of purchase of the land by Thomas Duncan Chandler.

"(2) Because his honor erred in finding, as matter of fact, that if the letters by Gardner to Hogan, one of June 25th, 1900, and one of

October 23, 1900, and the receipt of Hogan to Franklin of November 23, 1900, 'could be termed a contract, the receipt was not given until after Chandler had closed a trade with Gardner by letter or letters.' (a) In that the greater weight of the evidence shows that there was no such contract of trade by Chandler with Gardner for the land by letter or letters. (b) In that if, as matter of fact, there had been such contract, same was subsequently annulled by a new contract between Chandler and Gardner, under which Chandler obtained his deed upon new terms and a different consideration, evidenced by the deed itself, and the telegrams which passed between these two persons in evidence herein. (c) In that if, as matter of fact, there had been such contract of purchase as thus stated in the decree, his honor erred in not further finding, as matter of fact, that Franklin entered into his contract of purchase without notice of any purchase by Chandler, and his honor erred in not finding and adjudging, as matter of law thereon, that, Gardner having made it possible for Hogan to sell as his agent and bind him, and Hogan having made a sale, received part of the purchase money, and placed the purchaser in possession without notice of such alleged contract of sale to Chandler, that such contract is entitled to be enforced in preference to establishing the alleged contract of sale made by Gardner, as principal, to Chandler, where no purchase money was paid and no possession given. (d) And his honor further erred in establishing such alleged contract of sale to Chandler by letter or letters in this case, while the said Chandler, by his pleadings in the cause, relied only upon his deed from Gardner, set up his complaint in the one case, and his answer in the other case, there having been no amendment of the pleadings, and no attempt to do so. (e) His honor should have held, and erred in not holding, that said Chandler, having by his pleadings, both in his complaint in one case and his answer in the other, stood upon his legal rights alone, and interposed no plea of any equitable right to specific performance of a contract superior to the rights and equities of Franklin, was thereby not entitled to any decree for specific performance of such alleged contract, or the establishment of a deed executed in pursuance thereof, such deed being subsequent to the date of the contract of Franklin. (f) His honor should have further held that, the counsel of Chandler having for the first time in their argument before him taken the position that Chandler was entitled to an equity for the establishment of his deed because of its being executed as the performance of a contract anterior to the date of the contract of Franklin, that the objections to the same there urged and argued by the counsel of Franklin was due and timely; that such alleged contract could not be enforced or established, because (1) same had not been pleaded, (2) because same did not conform to the requirements of the statute of frauds, in that the contents of

the alleged letter or letters by Chandler was not proven, and in that no definite description of the land was shown either by letter or letters or telegrams passing between Gardner and Chandler.

"(3) Because his honor erred in finding as a fact that Gardner had made, executed, and delivered his deed to the said parcel of land to Chandler before Franklin took possession of the premises; whereas it sufficiently appears that, Chandler being in Sumter, and the deed having been signed in Missouri on the 10th of November, it was a physical impossibility for the deed to have been transmitted and delivered before the 12th of November, the date when possession was given to Franklin. And his honor should have so found, and should have further held, that where the rights of a third party intervene, as in this case, the time of the actual delivery of that deed was the time and delivery, and not the date of signing the same.

"(4) Because his honor erred in finding as matter of fact that before Franklin took his receipt of November the 3d, that he had full notice that Chandler had already closed the trade with Gardner for the land, there being no evidence upon which such finding could have been made.

"(5) Because his honor erred in finding as matter of fact that, before Franklin took possession of the premises, the deed to Chandler had been made, executed, and delivered by Gardner, evidently finding thereby that the deed was delivered on day of its date, which was not in fact delivered for several days thereafter, and after the 12th of November, date of Franklin's possession, according to the greater weight of the evidence.

"(6) Because his honor erred in adjudging and decreeing that Samuel Franklin is not entitled to the specific performance, and in dismissing the complaint; whereas, as matter of fact, he should have found that Samuel Franklin entered in a valid contract of purchase of the premises before the alleged purchase by Chandler, in compliance with the requirement of the statute of frauds, and that, whether such compliance was shown or not, that there was such part performance of the contract with Franklin as would take the case out of the statute, and which would give Franklin equities and rights superior to those of Chandler, and entitle Franklin to a decree for specific performance; and his honor should have so decreed, and should have required Chandler to convey the premises to Franklin upon payment by the latter of the balance due by him as the purchase money.

"(7) Because his honor erred in holding that in the trial of said cause he was sitting as judge and jury, and in rendering final judgment upon the issues properly triable before a jury in said cause."

The duty now devolves upon us to pass upon these exceptions.

1. Stripped of words and phrases, appel-

lant's contention that he obtained a prior right to that of Chandler cannot be sustained. The fact is that Chandler began his trade with Gardner before Hogan ever dreamed of becoming the agent of Gardner to sell the seven acres; for on the 20th March, 1900, Gardner wrote to T. D. Chandler as follows: "Tremont, Mo., March 20, 1900. Mr. T. D. Chandler—Dear Sir: Your note just received. It was sent to the wrong office; very sorry it has been delayed, but hope you haven't given me out writing to you in answer to your proposition. Yes if you will settle Hogan's debt and pay me \$150 the first of October, with eight per cent. interest from the first of March when Harby's claim is settled, the claim will be perfect, have deed prepared and send to me and I will sign, acknowledge and return the same to you in return for your note. I mean negotiable note, one that discount it in bank. If wish to do so please let me hear from you soon. Yours very respectfully, James E. Gardner." Whereas Hogan's first letter from Gardner was dated 25th June, 1900, as follows: "Tremont, Mo., June 25th, 1900. Mr. Eugene Hogan, Sumter, S. C.—Dear Sir: Your welcome letter received some time ago, it found us all well, was indeed glad to hear that you were all in usual health, would have written you sooner but had a letter from Mr. Chandler saying that he wished to buy the place, he has written me several times about it. I made him a proposition and he wrote me he would take the place at my price and afterwards went back on it. I offered him the place for \$150.00. I think that is entirely too cheap, but if I had the money now I could invest it to a big advantage now. I will give you all over that amount you can get out of it after paying Harby's debt if you sell or cause me to make sale of it. I think that if you will talk the matter up so Mr. C. can get hold of it that he will pay a fair price for it. I will close hoping to hear from you soon, I remain yours very respectfully, Jas. E. Gardner."

Now, so far as the record shows, there was nothing which passed from Hogan to Gardner showing an acceptance by Hogan of this agency offered by Gardner to him until some time in the month of October, 1900, as shown by this telegram: "October 24, 1900. James E. Gardner, Tremont, Mo.: I believe I have sold your land, will write. Eugene Hogan."

Now, it must be noted that if Hogan as agent sold this seven acres of land as the agent of Gardner to Samuel Franklin, the appellant, he must have relied upon the letter of Gardner, dated the 25th June, 1900, and did not rely upon the letter of Gardner to him, Hogan, dated the 23d day of October, 1900. Every witness states that it takes at least two whole days for a letter to come from Missouri to Sumter, S. C. So it must have been as we stated, as only one day elapses between Gardner's letter to Hogan and Hogan's telegram to Gardner. The let-

ter referred to is as follows: "Tremont, Mo., October 23, 1900. Mr. Eugene Hogan, Sumter, S. C.—Dear Sir: I received a letter a few days ago from H. Harby, he said he was going to foreclose his mortgage soon unless he gets the money, he also said that there was a man who wanted the place, but he only wanted to pay me \$125.00 and assume the payment of his debt. I think it was T. D. C., though he did not say. I believe they are working together to try to get the place for less than it is worth. I want you to help me to sell to some one else so as to defeat them. Do your best to sell it at once. What has become of Briggs Bros., and Charley Muller. Where is Edmund, is he in the Philippines, or did he ever go; I hope he never went, for I do think that is a cruel war uncalled for and without cause. Hoping to hear from you soon. This leaves all well, wishing you and yours the same and much success, I remain, very respectfully, Jas. E. Gardner."

Now, on the very same day that Gardner wrote the foregoing letter to Eugene Hogan, he wrote the following letter to T. D. Chandler: "Tremont, Mo., October 23, 1900. Mr. T. D. Chandler—Dear Sir: Yours of the 20th to hand, will say in reply that I have not authorized Mr. Hogan to sell that piece of land for me, he wrote me about it and I wrote him that it was for sale. I also told him that if I sold it, that a check must accompany the deed, then I would sign and return deed. If you want the place you can have it. If you will take it at once for \$150.00, without me having to make any settlement with Harby, so if you accept my proposition fill out deed and send to me at once, will sign and return same at once. Yours respectfully, Jas. E. Gardner."

No letter of Hogan to Gardner appears in the record after this. We assume, however, that the letter of A. B. Stuckey, Esq., which was dated the 30th, but mailed on 31st of October, 1900, was the letter referred to by Eugene Hogan in his dispatch to Gardner on the 24th October, 1900, hereinbefore recited. This letter of Mr. Stuckey was as follows: "October 30, 1900. Mr. James E. Gardner, Tremont, Mo.—Dear Sir: Enclosed please find a deed to be executed by you to the Hogan lot. Mr. Harby says he will give us a few days to settle up with him. So in accordance with the proposal in your letter to Mr. Hogan of June last to give him all he can make out of it above \$150.00 to be paid you and above the debt held by Mr. Harby. Mr. Hogan has bargained to sell provided it can be wound up right away. So please don't delay and to make yourself safe, you send the deed to Bank of Sumter and instruct them not to deliver till payment of \$150.00 to be returned by bank to you. I suggest this as a safe way to transact the matter. Now, please bear in mind that the deed must be executed and probated in accordance with our law here and not the laws

of Mo. There must be two subscribing witnesses to your deed. One of these witnesses must appear before your clerk of some Court of record, and then and there sign the probate. So, too, have your wife appear before the clerk of Court. Now, our law does provide that a notary using his seal may do for both above provided he affix thereto the cert. of the clerk of Court as to his official character, but the surest and best plan is for you and wife to go to the clerk's office and there have the paper with witness executed. Please do not delay, as this party may back out. Yours very truly, A. B. Stuckey."

To go back for a moment. We wish to call attention to the fact that Gardner's letter of the 23d October, 1900, to T. D. Chandler only reached the latter through the mails on the 25th or 26th of October, 1900. He, Chandler, replied to it by telegram on 2d November, 1900, as follows: "Sumter, S. C., Nov. 2d, 1900. To James E. Gardner, Bolivar, Mo., via Bolivar Station, Mo. I accept your offer for land. Don't sign deed sent for negro. I will forward deed to myself. Answer. (Signed) T. D. Chandler." On the next day, the 3d November, 1900, Gardner telegraphed as follows: "Bolivar Station, Mo., Nov. 3, 1900. T. D. Chandler, Sumter, S. C. Message received. Send deed with check. One hundred and seventy-two dollars. Will sign return. Jas. E. Gardner." On the same day, 3d November, 1900, T. D. Chandler sent the following: "11, 3, 1900. To James E. Gardner, Bolivar Station, Mo. New York exchange and deed sent to Polk County Bank. Accept. (Signed) T. D. Chandler." On the 10th day of November, 1900, James E. Gardner executed his deed conveying the seven acres of land to Thomas Duncan Chandler, which was placed on record by the latter.

Now we will return to Samuel Franklin. On the 31st October, his attorney sent on the deed to the seven acres of land to James Gardner, conveying the seven acres of land to said Samuel Franklin. On the 8th November, 1900, James Gardner returned said deed, refusing to sign the same on the ground that he had already sold the land to Chandler. But on the 3d day of November, the said Samuel Franklin paid to Eugene Hogan the sum of \$5, and took the following receipt: "November 3, 1900. Received Sumter, S. C., November 3d, 1900, of Samuel Franklin, five dollars in part payment of the lot of land of seven acres owned by James E. Gardner, on the road from Sumter to Stateburg adjoining the lands of T. D. Chandler and others—the power to sell the same having been given to me by said J. E. Gardner by his letters to me, one dated June 25th, 1900, and the other dated October 23d, 1900. The terms of sale are for cash, the price being four hundred and fifty dollars, including therein the mortgage debt over the land now held or controlled by Horace Harby. Eugene Hogan."

We are now prepared to answer this question, and we hold that there was no contract between Franklin and Gardner. It is evident that such was the opinion of Eugene Hogan, the agent, and Mr. A. B. Stuckey. The former said in his telegram, "I believe I have sold your land;" the latter said in his letter to Gardner, dated 30th October, 1900, "Please do not delay this as the party may back out." If Samuel Franklin had made a binding contract, where was there any evidence in writing signed by himself or any lawfully empowered agent? If Samuel Franklin had himself made no contract, how can it be said that James E. Gardner had made such a contract with Franklin? But it is suggested that Chandler had changed the contract contemplated by Gardner in his letter of the 23d October, 1900. Look back at the first letter of Gardner to Chandler of 20th March, 1900, and you will see what was in the minds of Gardner and Chandler, to wit: Says Gardner, "If you will close this contract with a negotiable note payable at 1 October next, I will let you have the land at \$150 plus the payment of Harby's mortgage, plus the interest on \$450 at eight per cent. for seven and one-third months, which interest amounts to \$22." The trade was not consummated by the negotiable note due 1st October, 1900, but was on the same principle consummated on the 2d of November, 1900. This exception is overruled.

2. We think the circuit judge was correct. You might call the letters of 25th June, 1900, and 23d October, 1900, and the receipt of \$5 by Hogan, a contract, but it was not a contract. Certainly the minds of Chandler and Gardner met, and the contract between them was carried into execution. (a) The letters and telegrams between Chandler and Gardner certainly showed a contract between them. I will take so much; I will give so much. Deed and money sent and accepted. Deed returned fully signed. We would call it a fully consummated contract for a valuable consideration. (b) The new contract here referred to is fully explained by going back to the letter of 20th March, 1900, from Gardner to Chandler, and to the letter of 25th June, 1900, from Gardner to Hogan, when he says Chandler had agreed to his terms. (c) Certainly, when the receipt for \$5 was given by Hogan on the 3d day of November, 1900, his attorney, Mr. Stuckey, knew that Mr. Chandler was after this land as a purchaser, or why else did he labor so earnestly to have him not interfere on the evening of the 2d November, 1900? So far as the delivery of possession of the seven acres to Franklin by Hogan, it was an idle act. Hogan possessed the keys to the house on Gardner's land without his knowledge, and, furthermore, he had no authority from his principal to treat with Franklin as to the matter of possession. His authority to act for his alleged principal as to this matter rendered each of such actions a nullity in the

eyes of the law and equity. An agent acts at his peril in anything beyond the scope of his agency. (d) When Gardner ratified his promises to Chandler by making his deed for the seven acres of land, he put it beyond his power to recall said deed, if he had attempted to do so, which fact he has ever since recognized, as witness his return of the proposed deed to Mr. Stuckey without his signature, for the reason that he had already sold the land by contract to T. D. Chandler. (e) T. D. Chandler needed no other doctrine in the law but to show that he had a deed from Gardner for the land, and that he had paid a valuable consideration therefor. It remained for Franklin to successfully impeach that consummated transaction between Gardner and Chandler. (f) Nor did Chandler fall in replying to the charges of Franklin. If Chandler was not answerable for any failure in the equities attempted to be set up by Franklin, his claim was prior in point of time to that of Franklin, and we have already shown that Franklin had no valid contract that he was entitled to set up either against Gardner or against Chandler.

3. There can be no question that under the contract between Chandler and Gardner, when Chandler paid the consideration and sent the deed to Gardner for execution, such deed operated in his favor from the very date of its execution, which was anterior to the attempted possession of the land by Franklin, the appellant. This exception is overruled.

4. In view of the facts, we cannot hold that the judge made any mistake in this finding. The very letter shown by Hogan to Mr. Stuckey while he was investigating his client's rights showed that Mr. Chandler was seeking a title, and on the 2d day of November, 1900, Mr. Chandler refused to cease opposing Franklin's title. This exception is overruled.

5. Franklin had no right of possession. He was bound to make inquiry as to Hogan's right as agent to deliver possession. On the 12th November, 1900, which was the date of his attempt at possession, his attorney had received the deed he had sent to Gardner on the 31st of October, 1900, which was notice to him that Gardner repudiated any alleged agency of Hogan. This exception is overruled.

6. We have already held that there was no valid contract between Franklin and Gardner, and certainly none such as would interfere with T. D. Chandler which could be specifically enforced. Besides, what had Franklin parted with as value except the \$5 paid to Hogan, who was not clothed with power from Gardner to receive any money for him? As before stated, notice to Franklin of the want of such power in such agent will be insisted upon under the law governing agents. If they (agents) have not power to bind their principals, third parties act at their peril with

such unauthorized agents. This exception is overruled.

7. Judge Watts' order, referring issues in both actions consolidated under his order, when no appeal is taken therefrom, becomes the law of this case, and therefore Judge Hudson was not at fault. No such question was raised by appellant at the hearing before Judge Hudson. The exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(65 S. C. 539)

**J. HARZBURG & CO. v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina. April 1, 1903.)

**DEPOSITION—CERTIFICATION—PARTNERSHIP—EVIDENCE—CARRIERS—INJURY TO BAGGAGE—PLEADING—INSTRUCTIONS—DAMAGES.**

1. Where the genuineness of the evidence in a deposition was certified to by the officer, it is sufficient, the law not requiring the witness to sign in the presence of the officer.

2. The continuance of a partnership beyond the time to which it was limited in a written agreement may be shown by parol.

3. In an action for damages to one piece of clothing, it is not necessary to allege special damage to the whole suit.

4. Where it was not clear from an answer whether a witness intended to place the damage of which he was speaking at \$500 or \$250, a question, "Was or was not your actual loss, on account of the 49 samples, \$250?" was not erroneous as leading.

5. An instruction in an action for injuries to baggage that, when the railroad gave a check for the trunk it took the burden of care in transporting and delivering the trunk, is not erroneous as a charge on the facts.

6. It is not error to refuse to charge a correct abstract proposition of law.

7. Damages to baggage resulting from a heavy rain does not excuse a carrier, as being an act of God, unless it is shown that the injury could not have been prevented by any reasonable care.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by J. Harzburg & Co. against the Southern Railway Company. From judgment for plaintiffs, defendant appeals. Affirmed.

C. P. Sanders, for appellant. J. E. McDonald, for respondents.

WOODS, J. This suit was instituted by the plaintiffs, merchants of Baltimore, to recover \$500 damages alleged to have been caused by the defendant's negligence and carelessness in not protecting from a rain storm, at its Winnsboro station, four trunks of sample clothing checked by the plaintiff's salesman over defendant's line from Charleston to Winnsboro. The defense was a general denial and contributory negligence. The jury found a verdict for \$250, and the defendant appeals, charging errors in the admission of testimony and the instructions of the presiding judge.

As to the second exception, and subdivision

¶ 1. See Depositions, vol. 16, Cent. Dig. §§ 159, 133.

2 of the first exception, it is only necessary to say the evidence was taken at the place in Baltimore more accurately described in the notice, defendant attending and participating. The law does not require the witness to sign in the presence of the officer. The genuineness of the evidence was certified to by the officer, and, if the signature was not genuine, it was the duty of the defendant to make it so appear to the court. This disposes of the first, second, third, and fourth exceptions.

Defendant could not have been injured by the introduction of plaintiff's written partnership agreement, which had expired by its own limitation at the time the damage was done, and the fifth exception cannot be sustained.

In the sixth exception, appellant takes the position it is not competent to prove by parol the continuance of a partnership beyond the time to which it was limited in a written agreement. This position cannot be sustained, for the reason that the formation or continuance of a partnership may be proved by any competent evidence, written or parol.

In the seventh, eighth, and tenth exceptions, appellant submits the question whether the plaintiffs could recover for depreciated value of a suit of clothing considered as an entirety, when only one article of the suit was injured, without alleging special damages in this regard. Each garment of a suit of clothing usually has a degree of value growing out of its connection with the other parts, and for this reason no special allegation of such value, or the impairment of such value, was necessary.

One of the plaintiffs was asked: "Tell us, if you know it, was or was not your actual loss, on account of the forty-nine samples, \$250?" In the ninth exception, appellant insists this question was leading. It will be seen by reference to the testimony that it was not clear, from what the witness had just said, whether he meant to place the damage of which he was speaking at \$500 or \$250, and the question manifestly was asked the witness, not to lead him, but to ascertain which of these amounts he meant as his estimate. Besides, it is manifest no injury resulted to appellant from allowing the question.

In his charge the presiding judge used this language: "I charge you, as a matter of law, that, when the railroad gave check for the trunks to the traveling salesman, they took the burden of care and ordinary precaution in transporting and delivering the trunks in good condition." Appellant takes the position this was an assumption and statement that checks had been issued, and was a charge on the facts. From an examination of the charge it is apparent, when this language was used, the circuit judge was speaking generally of the duty of a railroad company to care for checked baggage. He subsequently expressly left it to the jury to say whether in this case

checks had been issued. In addition to this, the witnesses on both sides proved that plaintiffs' agent had the checks, and no issue whatever was made concerning them. The eleventh exception is, therefore, without foundation. *Hollings v. Bankers' Union*, 63 S. C. 197, 41 S. E. 90; *Jenkins v. Ry. Co.*, 58 S. C. 381, 36 S. E. 703.

The twelfth exception cannot be sustained, because this court has very often held a hypothetical statement made in a charge is not a statement of the facts of the case on trial.

The defendant's sixth request to charge was as follows: "Where baggage is injured, it is the duty of the passenger, after the baggage is delivered to him, to do all he can to lessen the damage, and if he fails to do this, and by reason of such failure the damage is increased, then for this the railroad company is not to be held responsible." This was a correct proposition of law, and refusing to charge it would be reversible error, if it had been applicable to the proven facts of the case. Appellant's counsel argues that plaintiffs should have taken clothing out of the trunks and dried it, so as to lessen the damages, and that for this reason the foregoing proposition was applicable. The plaintiffs' agent testified drying would not have reduced the damage, and the defendant offered no evidence tending to show it could have been so reduced. There was therefore no evidence before the court to which this request could apply, and it was not, for this reason, error to refuse it. The thirteenth exception cannot be sustained. *Hicks v. Ry. Co.*, 63 S. C. 559, 41 S. E. 753.

Appellant next insists the jury should have been given this charge, as requested: "If an injury is caused by an unprecedented rainfall, such as ordinary human foresight and prudence could not foresee, then such injury is caused by an act of God, for which the railroad is not to be held responsible." This was not a sound legal proposition. Even if the injury was caused by an unprecedented rainfall, such as ordinary human foresight and prudence could not anticipate, the carrier would still be liable unless he was unable to guard against the injury. It is not sufficient, to relieve a carrier of liability for injury to goods, that the damage should have resulted from unusual and unforeseen action of nature; the carrier must show further that the injury could not have been prevented by any foresight, pains, or care reasonably to be expected. *Reaves v. Waterman*, 2 Speers, 197, 42 Am. Dec. 364; *Ewart v. Street*, 2 Bailey, 157, 23 Am. Dec. 131; *Slater v. Ry. Co.*, 29 S. C. 101, 6 S. E. 936; 1 Cyc. of Law, 758. Before reaching defendant's requests, the presiding judge had fully charged this doctrine in terms by no means unfavorable to appellant. The fourteenth exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.



(65 S. C. 573)

**MUCKENFUSS v. FISHBURNE et al.**

(Supreme Court of South Carolina. April 7, 1908.)

**APPEALABLE ORDER—RECOMMITTING EQUITY CASE.**

1. Defendant cannot appeal from an order recommitting an equity cause to take and report other testimony, except for want of jurisdiction, or failure to grant a mode of trial to which he was entitled by law.

2. A judge may grant an order, while holding court in another county or at chambers, recommitting a case for further evidence.

Appeal from Common Pleas Circuit Court of Dorchester County; Townsend, Judge.

Foreclosure by Harriet E. Muckenfuss against Helen M. Fishburne and Sophia F. S. Marion. From order recommitting case with instructions, defendants appeal. Affirmed.

Mr. Reynolds, for appellants. Simons, Siegling & Cappelmann and Burke & Erckman, for respondent.

**JONES, J.** This is an appeal from an order of Judge Townsend, dated March 13, 1902, referring it to the master to take and report testimony in addition to the testimony previously taken and reported pursuant to an order of Judge Aldrich dated February 13, 1901. An order referring or recommitting a cause to the master to take and report testimony is addressed to the discretion of the court, as matter of administration, for the purpose of preparing for and speeding a hearing of the cause upon its merits. It determines no rights or issues, does not involve the merits, and does not affect any substantial right, which, in effect, determines the action and prevents a judgment. An appeal from such an order will not be entertained unless it operates to deny to a litigant a mode of trial to which he is entitled by law, or unless the order is assailed for want of jurisdiction. *Lowndes v. Miller*, 25 S. C. 122; *Ferguson v. Harrison*, 34 S. C. 169, 13 S. E. 332; *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97; *Barnwell v. Marion*, 58 S. C. 463, 36 S. E. 818. This action being for the foreclosure of a real estate mortgage, and there being no issue therein which defendant is entitled to have submitted to a jury as matter of right, it only remains to consider the exceptions in so far as they may raise a jurisdictional question.

The third exception is as follows: "(3) Because his honor Judge Townsend erred in passing said order of March 14, 1902, at Charleston, S. C., as the court of common pleas for Charleston county had no jurisdiction over these defendants, they being residents of Dorchester county, and the property the subject-matter of this suit being also in Dorchester county, and the court of common pleas for said county had adjourned sine die February 22, 1902, and this cause was con-

tinued, and the record for the above-entitled cause being of file in the court at Dorchester county." The first difficulty in the way of this exception is that the "case" does not show that the facts are as alleged in the exception. It appears that the matter of referring the cause to the master was submitted to Judge Townsend while he was holding court in Dorchester county on the call of the case for trial. If, therefore, it be true that he made the order after the adjournment of the court for Dorchester and while he was in Charleston, he had power to do so. *Chafee v. Rainey*, 21 S. C. 18. Such an order may be at chambers. *Bank v. Fennell*, 55 S. C. 379, 33 S. E. 485.

The exceptions are overruled, and the order appealed from is affirmed.

(65 S. C. 502)

**HENRY SONNEBORN & CO. v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina. March 31, 1903.)

**DEPOSITIONS—NOTICE—SIGNATURE OF WITNESS—REFRESHING MEMORY—CARRIERS—INJURY TO BAGGAGE—SPECIAL DAMAGES—ACT OF GOD.**

1. Where a notice provides for the taking of a deposition at No. 21 Bank of Baltimore building, it is complied with by taking the deposition at the office of S., No. 21 Bank of Baltimore building, the objector being present by representative.

2. Code 1902, § 2881 et seq., do not require that the signature of the witness be identified, other than by the certificate of the notary that he had sworn and examined the witness.

3. Where a witness had testified that he saw the samples of goods sold, and superintended the charging of the same at the time they were furnished, he could refresh his memory as to the value of the sample by an inspection of the books.

4. In an action against a railroad company for putting off trunks of sample clothing at a station during a severe rain without protection, under the issue of willful negligence it is proper to show special damage.

5. One who has had experience in custom-made clothing may testify as to the injury caused by rain, though he has never seen the goods.

6. It is the duty of a railroad company to protect the baggage of its passengers, while in its custody, from exposure to rain, by the exercise of due care.

7. If there be any negligence on the part of a carrier in the care of baggage in leaving it exposed to the rain, the carrier cannot escape responsibility by showing that the act of God was the cause of the injury.

8. An act of God means inevitable accident, without the intervention of man and the public enemy.

Appeal from Common Pleas Circuit Court of Fairfield County; Watts, Judge.

Action by Henry Sonneborn & Co. against the Southern Railway Company. From judgment for plaintiffs, defendant appeals. Affirmed.

C. P. Sanders, for appellant. J. E. McDonald, for respondents.

**JONES, J.** The appeal in this case is from a judgment on verdict in favor of plaintiffs

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 732.

in an action for damages alleged to have been caused by defendant's negligent and wanton conduct in putting off its train in Winnsboro, S. C., 10 trunks of sample clothing belonging to plaintiffs, during a severe rain and without any protection, whereby the samples became wet and injured.

1. The first exception assigns error in admitting the deposition of Moses S. Sonneborn, the objections thereto being: (1) That it was taken in the office of Shiver, Bartlett & Co., instead of Thos. K. Le Brou, pursuant to the notice; (2) when it appeared that the signature of the deposition had not been witnessed by the notary, there being no identification of the signature as being the true signature of the witness examined. These objections were properly overruled. The notice was that the deposition could be taken before Thomas K. Le Brou, a notary public, at his office, No. 21 Bank of Baltimore building, in the city of Baltimore, and the certificate states that it was taken by Thomas K. Le Brou, a notary public, at the office of Shiver, Bartlett & Co., No. 21 Bank of Baltimore building, Baltimore, Md. It thus appears that the deposition was taken at the place noticed, and the inference is that the notary mentioned also had his office at that place. Besides, this defendant was present by representative at the taking of the deposition.

2. With reference to the second objection as to the identification of the signature of the deponent, such identification sufficiently appears by the certificate of the notary to the effect that he had sworn and examined the witness Moses S. Sonneborn, and that the questions and answers were contained in the pages constituting the deposition. The statute (section 2881 et seq., Code 1902) relating to such depositions does not require any other identification of the deponent's signature. The signature purporting to be that of Moses S. Sonneborn, and attached to the deposition is presumptively the signature of the witness Moses S. Sonneborn, who was sworn and examined by the officer certifying the deposition.

3. The second exception alleges error in allowing question No. 28 of the deposition of the witness Sonneborn, and the answer thereto, when it appeared that the witness had not made the entries in the book, nor could he testify to the fact contained in the entry in the books from his own knowledge. Interrogatory No. 28, and the ones immediately preceding, are as follows: "26 Q. Have you produced the book of original entry containing the list of samples taken by Mr. Browning on said trip? A. I have done so, and this is the book. 27 Q. Is that the book of original entry? A. It is. 28 Q. According to the book you hold in your hand, what is the exact value of the samples taken by Mr. Browning on said trip? A. The exact value as to loss or damage with respect to the salable value of the suits, of which Mr. Browning carried the sample coats, was \$2,341.24, and the sample coats which he carried cost more than half

the cost of the suits; but, in case of loss or damage to the coats, it also depreciates the cost of the pants and vests." The witness had previously testified that he saw the samples furnished to Mr. Browning, the traveling agent, and that he superintended the charging of the same at the time they were furnished. It thus appears that the grounds of objection are not based upon the facts. The witness, having seen the samples furnished to the agent, and superintending the charging the same on the books kept for that purpose, could certainly refresh his memory as to the value of the samples by an inspection of the books. *State v. Collins*, 15 S. C. 376, 40 Am. Rep. 697, and authorities therein mentioned.

4. The third, fourth, fifth, and sixth exceptions charge error in allowing the witness Browning to testify, over objection, as to loss or damage with respect to the salable value of the whole suits by reason of the injury to the coats. The trunks contained overcoats, and coats forming parts of full suits, but the vests and pants of such suits were in Baltimore at the time of the injury. The objection urged to this testimony is that it is an attempt to prove special damages not alleged in the complaint. The fifth allegation of the complaint is as follows: "(5) That upon the arrival of the defendant's said cars at the town of Winnsboro, on which the plaintiffs' salesman and agent was a passenger as aforesaid, the defendant, by its agents, servants, and employes, recklessly, carelessly, negligently, willfully, wantonly, and in utter and willful disregard of the rights of the plaintiffs, put off the 10 said trunks of clothing samples upon the platform of its passenger station at the town of Winnsboro during a very hard down-pour of rain; and then and there recklessly, carelessly, willfully, and wantonly neglected, failed, and refused to move said trunks out of the rain and put them in its baggage room or other place of shelter, or to cover the same with canvas cloth, as was its duty in the circumstances, in order that the samples in said trunks might be kept dry and uninjured by the rain; but, on the contrary, the defendant carelessly, negligently, recklessly, willfully, and wantonly placed and turned said trunks with their ends upward instead of placing them down flat—in which first position the rain could more easily run into said trunks and wet contents thereof—and thus allowed the said 10 trunks of samples belonging to plaintiffs as aforesaid to remain unprotected in the rain and weather for the space of one hour, whereby the said samples of clothing in said trunks were thoroughly wet and saturated with the rain water, and were thereby damaged and injured to the amount of one thousand (\$1,000) dollars." In the case of *Lipscomb v. Tanner*, 31 S. C. 52, 9 S. E. 733, the court said: "It is not always easy to determine whether damage is or is not special. The cases upon the subject are full of nice distinctions. We have seen no clearer definition or description of it than the following: 'The

general allegation of damages will suffice to let in proof and to warrant recovery of all such damages as naturally and necessarily result from the unlawful act complained of; the law implies such damages. But where damages do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage sustained in order to introduce testimony in regard to it; the rule is to avoid surprise, etc. See 5 Am. & Eng. Ency. Law, 49, and very full notes." Such is the rule established by the decisions in this state. *Alston v. Huggins*, 3 Brev. 185; *Rowand v. Bellinger*, 3 Strob. 375; *Loeb v. Mann*, 39 S. C. 468, 18 S. E. 1; *Mood v. Telegraph Co.*, 40 S. C. 528, 19 S. E. 87; *Pearson v. Spartanburg Co.*, 51 S. C. 484, 29 S. E. 193. The injury alleged in the complaint was the negligent and wanton exposure of the trunks to the rain, whereby the samples of clothing in the trunks were wet and saturated with rain water and damaged. Considered with reference to the distinction between general damages and special or consequential damages, we think evidence as to damage resulting to the whole suit, parts of which were not in the trunk, would relate to special damages. With respect to actual, or compensatory, or general damages, the highest measure of damages that could be awarded under the complaint would be the depreciation in the value of the coats, alone, through the negligence of defendant. But the complaint alleged, also, that the conduct of the defendant which caused the injury was wanton, and demanded punitive damages. In view of this, it was competent for plaintiffs to show not only general, but special, and even remote, damages resulting to them from defendant's act, with a view to enable the jury to award proper punitive damages under all the circumstances of the case, in the event they should conclude that defendant's conduct was wanton. *Pickens v. R. R. Co.*, 54 S. C. 505, 62 S. E. 567.

5. The seventh exception complains of error in allowing the witnesses Owens and Kitchens to testify as to the effect generally upon custom-made clothes by reason of the canvas in the lining of the coats getting wet, when these witnesses had not seen the coats in question. The exception is not sustained. Previous to the testimony of the witnesses it had been testified that the clothes in question were custom-made, and that such clothes generally have a buckram or canvas lining between the inner lining and the outside, which, if it gets wet, will draw up and put the coat out of shape. Owens had been a clerk in a dry goods store handling custom-made clothes for about 10 years, and Kitchens had been in the mercantile business and handling such clothing for about 30 years. Under these circumstances, they were competent as experts to testify as to the effect the wetting of the canvas in such coats would have.

6. The eighth exception imputes error as follows: "In refusing to allow the witness Skinner to testify and state why the railway company had not taken extra precautions to avoid trunks and baggage getting wet previous to this. It being respectfully submitted that it was both relevant and competent to prove that, in view of there being an unprecedented rainfall, something beyond the experience of people of ordinary prudence, the company was not to be held responsible for not taking extra precautions to prevent injury, and was in response to the facts brought out by the plaintiffs on the cross-examination of defendant's witness as to the absence of a canvas covering, and would have tended to negative the idea of negligence in not having such canvas on hand." The testimony was properly excluded, because it would have been merely the opinion of the witness, and that, too, upon an irrelevant matter. It had already been shown that the trunks had been left exposed to a very heavy rain, and the question was as to the duty of the defendant company under such circumstances to protect the trunks by placing them under shelter or covering at the time of the injury. As it is the duty of a railroad company to protect the baggage of its passengers, while in its custody, from exposure to rain, by the exercise of the care due under the circumstances, we do not see how its failure to exercise proper precautions in that regard in the past would tend to excuse or negative an inference of negligence in the present instance. Negligence does not cease to be negligence when it is customary.

Appellant's ninth exception is as follows: "In refusing to charge defendant's sixth request, to wit: 'Where baggage is injured, it is the duty of the passenger after the baggage is delivered to him to do all he can to lessen the damage; and if he fails to do this, and by reason of such failure the damage is increased, then for this the railroad is not held responsible.' The error being that, in refusing this request, his honor allowed the jury to estimate and give as damages any injury that might have been done to the clothing by reason of the failure of plaintiffs or their agent to take care of them after they had been delivered to them by the railroad." This exception is not well taken, for an inspection of the record shows that the charge of the judge was all that appellant could properly require in that connection. The case shows that, in response to appellant's requests to charge, the jury were instructed as follows: "I refuse to charge you that, in that language; but I have already told you that if you believe the railroad was careless and negligent, and that was the cause, the direct and proximate cause, of the damage to the plaintiff, if he sustained any at all, then the plaintiff would be entitled to recover damages as they sustained by reason of the carelessness and negligence of the railroad

in injuring them, if you think the railroad did carelessly and negligently injure the property of the plaintiffs."

7. The tenth and last exception assigns error as follows: "In refusing to charge defendant's ninth request, to wit: 'If an injury is caused by an unprecedented rainfall, such as ordinary human foresight and prudence could not foresee, then such injury is caused by an act of God, for which the railroad is not to be held responsible.' The error being, it is respectfully submitted: (a) In refusing to define what is an act of God. (b) In leaving it to the jury to say whether an unprecedented rainfall, such as ordinary human foresight and prudence could not foresee, was or was not an act of God. (c) In holding substantially that this was a question of fact for the jury, instead of holding it to be a question of law for the court." The judge had already charged that a railroad company is not liable for such damage to goods in its custody by an act of God, and so stated in refusing the above request in the language proposed. The request was properly refused in that form, because it failed to exclude all human agency as a co-operating cause. The correct rule is thus stated in *Slater v. R. R. Co.*, 29 S. C. 101, 6 S. E. 936: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which if it had not been present the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility, and the onus is upon the carrier to show not only that the act of God was the cause, but that it was the entire cause, because it is only when the act of God is the entire cause that the carrier can be shielded." An act of God means "inevitable accident, without the intervention of man and the public enemies." 2 Kent Comm. p. 597.

The judgment of the circuit court is affirmed.

(88 S. C. 1)

STATE ex rel. BRUCE et al. v. RICE et al.

(Supreme Court of South Carolina. April 7, 1903.)

TOWN COUNCIL—ELECTION TO FILL VACANCIES—TITLE TO OFFICE—INJUNCTION.

1. Under Code 1902, § 1940, providing that, in case any vacancy shall occur as to any of the wardens of the town, an election shall be held, and the intendant and warden shall give notice thereof, on refusal of the members of the town council to qualify, two wardens may order an election to fill the vacancy.

2. In actions to try title to office the issue shall be made by complaint and answer, and not on the coming in of the return to the rule to show cause.

3. Pending an action to try title to the office of the warden of a town, the officers de facto

will not be enjoined from exercising the duties of their office.

Appeal from Common Pleas Circuit Court of Union County; Townsend, Judge.

Action by W. W. Bruce, as intendant, and Wm. K. Thomas and J. A. Hancock, as wardens, of the town of Carlisle, against J. G. Rice, W. B. May, K. D. Bailey, J. D. Fleming, and W. F. Bates. From orders of the court all defendants except Bates appeal. Reversed.

J. C. Wallace, for appellants. B. T. Townsend and Munro & Sanders, for respondents.

JONES, J. This is an action by summons and complaint as a substitute for proceedings in quo warranto, and it is sought to have determined who is entitled to the office of intendant and wardens of the town of Carlisle. The appeal is from an order of Judge Townsend, dated June 3, 1902, requiring defendants to show cause before him at chambers at Union, S. C., on the 27th day of June, 1902, by what authority they are holding and exercising the duties of intendant, wardens, and clerk and treasurer, respectively, and why they should not be enjoined from further exercising any of the duties of said officers, and in the meantime enjoining and restraining them from discharging any of the duties of said officers until the further order of the court. The exceptions to the said order are as follows: "(1) Because the verified complaint upon which it was based does not state facts sufficient to authorize it, and his honor erred in granting it. (2) Because his honor erred in not requiring bond or undertaking on the part of plaintiffs at whose instance the injunction was granted, as required by statute, upon granting the order of injunction. (3) Because his honor had no jurisdiction to make said order of injunction, and erred in granting the same. (4) Because his honor had no power to enjoin the duly declared elected, qualified, and acting town council of Carlisle and clerk and treasurer thereof from performing the functions of their office, of collecting taxes or otherwise, until the right and question of title to said offices had been determined in an action in the courts, and his honor erred, therefore, in enjoining them temporarily, and requiring them to show cause before him on June 27, 1902, why they should not be enjoined from further exercising any of the functions of said offices. (5) Because no injunction is allowed as a remedy in the action and proceedings provided by statute for trying and determining the rights to office (chapter 2, tit. 13, of the Code of Procedure), and his honor therefore erred in granting said order of injunction, and to show cause why it should not be made permanent."

From the allegations of the complaint it appears: (1) That the town of Carlisle was duly chartered under the laws of this state. (2) That pursuant to said charter an election

was held for intendant and wardens of said town on the 14th day of January, 1902. (3) That the managers of election counted the votes, and declared W. H. Gist elected as intendant, and J. G. Rice and W. F. Bates, defendants, and W. H. Thomas and J. A. Hancock, plaintiffs, as wardens. (4) That W. H. Gist qualified as intendant and defendants Rice and Bates qualified as wardens. (5) That plaintiffs, Thomas and Hancock, refused to qualify, and that an election was held to fill such vacancies on February 3, 1902, at which election defendants W. B. May and K. D. Bailey received the highest number of votes, were declared elected, and qualified. (6) That defendant Fleming was chosen clerk and treasurer by the council, and qualified. (7) That W. H. Gist, who had been declared elected as intendant, discharged the duties of the office until restrained from so doing by an order in the case of *State ex rel. W. W. Bruce, as Intendant, v. W. H. Gist*. (8) That, after W. H. Gist was restrained from acting as intendant as aforesaid, the defendants Rice, May, and Bailey met as wardens, and attempted to elect J. G. Rice as intendant pro tem., and that Rice has since been acting as such. It thus appears that defendants are at least de facto officers of said town. The complaint, however, alleges that at the election on January 14, 1902, the managers unlawfully refused to allow 9 qualified electors of said town to vote at said election, and that said electors desired and intended to vote for W. W. Bruce as intendant, and for J. G. Rice, C. D. Anderson, W. K. Thomas, and J. A. Hancock as wardens; that the managers of election, out of a total of 39 qualified electors presenting themselves to vote, allowed only 22 to vote, and that out of such 22 votes the plaintiff Bruce received 9 for intendant and W. H. Gist received 13 for intendant; whereupon the managers illegally declared W. H. Gist the duly elected intendant.

The complaint further charges that the election to fill vacancies on February 3, 1902, was without authority of law. There is, then, no doubt that defendants J. G. Rice and W. F. Bates were duly elected and qualified wardens of said town at the time of the election to fill vacancies, and that W. H. Gist had been declared elected as intendant, and had qualified as such at that time. Section 1940, Code 1902, provides: "In case a vacancy shall occur in the office of intendant or any of the wardens by death, resignation, removal from the state or for any other cause, an election shall be held to fill such vacancy, and the intendant and warden (or wardens, as the case may be), shall give ten days' previous public notice of such election," etc. The election to fill the vacancies caused by the refusal of plaintiffs, Thomas and Hancock, to qualify, was within the power of Gist, Rice, and Bates, acting town council, to order. It being conceded that defendants May and Fleming received the highest number of votes at that election, were declared

elected as wardens, and qualified as such, the defendants constituted the lawful town council of Carlisle at the time of the action complained of in this appeal. Even if it be true that at the time of ordering the election to fill vacancies Gist, acting as intendant, had been enjoined from acting as intendant, the act of Gist, Rice, and Bates in ordering said election was not void. The complaint, therefore, does not state a cause of action against the defendants, and would not support the rule to show cause and the restraining order from which the appeal is taken.

Furthermore, a rule to show cause and a restraining order in the meantime is not proper in actions of this kind. It was common to issue a rule to show cause under the old proceedings on information in the nature of quo warranto, and to make up the issues upon the return to the rule; but the writ of quo warranto and proceedings by information in the nature of quo warranto are abolished, and the only remedy in such cases is as provided in section 424 et seq. of the Code of Civil Procedure, which requires an action by summons and complaint. In such case the issues are made by the complaint and answer, and not under rule to show cause. *State v. Evans*, 33 S. C. 184, 11 S. E. 697.

With reference to the restraining order, if there was any power to issue the same, it must be found in some express provision of law, for it is contrary to the established rules of equity to restrain persons from exercising the functions of public offices pending litigation as to title thereto. "Equity will refuse to enjoin officers de facto from exercising the duties and functions pertaining to their office pending a litigation in the nature of quo warranto to determine their title, such refusal being based upon the recognition of that element of public interest which requires that some one should continue to exercise the duties of a public office pending a litigation as to its title." 2 High on Inf. 1315. Referring to section 240 et seq. of the Code of Civil Procedure for power to issue such restraining order, we find none. It does not "appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce injury to the plaintiff." It does not appear "that the defendant is doing, or threatens or is about to do, or procuring or suffering some act to be done, in violation of the plaintiffs' rights respecting the subject of the action, and tending to render the judgment ineffectual"; nor does it appear "that defendant threatens or is about to remove or dispose of his property with intent to defraud," etc. The subject of the action is title to a public office, to which, so far as it appears, there are attached no fees, salary, or emoluments. It could in no wise tend to preserve the subject of the action in statu quo by restraining

the performance of public duties. The object of the foregoing section of the Code, as declared in *Pelzer, Rodgers & Co. v. Hughes*, 27 S. C. 415, 3 S. E. 785, "is to preserve the subject of controversy in the condition in which it is when the order is made until an opportunity is afforded for a full and deliberate investigation."

It is, therefore, the judgment of this court that the orders appealed from be reversed and set aside.

(66 S. C. 18)

**HOLMES v. WEINHEIMER.**

(Supreme Court of South Carolina. April 8, 1903.)

**TAX SALE—RIGHTS OF PURCHASER—TOWN TAXES—CONSTRUCTION OF DEED—INSTRUCTIONS.**

1. Under Act Feb. 9, 1882 (17 St. at Large, p. 987), making state taxes a first lien, a sale for such taxes gives the purchaser a good title as against any taxes then due the town of Mt. Pleasant, though the charter of the town provides that the purchasers at sales for town taxes shall have all the rights given purchasers at tax sale by Act Dec. 24, 1887 (19 St. at Large, p. 862), relating to forfeited lands, delinquent lands, and collection of taxes.

2. It is error to submit to a jury the construction of a deed.

3. An instruction entirely inapplicable to the case, and tending to mislead the jury as to the real issue, is erroneous.

Appeal from Common Pleas Circuit Court of Charleston County; Townsend, Judge.

Action by Geo. S. Holmes, agent, against W. S. Weinheimer. From judgment for defendant, plaintiff appeals. Reversed.

Messrs. Young & Young, for appellant.  
Messrs. Bryan & Bryan, for respondent.

**WOODS, J.** The plaintiff, George S. Holmes, instituted this suit in 1899 to recover of the defendant, W. S. Weinheimer, a lot in the town of Mt. Pleasant. The lot was sold by the sheriff of Charleston county, as the property of William Horry, for the collection of the state and county taxes, on January 4, 1897, and bought by the plaintiff, and he claims under the title made by the sheriff to him. On June 7, 1897, a lot, which plaintiff alleges is the same lot, was sold by the intendant of Mt. Pleasant, as the property of W. H. Horry, for collection of town taxes, and bought by the defendant, who, it is alleged, holds possession under the intendant's deed. The verdict was for defendant, and plaintiff appeals, assigning a number of errors in the charge to the jury.

The presiding judge charged the jury, if the sale made by the sheriff to enforce the collection of taxes levied by the state, under which plaintiff acquired title, was regular and legal in all respects, yet plaintiff's title would be defeated by a sale made to defendant by the intendant of Mt. Pleasant to enforce a collection of municipal taxes levied

on the lot as the property of the same owner. The appeal involves mainly the correctness of this proposition. The circuit judge explained to the jury that this strange result could not be avoided because of the peculiar powers conferred by the charter of the town of Mt. Pleasant, 20 St. at Large, p. 1262. This act of 1891, which amended the charter, after providing that the intendant shall sell property for nonpayment of taxes, and put the purchaser in possession, continues as follows:

"Sec. 5. The manner and time of seizing, levying, advertising and selling, making conveyance and putting the purchaser or purchasers into possession of the property sold and conveyed under this act, shall, as nearly as may be, conform in all respects to the provisions of section 2 of an act entitled 'An act in relation to forfeited lands, delinquent lands, and collection of taxes,' approved December 24th, A. D. 1887.

"Sec. 6. The purchaser or purchasers at such sale shall have and enjoy all the rights, powers and privileges, and the delinquent taxpayer be subject to all the disabilities, requirements and limitations set forth in an act entitled 'An act in relation to forfeited lands, delinquent lands, and collection of taxes,' approved December 24th, A. D. 1887."

The view expressed in the charge was that these provisions of the municipal charter placed the enforcement of the collection of the town taxes on precisely the same footing as the enforcement of the collection of state taxes. The act in which state taxes were made a first lien was passed February 9, 1882 (17 St. at Large, p. 987), and the portion of the section under consideration is: "All taxes, assessments and penalties legally assessed, shall be considered and held as a debt payable to the state by a party against whom the same shall be charged; and such taxes, assessments and penalties shall be a first lien in all cases whatsoever upon the property taxed; the lien to attach at the beginning of the fiscal year during which the tax is levied; and such taxes shall be first paid out of the assets of any estates of deceased persons, or held in trust as assignee or trustee, as aforesaid, or proceeds of any property held on execution or attachment; and the county treasurer may enforce the said lien by execution against the said property; or if he cannot levy thereon, he may proceed by action at law against the person holding said property." Gen. St. 1882, § 170. It will be observed the Mt. Pleasant act confers upon the purchaser at the intendant's sale all the rights, powers, and privileges set forth in the act of December 24, 1887 (19 St. at Large, p. 862). This is not the act which confers a first lien for state taxes, and it is, therefore, quite obvious the charter did not directly make the municipal taxes of Mt. Pleasant a lien on the property taxed. It is hardly necessary to say that a municipal tax is not a lien on the property upon which it is levied,

¶ 2. See Deeds, vol. 16, Cent. Dig. § 255.

unless made so by direct legislative enactment, or by action of the municipal corporation in pursuance of express legislative authority. *Heine v. Levee Com'rs*, 19 Wall. 655, 22 L. Ed. 223. In the absence of any express provision of law that the town of Mt. Pleasant shall have a lien like that of the state for its taxes, the charge to the jury could be sustained only on the ground that the lien for taxes is implied in the general "rights, powers, and privileges" conferred on purchasers at sales made by the Intendant. The law in express terms makes the claim of the state for taxes a first lien, and the court would not, unless compelled by enactment capable of no reasonable interpretation, impute to the General Assembly the inconsistency of attempting to make a municipal tax also a first lien. Certainly, it cannot by implication be held the statute amending the charter of Mt. Pleasant must be so construed. To hold a municipal corporation has received by implication a power enabling it to defeat or interfere with the established policy adopted by the state for the collection of its own taxes would be in the face of the plainest rules of construction. *Mauldin v. City Council*, 33 S. C. 23, 11 S. E. 434, 8 L. R. A. 291; 2 Dillon on Municipal Corporations, § 763. It is useless to consider in detail the rights the sale made by the Intendant of Mt. Pleasant confers on the purchaser by virtue of the charter and the act of December 24, 1887, for it is quite manifest such sale could have no effect on the lien in favor of the state for taxes, or on a title made in the due enforcement of that lien. In truth, it is conclusive of the whole question to say that the General Assembly did not create a lien for state taxes by the act of 1887, and certainly no lien for municipal taxes could be implied by the reference made to that act in the Mt. Pleasant charter. The plaintiff claimed as a purchaser from the sheriff at a sale made by that officer in enforcement of the state's first lien for taxes. His title is referred to this lien, and, if otherwise good, it could not be defeated by a tax sale made by the Intendant of Mt. Pleasant to enforce collection of municipal taxes assessed against the property in the name of the same owner. This disposes of the third, fourth, fifth, sixth, eighth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth exceptions, all of which relate to the error of the circuit judge in not charging in accordance with the principles above stated. In view of this conclusion, it is unnecessary to pass upon the seventeenth exception, which draws in question the constitutionality of the act of 1891, amending the Mt. Pleasant charter; for, under the case presented to this court, if the plaintiff proves at the next trial a legal sale under which he acquired a tax title, it cannot be defeated by the sale for municipal taxes; and, if he fails to establish a valid sale for state taxes, he will not be able to recover, even regarding the municipal sale for taxes absolutely void. He

must recover on the strength of his own title, not on the weakness of the defendant's.

The circuit judge was in error in leaving it to the jury to say whether the deed made by the sheriff to plaintiff was in evidence, and the first exception is sustained.

The second, seventh, tenth, and sixteenth exceptions all relate to alleged errors in the charge in submitting to the jury the construction and import of deeds and other documents introduced in evidence. As the case is to go back for a new trial, any detailed analysis or discussion of the charge in this regard would be of no value. It is sufficient to say it is the province and duty of the judge to instruct the jury as to the construction and nature of the written instruments. *Russell v. Arthur*, 17 S. C. 480; *Asbill v. Asbill*, 24 S. C. 359; *Coates v. Early*, 46 S. C. 220, 24 S. E. 305; *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581, 38 S. E. 222. Some portions of the charge, it seems to us, must have produced the impression that the construction and import of the tax deeds and other papers might be passed on by the jury.

The instruction referred to in the ninth exception, as to the duty of the plaintiff, as mortgagee, to look out for taxes, and pay them, was erroneous, because it was entirely inapplicable to the case, and tended to mislead the jury as to the real issue. The plaintiff's mortgage had been merged in the title made to him by the sheriff, and he was not a mortgagee when the town undertook to enforce the collection of its taxes. He was not asserting against the Mt. Pleasant tax sale a title acquired under his mortgage, but under a sale for the enforcement of the state's lien for taxes. The fact that he held a mortgage on the lot may have been, as he said, an inducement to purchase, but it had no connection whatever with the source of strength of his title.

The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered.

(65 S. C. 517)

#### NORMAN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 1, 1903.)

#### APPEAL — GENERAL EXCEPTIONS — CARRIER — EXPULSION OF PASSENGER — LIMITED TICKET.

1. Where exceptions fail to point out any specific error, they are too general for consideration.

2. Where a passenger is put off a train by a conductor because the time limit on his ticket has expired, whether he is entitled to punitive damages, the pleading sustaining such a claim, is for the jury.

3. Where a passenger pays full fare for a general ticket, he is not bound by limitations printed thereon, where his attention has not been called to them, and the posting of notices in the waiting rooms and ticket offices is not sufficient to charge him with notice thereof.

Appeal from Common Pleas Circuit Court of Union County; Watts, Judge.

Action by Charles H. Norman against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts, omitting the formal allegations, are thus set out in the complaint:

"Second. That on the 7th day of January, 1899, the plaintiff being then at Union, in the county of Union, aforesaid, his place of residence, and desiring and intending to go to Spartanburg, aforesaid, on business, purchased from defendant one first-class passage from Union to Spartanburg, paying full fare for same, and receiving a first-class ticket therefor.

"Third. That on said 7th day of January, 1899, the plaintiff boarded the train upon which he expected to travel, but just before its departure plaintiff was handed by the defendant's ticket agent, who was also the telegraph operator, a telegraphic dispatch directing plaintiff not to come to Spartanburg that day; and plaintiff thereupon, because of said dispatch, decided to remain at Union, and got off the train along with said agent. The plaintiff's change of purpose and his reason therefor was known to said agent, and plaintiff did not use, or attempt to use, said ticket that day.

"Fourth. That on the 8th day of January, 1899, plaintiff again boarded defendant's train for Spartanburg, and when accosted by the conductor tendered the ticket for passage to Spartanburg. That the conductor refused the ticket, telling the plaintiff he could not ride upon it; that such ticket was good only on the day of sale; and that he would have to pay fare or get off the train, which plaintiff declined to do.

"Fifth. That at Pacolet station the conductor came to plaintiff, telling plaintiff that by order of the defendant's superintendent the plaintiff must pay fare or leave the train; and plaintiff declined to leave, whereupon the conductor seized plaintiff, and forcibly ejected him from the car; and plaintiff was compelled, in order to pursue his journey, to purchase and pay for a passage from said station to Spartanburg. And plaintiff was ejected from said car by order of said superintendent.

"Sixth. That by reason of said wrongful conduct and force of defendant in ejecting the plaintiff he was greatly distressed and disturbed in his mind and feelings and humiliated in spirit, and was held up and exposed to the gaze and contempt of strangers and passengers upon the car as a person who was attempting to defraud the defendant company, and cheat them out of a passage or fare.

"Seventh. That the ticket purchased at Union, and tendered for passage and refused, had printed upon its face the following, among other, words: 'Good for one first-class passage, unless otherwise notched, if used on or before midnight of date canceled by "L" punch in margin below, only on the

trains stopping at destination,' and the date of its sale, January 7, 1899, was stamped upon its back, and same date was canceled by 'L' punch in margin below. But the plaintiff avers that at the time of the purchase by him of said passage and receipt of said ticket he was not aware that the ticket contained the printed words above set forth, or that there was any condition or limitation that the ticket was good only on the day as canceled by the punch, or good only on day of sale; and he was not aware of any rule or regulation of the defendant company that such ticket was good only on day of sale or as canceled, or that the ticket purchased by plaintiff was good only, and must be used, on the 7th day of January, 1899. And plaintiff avers that he had previously ridden upon defendant's trains on similar tickets on days subsequent to the day of sale.

"Eighth. That by reason of the facts hereinabove alleged the plaintiff has suffered injury and damage to the amount of six hundred (\$600) dollars."

The jury rendered a verdict in favor of the plaintiff for \$200.

C. P. Sanders, for appellant. McGowan & Gunter, for respondent.

GARY, A. J. The first and second exceptions assign error on the part of his honor the circuit judge, as follows: "(1) In allowing the following question to be asked the plaintiff, and in allowing him to answer the same: Q. Did you say anything to him with reference to the ticket as to why you got off? And also in allowing the plaintiff to detail a conversation had between himself and the telegraph operator on the day he purchased the ticket in question. (2) In allowing the plaintiff in reply to testify as to facts which he says occurred between himself and the conductor, which facts had already been testified to; the error being that the same was cumulative evidence." While these exceptions were not formally abandoned, nevertheless they were not discussed by the appellant's attorney. They, however, fail to point out any specific error, and are, therefore, too general for consideration.

The thirteenth exception is as follows: "(13) Because his honor erred in refusing defendant's twelfth request: 'In this case only actual damages can be allowed; no vindictive or punitive damages can be recovered,' and in submitting to the jury the question of vindictive or punitive damages. It being respectfully submitted that in this case there was a time limitation plainly printed upon the ticket, which his honor instructed the jury the defendant company had a right to make; and it being an admitted fact that the time within which the ticket was to be used had expired, and the evidence showing that there was no unusual force, no insult, no willfulness or maliciousness on the part of the defendant company, but only an honest effort to enforce a reasonable rule of the company in a quiet



and dignified way, his honor should have instructed the jury that this was not a case for vindictive or punitive damages." By reference to the complaint it will be seen that the allegations thereof are appropriate to an action for punitive damages. In the case of *Myers v. Southern Ry. Co.*, 64 S. C. 514, 42 S. E. 598, Mr. Justice Jones says: "It was fairly left to the jury in other portions of the charge to determine whether defendant's agent was merely negligent in his conduct, or whether he was acting willfully or wantonly. If defendant's agent, conscious of plaintiff's right as passenger, nevertheless invaded that right by exacting and coercing an unlawful payment of money under threat of expulsion from the train, his conduct was willful or wanton, such as would subject defendant to exemplary damages." In the case of *Griffin v. Southern Ry. Co.*, 65 S. C. 122, 43 S. E. 445, the court uses this language: "It is frequently difficult to tell whether an act of wrong is attributable to willfulness or mere inadvertence, which is the foundation of negligence; and, whenever the facts are susceptible of more than one inference, it is peculiarly the province of the jury to determine such question. *Pickens v. R. R. Co.*, 54 S. C. 498, 32 S. E. 567. The fact that it is often hard to determine whether an act of wrong was the result of recklessness or inadvertence was no doubt one of the reasons inducing the Legislature to pass the act of 1898, hereinbefore mentioned." These cases are cited with approval in *Marsh v. W. U. Tel. Co.*, 65 S. C. —, 43 S. E. 953. The presiding judge could not have decided that the plaintiff was not entitled to punitive damages in this case without invading the province of the jury.

All the other exceptions, in different forms, raise the question whether his honor the circuit judge erred in ruling that the plaintiff was not bound by the conditions printed upon the ticket unless he had actual notice thereof. The authorities upon this question are conflicting, and it has never been decided in this state. The principle is correctly stated in the case of *Louisville & N. R. Co. v. Turner* (Tenn.) 47 S. W. 223, 43 L. R. A. 140, as follows: "While there may be some uncertainty, and even conflict, in the authorities, we are of the opinion that the correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which, under the proper and usual schedule of the road, stops at the point of the passenger's destination." If a ticket, limited or conditional, is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration or with the alternative presented to the passenger of a full and unlimited ticket." Numerous authorities are cited to sustain this doctrine. Continuing, the court says: "So, in *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 330, 21 L. Ed. 303, it is said: 'Nothing short of an express stipulation by parol or in writing will be permitted to discharge a carrier from the duties

which the law has annexed to his employment; and such agreement is not to be implied or inferred from a general notice to the public, limiting the obligation of the carrier, which may or may not be assented to.' See, also, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465. We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by the passenger, without more, are not sufficient to bind him to such limitation or condition, in the absence of notice to him of such condition or limitation, and his assent thereto, when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place with the crowd at the ticket window, and produces and hands over his money with a request for ticket to destination. His money is received. The ticket is procured, and, after being stamped, is handed to him through the ticket window. He has no opportunity to see what is upon it, and he has no time in the rush to stop and read and consider what may be printed or stamped on its face or back; and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contracts, and are not intended to do so. They are mere tokens to the passenger and vouchers to the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and, if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards, and it would impose quite a serious burden upon travel that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare. *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 545; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 505, and note; *Ray, Passenger Carriers*, § 145; *Hutchison, Carriers*, §§ 246, 580, 581; 4 *Elliot, Railroads*, § 1593. This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains, with limitations and conditions, such as excursion, round trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser, and assented to orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has

been very wisely said that the purchaser should, in view of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to be informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare, and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket." We have quoted at length from the foregoing case because its reasoning renders unnecessary the citation of other authorities.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(65 S. C. 524)

**DU PONT v. CHARLESTON BRIDGE CO.**  
(Supreme Court of South Carolina. April 1, 1903.)

**EASEMENT—CONSTRUCTION—WAIVER—ADVERSE POSSESSION—LIMITATIONS.**

1. On destruction of a bridge, its proprietors established a ferry, and the owner of the land was granted free passage over the same in consideration for the maintenance of the highway over her land. *Held* binding on the bridge company for the benefit of all subsequent grantees of the land while the company used the turnpike, whether it maintained a bridge or a ferry.

2. Where a person claiming a right to cross a bridge or ferry free of toll pays the toll on demand, under protest, it is not a waiver of the right to a free passage.

3. Where a person having a right of free passage over a bridge had full notice that such right would not be recognized, and the bridge company was operating the bridge in constant denial of her claim, requiring her to pay toll every day, and the right was denied her continuously for 12 years, the easement was barred by limitations.

4. Where there is a judgment for the recovery of land or any right of property remaining unenforced for the statutory period, the defendant in possession is presumed to hold in subordination to the right fixed by the judgment or decree; but where the defendant, in possession of the property in which a right has been fixed by the judgment or decree of the court, holds it adversely and in denial of such right for the statutory period, with full notice to the true owner of the adverse holding and denial of his right, the statute of limitations is a complete bar to any action for the enforcement of the right.

Appeal from Common Pleas Circuit Court of Charleston County; Townsend, Judge.

Action by Cornelia G. Du Pont against the Charleston Bridge Company. From decree in favor of plaintiff, defendant appeals. Reversed.

Ficken, Hughes & Ficken, for appellant.  
Young & Young, for respondent.

**WOODS, J.** The Charleston Bridge Company was chartered by an act of the Legislature, December 17, 1808 (9 St. at Large, p. 434), for the purpose of establishing a bridge over Ashley river from the parish of St. Philip to the parish of St. Andrews; and authority was given to the incorporators to establish also a turnpike road from the terminus of the bridge in the parish of St. Andrews to

a point of intersection with another road. The charter was without limit of duration, but required both bridge and road to be completed within seven years from its date, and in the meantime the company was allowed to establish a ferry at the place fixed for the construction of the bridge. The bridge was completed in 1810, but was destroyed by a cyclone in 1813. There was no hope that the bridge would be rebuilt, and the Legislature in 1815 established a ferry at the same place, and vested it in the Charleston Bridge Company for 20 years. In 1834 the charter of the company was renewed for 14 years, and it was given all the powers and privileges acquired under former acts of the Legislature. 9 St. at Large, 601. There was a renewal in 1848 of the authority to conduct a ferry for 14 years. 11 St. at Large, p. 532. In 1856 the bridge was rebuilt under the original charter, but was burned by the Confederate army in the evacuation of Charleston in 1865. The company again ran a ferry until 1886, when the bridge was again rebuilt. The General Assembly, on December 21, 1882 (18 St. at Large, p. 74), passed an act to revive and renew the charter of the company granted on December 17, 1834. Either bridge or ferry was open to the public from 1808 to the present, but they were never in operation at the same time. The company, some time prior to 1817, while it was operating the ferry, built its turnpike road over the lands of Mrs. Chalmers without permission. Upon receiving a letter from her, dated October 31, 1817, demanding a return of her land so used, or payment for it, or free passage of the ferry for herself and family and servants, the company sent the following communication in reply: "Your letter of the 31st ult. was this day laid before the board of directors of the bridge company, and the following resolution passed thereon, viz.: 'On application of Mrs. Chalmers, as owner of a plantation through which the turnpike road passes, for the privilege of passing the ferry as consideration for the use of the land and damages, resolved, that the owner of the said plantation, with his or her carriage horse or horses, and accompanying servants, have the privilege of passing the ferry free of toll. By order of the board. J. M. Davis, Secretary. Charleston, 14 November, 1817.'" This arrangement remained in force until Mrs. Chalmers sold the land over which the turnpike road passed to her son, H. J. Chalmers, when the company refused to allow him or her to pass the ferry free, claiming it had merely given a license revocable at will, and that it did not confer any right to cross the ferry without toll upon subsequent owners of the land. Upon this Mrs. Chalmers and her son filed their bill in the court of equity, praying for specific performance. This suit resulted in a decree of Chancellor Waties, in which it was held that the perpetual privilege of crossing the ferry free had been granted to the owner of the Geddes Hall Plantation, whoever such owner might be, in considera-

tion of the use of the land over which the company's turnpike passed, and it was not, therefore, a revocable license; and it was decreed "that the defendants and their agents be perpetually restrained from exacting toll for passing their ferry from the complainant, Henry I. Chalmers, the present owner of said land, with his carriage horse or horses, and accompanying servants, subject, however, to any general restrictions which may at any time be established by the said ferry; and that the said complainant and his mother, Sophia Chalmers, do execute a release to defendants of all claim for damages or other compensation on account of the running of the turnpike road through the said land." It will be observed no reference is made to free passage of a bridge, and the issue here made was not decided nor anticipated by the decree. There seems to be no doubt that, for all the time the company operated the ferry, the privileges fixed by the decree were allowed to the successive owners of the land without question. The plaintiff is now the owner of the Geddes Hall Plantation, and demanded of the company for herself and family and servants the privilege of crossing the bridge free of toll. This demand was refused by the company, and the plaintiff on January 4, 1900, brought this action to enjoin the defendant from charging her any toll for herself, her family, her servants, horses and carriages, asking a decree that the company's bridge or ferry be forever free to her, her family, servants, horses and carriages, and for judgment for damages for the past denial of her rights in this regard.

The defendant's answer really sets up three defenses: First, that the contract made with Mrs. Chalmers in 1817 for herself and the subsequent owners of the land, and the decree of Chancellor Waties fixing the rights of the parties under that contract, contemplated free passage of the ferry only, and not of the bridge. Second, that if the plaintiff or her husband, who conveyed to her, ever had any license or easement to cross the bridge free of toll, it was lost by abandonment and waiver. Third, that the claim of the plaintiff is barred by the statute of limitations.

The case was referred to G. H. Sass, Esq., master, who reported that the plaintiff was entitled to the relief sought, and recommended in her favor for \$1,495 damages. His honor Judge Townsend, upon hearing the cause, overruled the exceptions on both sides and confirmed the report in a formal decree. The case is submitted to this court on exceptions by defendant, which cover the defenses above stated. It is hardly necessary to say that the decree of Chancellor Waties construing the original contract is absolutely binding as far as it goes in this case, because the defendant was a party to the cause in which it was made, and the plaintiff is claiming through another party to that cause; but the precise question made here was not then in issue. The great lapse of time since it was

made, as we shall hereafter endeavor to show, does not in the least impair its force in this regard, unless in the meantime the parties themselves have by some act or omission defeated the right which the decree conferred.

The first defense, that free passage over its ferry did not mean free passage over its bridge, raises an interesting issue. The bridge company in 1817, the date of the contract, and also in 1820, the date of the decree, was operating a ferry only, but it had a charter to establish a bridge whenever it saw fit. It was almost absolutely necessary for the purposes of either enterprise that it should retain the road through the Geddes Hall Plantation. It is true that no bridge was contemplated in 1817, when the contract was made, or for many years after, but both parties well knew the road would be needed if the bridge ever should be rebuilt. The ferry was chartered and established merely as a substitute for the bridge, and they were never in use at the same time. When the bridge was rebuilt in 1856, and again in 1882, the company continued to use the road in connection with the bridge, just as it had done in connection with the ferry, without any new negotiation or recognition of any right of the owner of the Geddes Hall Plantation to object. It is impossible to resist the conclusion that the bridge company regarded the turnpike as much an adjunct of the bridge as of the ferry, when the bridge was in operation. In other words, it attached to the bridge all the benefit it acquired from the owner of Geddes Hall for the operation of the ferry. The contract contemplated that a perpetual right should attach to Geddes Hall in consideration of a continuing detriment to the property growing out of the perpetual use of the road by the company. It is true the company had a franchise to establish both a bridge and a ferry but there was only one corporation, and it never had any intention to establish or operate them together. These considerations lead to the inquiry, could this company, having acquired a valuable continuing right for the benefit of its ferry, substitute a bridge for the ferry, and use this right for the benefit of its bridge precisely as it had done for its ferry, without having the bridge charged with the same burden which had attached to the ferry? Could the company, by a mere substitution of means of transportation, rid itself of a burden, and at the same time retain the benefit which it acquired by assuming the burden? If so, then it might have built a bridge just after the contract was made, refused free passage to the owner of Geddes Hall, and at the same time retained the road. It can hardly be maintained that this course would have received legal sanction. In the effort to arrive at the scope of the contract, it should be kept constantly in mind that the purpose of the contract was to bestow upon the owner of Geddes Hall the right to cross the river free in considera-

tion of land for a road, which was as essential to a bridge as to a ferry, and the ferry is mentioned because of the accidental circumstance that there was a ferry, and not a bridge, then in operation. "The general intention to be collected from the whole context and every part of a written instrument is always to be preferred to the particular expression." *Anderson v. Holmes*, 14 S. C. 104. It is true a bridge cannot be construed to be a ferry, but it may well be a substitute for a ferry when it was manifestly so intended, and, where so substituted, it will be charged with the license or privilege of free passage resting on the ferry, when its owner continues to use for the bridge the easement in consideration of which the free passage was bestowed. Although the testimony is very meager, we think the circumstances warrant the statement that it is extremely probable this was the position assumed and acted on by the bridge company for many years. It is true the view taken by parties themselves of their obligations is not conclusive, but in all doubtful cases it is of great value. *Murray v. Alken*, 37 S. C. 485, 16 S. E. 143; *R. R. Co. v. Trimble*, 10 Wall. 383, 19 L. Ed. 948. The focal point in trying to arrive at the construction placed on the contract by the parties themselves is the closing of the ferry and opening the bridge in 1856. The fact that no testimony was offered as to anything occurring between the parties when that change was made is significant. If the company at that time had denied the right of the owner, Mrs. Geddes, to cross the bridge free of toll, and yet retained the road over her lands as an adjunct of the bridge, it is probable the change would have resulted in protest or dispute of some kind, because the company would have had the road from that date forward in perpetuity, without any compensation whatever to the owner of Geddes Hall; and, if there had been any question, the company could have furnished at the trial proof of the change and of its position in the matter by its minutes, as it did in other instances when dispute arose. The positive evidence on this subject is unsatisfactory, and, standing alone, would not be an adequate basis for a conclusion. Mr. G. G. Du Pont testifies he often passed with his father, who managed the Geddes Hall Plantation for the owner, and he never saw him pay toll, but the bridge was burnt when he was only five years old, and his father died before it was rebuilt. A certificate was offered in evidence, signed by Geo. W. Burn, who had been the superintendent of the bridge, to the effect that Mr. W. Du Pont, who was the manager of Geddes Hall, had always had the right of crossing the bridge and ferry while Burn was in charge. This certificate was received by the master subject to objection, which was renewed by the defendant in exceptions to the master's report, but all exceptions were overruled, and its admission is not made a ground of appeal, so it is before this court

as competent evidence. The defendant offered no evidence whatever tending to show free passage across the river was refused the owner of Geddes Hall when the bridge took the place of the ferry in 1856. All the circumstances, sustained by what evidence we have, lead to the conclusion that when the bridge was rebuilt in 1856 it was treated by both parties as a substitute for the ferry, and free passage was allowed over it to the owner of Geddes Hall. The defendant continued the use of the land for its road with this understanding, thus waiving its right, if it had any, to charge toll. We conclude, therefore, that plaintiff's grantor, G. G. Du Pont, had the right to cross the bridge free of toll when it was rebuilt in 1882, and this right was acquired by the plaintiff when she purchased the land August 28, 1888. The first defense, therefore, must fail.

It remains to inquire whether the right has been lost by any act or omission on the part of the plaintiff, Mrs. Du Pont. The defendant claims that after the building of the bridge in 1882 the plaintiff and her husband, who conveyed the land to her, always paid toll up to the commencement of this action, and thus waived the right of free passage, if it ever existed. We do not think this position can be sustained. The undisputed testimony is that Mr. G. G. Du Pont, in his own behalf, and afterwards as agent for his wife, continually asserted the right to cross the bridge, and had frequent interviews with the officers of the company concerning it. The fact that toll was paid when the parties could not possibly otherwise cross a bridge they were obliged to cross certainly was not waiver of any right, and no evidence of abandonment, nor was the offer of Mr. Du Pont to pay a certain sum weekly, instead of paying at each passage, of any consequence. It is said in *Polson v. Ingram*, 22 S. C. 547: "It will be observed that the question of abandonment is a very different question from having the easement defeated and divested by the adverse use of another. This last question is to be determined by the character of the adverse use, and how long continued, while the former depends upon the intention of the party in possession, without regard to the claims of others. Such being the law, it would have been error for the judge to have charged, as a direct and positive proposition, 'that twenty years' nonuser will presume the abandonment of an easement.'" *Grocery Co. v. Moore*, 63 S. C. 188, 41 S. E. 88.

It is now to be considered whether the plaintiff's right is barred by the statute of limitations. The long lapse of time since the decree was rendered does not affect this question. That decree fixed the rights of the owner of Geddes Hall respecting the specific license he was then claiming to cross the ferry, and it in terms applied to all subsequent owners of the property, however remote. The bridge company could never afterward be heard to bring into issue the license therein adjudged to belong to the owner of Geddes

HALL. The perpetual right established by a decree of this kind is never presumed to be destroyed or lost by mere lapse of time. Such a decree may be carried into effect by further orders in the same cause whenever circumstances arise making this necessary, or, where such changes have taken place in the situation of the parties or the property involved as to embarrass the court in proceeding under the original decree, another complaint in equity may be filed to carry the original decree into effect. The effectual defense here is not the mere failure of the plaintiff to sue on the decree of Chancellor Waties for 20 years after she had the right to sue. If this action be regarded as a suit on the decree, it may be that, if plaintiff had simply had no occasion to use her right to cross the bridge for any period short of 20 years, she might then have sued on the decree and had her right established; and that, if she had for that period merely foreborne to use her privilege, and had allowed 20 years to pass after she could sue on the decree, her right of action might be gone, under section 111 of the Code of Civil Procedure. The actual denial of the plaintiff's right, and adversely excluding her from it, is a very different defense. Adverse possession under the statute of limitations, set up by the defendant here, is an affirmative defense based on positive action taken since the decree was made. In this respect it stands on the same ground as would the defense of the execution of a release in a case of this kind, or as the defense of payment would stand if the complaint were based on a decree for the payment of money. It may be set up not only as a defense, but as a basis of recovery. *Busby v. R. R. Co.*, 45 S. C. 317, 23 S. E. 50. The statement that the right to property, in this case the privilege of free passage over a bridge established by a judgment, is not lost by mere lapse of time, however great, does not imply that the right thus established may not be lost by the act or omission of the parties in interest themselves. A decree concludes all defenses which existed at the time it was rendered, but not defenses which arise after the decree has been made, and any defense which becomes available in the interval may be set up against an action on the judgment. *Black on Judgments*, § 972; *Burwell v. Jackson*, 9 N. Y. 535. To illustrate: If A., 50 years ago, obtained a decree of the court putting him in possession of a tract of land as against B., it is clear that A. could now set up the judgment against B., and prevent his recovery in any right that he might then have set up; but if A. had afterwards allowed B. to obtain possession of the land and hold it adversely to him for 10 years, with full notice of the adverse character of his holding, A. could not successfully rely on the former judgment to prevent the bar of the statute, because B. has acquired by his adverse possession a new title, subsequent to the judgment and entirely independent of it.

This view is supported by reason, and we think it is fully sustained by authority. It is well established in this state that a subsequent purchaser of land from a judgment debtor may hold by adverse possession as against a purchaser under the judgment. In *McRaa v. Smith*, 2 Bay, 339, where this doctrine was first announced, the argument of the court was that the judgment could not possibly have given a better claim to the land than an absolute conveyance from the judgment debtor would have given if made at its date, and if the judgment debtor had made an absolute conveyance at the date of the judgment, and subsequently made another deed, and the purchaser under the second deed had entered and held adversely for the statutory period, the right of the first purchaser would be gone forever. As was intimated in *Pegues v. Warley*, 14 S. C. 190, the reasoning would be still stronger if the judgment were for the actual title and possession of the land, instead of a lien in the enforcement of which the title was acquired. By this reasoning, when a suit is brought to enforce the right established by the decree of Chancellor Waties, it could not be relied on to defeat the bar of the statute in favor of an adverse holder, any more than could a deed of the same date covering the same scope. In either case, however, the burden is on the party who sets up adverse possession to show that he not only held adversely, but that he gave full notice to the real owner that he was so holding. Until this notice is given, the grantee may assume the grantor is holding in subordination to the title he has made; and the party in whose favor a decree has been made may assume other parties to the suit are holding in subordination to the decree.

The views expressed on this subject in *Van Rensselaer v. Wright*, 121 N. Y. 627, 25 N. E. 3, on which the plaintiff relies, are not in conflict with this position. All that was held in that case was that a lapse of 20 years does not presume the satisfaction of a judgment for the recovery of possession of land. So far as the judgment was concerned, that was the sole question; there was no claim in that case of adverse possession by defendant after the entry of the judgment. The distinction between that case and one where there is adverse possession for the statutory period after the entry of the judgment is thus stated in *Root v. Woolworth*, 150 U. S. 415, 14 Sup. Ct. 136, 37 L. Ed. 1123: "But, aside from this, the appellant stands in the same position now that he did in the former suit, when it was decreed that he had no right, title, or interest in the property. If, since that decree, he has inclosed a part of the land, cut wood from it, or cultivated it, he would be treated and considered as holding it in subordination to the title of Morton and his privy in estate, until he gave notice that his holding was adverse, and in the assertion of actual ownership in himself. In his position he could not have

asserted adverse possession after the decree against him, without bringing express notice to Morton or his vendees that he was claiming adversely. Without such notice, the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed, and his holding possession would, under the authorities, be treated as in subordination to the title of the real owner. This is a well-established rule." The conclusion cannot be avoided that, where there is a judgment for the recovery of land or any right of property remaining unenforced for the statutory period, the defendant in possession is presumed to hold in subordination to the right fixed by the judgment or decree; but where the defendant in possession of the property in which a right has been fixed by the judgment or decree of the court holds it adversely and in denial of such right for the statutory period, with full notice to the true owner of the adverse holding and denial of his right, the statute is a complete bar to any action for the enforcement of the right. *Oberlin v. Wells*, 163 Ill. 101, 45 N. E. 294; *Mabary v. Dollarhide* (Mo.) 14 Am. St. Rep. 643, and note; note to *Snell v. Harrison* (Mo.) 52 Am. St. Rep. 648; *Root v. Woolworth*, supra. Apply this conclusion to the facts of the case under consideration. In 1856, when the bridge was rebuilt, the owner of Geddes Hall had the right of free passage over it. The plaintiff, Mrs. Du Pont, acquired title to Geddes Hall, August 28, 1888, and, with the title, the right of free passage. This right was actively denied to her by the bridge company continuously from that time until the commencement of this action, January 4, 1900. Her claim was in the meantime frequently pressed upon the company, and was always refused recognition. She had full power and repeated notice that the right she is now seeking to enforce would not be recognized, and the bridge company was operating the bridge in constant denial of her claim, requiring her to pay toll every day. No more complete adverse claim, and no more explicit notice of it, could be suggested.

In the foregoing discussion of the statute of limitations, we have treated the right of passage of the bridge as if it had been expressly adjudged by the decree of Chancellor Waties, and this action is brought to carry that decree into effect. The issue made by plaintiff here, that the bridge should be charged with free passage just as the ferry had been before it was replaced by the bridge, was not before the court, and was not decided by that decree. We are inclined to the view that this, therefore, cannot be regarded an action on the decree, but rather an action to establish a right of the plaintiff, as owner of Geddes Hall, under the contract of the bridge company, beyond the adjudication made by the court in 1820. If this be the correct view, then the plaintiff's right of action under the contract accrued in 1888, when she acquired the title to Geddes Hall and the right to free

passage of the bridge, and the express withholding and denial of her right had continued for more than 10 years before the action was brought. Therefore, whether we regard this an act on the decree of 1820 or on the contract of 1817, the same result would follow.

The plaintiff, however, claimed that the passage of the river in 1900 by members of Mrs. Du Pont's family free of toll would break the bar of the statute. The evidence does not show that this was regarded by Mrs. Du Pont or the bridge company as any exercise of her right to cross the bridge free of toll, but only the ferry. A part of the bridge had been broken, so that it could not be crossed. If Mrs. Du Pont had asserted her right to cross the bridge free of toll at this time, and it had been accorded her, a very different question would be presented; but it is not every entry that breaks the continuity of adverse possession. There must be an assertion of right, and performance of some act that reinstates the party in possession of his right. See notes, *Trotter v. Cassady*, 13 Am. Dec. 185, and *Peabody v. Hewett*, 83 Am. Dec. 499. But, in addition to this, the bar of the statute was complete, and the plaintiff's right entirely gone, when the crossing of the river free of toll took place in 1900, after the commencement of this action.

Respondent further insists that, even if adverse possession for 10 years with full notice to the true owner would bar an action for the recovery of land based on a contract or on a judgment rendered for its possession, this rule would not apply to an easement or license. It is not material to the discussion of this question whether the privilege to which the plaintiff was entitled be regarded an easement or a license, for a license can stand on no higher ground than an easement in this respect. Nor is it necessary to decide whether a bridge is real or personal property, because sufficient time has passed, during which the plaintiff was continually denied her right to free passage, for the statute to be as effective in one case as in the other. We can discover no principle of law upon which the plaintiff's position, that an easement or license is not barred by the actual denial and exclusion of the claimant by the owner of the servient property for 10 years, can be sustained. The case of *Bowen v. Team*, 6 Rich. Law, 800, 60 Am. Dec. 127, is conclusive. It was there held the continued adverse possession for the statutory period of a right of way by the owner of the soil over which it passes, to the exclusion of the person claiming the easement, is a complete bar under the statute of limitations. In *Railway v. Beaudrot*, 63 S. C. 269, 41 S. E. 299, the same principle is again announced, and it is supported by the courts of other states. *Jones on Easements*, § 866. The case of *Parkins v. Dunham*, 3 Strob. 225, is not opposed to this view, for the decision there, that the easement to flow water was not barred by the owner of the land cultivating it for the statutory period, is placed on the

ground that the easement to overflow was not inconsistent with a degree of cultivation, and the cultivation of the land was no interruption of the easement. In the case now under discussion there was an absolute denial and deprivation of the license or easement for more than 10 years, with full and repeated notice to the claimant. The plea of the statute of limitations must be sustained. It is therefore unnecessary to consider the plaintiff's exceptions.

The judgment of this court is that the judgment of the circuit court be reversed and the complaint dismissed.

(55 S. C. 510)

**BUTLER v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. April 1, 1903.)

**TELEGRAM—FAILURE TO DELIVER—PUNITIVE DAMAGES.**

1. Where a messenger boy intentionally fails to deliver a telegram, the addressee is entitled to punitive damages.

2. Whether a verdict is justified by the evidence is a question of fact not reviewable by the Supreme Court.

Appeal from Common Pleas Circuit Court of Richland County; Aldrich, Judge.

Action by Jacob W. Butler against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The allegations of the complaint material to the consideration of the questions raised by the exceptions are as follows:

"(2) That on the 3d day of April, 1899, one J. B. Spivey, the son-in-law of the plaintiff, presented to and filed with the defendant, at its offices in the said town of Abbeville, the following message, to wit: 'Mr. H. F. Jumper, No. 709 Lumber Street: Wife very ill, come at once. Let parents and G. P. Spivey know. J. B. Spivey.'

"(3) That the defendant at said time and place received said message, and promised promptly to transmit by telegraph and deliver the same to the said H. F. Jumper at his said address in the city of Columbia, and that, in consideration thereof, then and there was prepaid to the defendant its regular charges.

"(4) That at said time the wife of said J. B. Spivey, mentioned in the said message, was critically ill; that the plaintiff is her father, and one of the parents mentioned in the said message, and that the same was presented to and received by the defendant to be transmitted and delivered as aforesaid, for the plaintiff's benefit, of all of which the defendant was apprised at the time of the presentation of said message to it as aforesaid; and that plaintiff has, on his part, in all respects fully complied with the terms and conditions of said agreement.

"(5) That although the said H. F. Jumper was at his residence, at No. 709 Lumber street,

in said city, during the whole of the said 3d day of April, when said message could and ought to have been delivered to him, and all of the following day, and although his said address was within easy reach of the defendant, and within its regular delivery limits in said city, the said defendant, willfully, wantonly, and grossly, negligently failed promptly to deliver said message, and the same, through the willful, wanton, and gross negligence of the defendant aforesaid, was not delivered, nor offered to be delivered, to the said H. F. Jumper, or any one for him, until the 7th day of April, 1899, upon demand then being made by the said H. F. Jumper therefor at defendant's office in the said city of Columbia, and that in the meantime, on the night of the 5th day of April, 1899, the said wife of the said J. B. Spivey died of said illness, and her remains were forwarded by railroad to Killian's, in the said county of Richland, for interment.

"(6) That by reason of defendant's said wanton, willful, and grossly negligent failure promptly to deliver said message as aforesaid, the plaintiff was deprived of seeing and being with his said daughter before her said death, and of accompanying her remains from the said town of Abbeville to said Killian's, and of providing for their proper reception upon their arrival at their destination at Killian's, was subjected to great mental anguish and suffering, and suffered damage in the sum of one thousand nine hundred and fifty dollars.

"(7) That on the 31st day of May, 1899, the plaintiff notified the defendant of the matters and things hereinabove set forth, and presented his claim in writing to said defendant for said sum of — by reason thereof, but that defendant has failed to pay the plaintiff said sum, or any part thereof, and has wholly ignored plaintiff's said claim.

"Wherefore the plaintiff demands judgment against the defendant for the sum of one thousand nine hundred and fifty dollars, and for the costs and disbursements of this action."

The jury rendered a verdict in favor of the plaintiff for \$650.

The following are the first seven exceptions:

"First. Because his honor erred in admitting, against the objection of the defendant, the plaintiff's witness Pete Thornton to testify as to the circumstances connected with taking the corpse of Mrs. Spivey from the depot at Killian's, S. C., to the house of the plaintiff, in reply to the following question: 'Q. What did you do? A. I assisted [the plaintiff] with two wagons—one to haul the company, and one to haul the corpse;' and to the questions and answers immediately following, having a similar import; it being respectfully submitted (1) that the cause of action herein arose prior to the mental anguish act of 1901, and evidence, the sole object of which was to show the mental anguish endured by the plaintiff, was irrelevant and inadmissible, and that the sole object and effect



of said testimony was to show the mental anguish suffered by the plaintiff; (2) that said testimony was irrelevant, because it appeared from the complaint that the failure of the plaintiff to make arrangements to meet the funeral party at Killian's, S. C., was not the natural, proximate, or direct consequences of the delay in the delivery of a telegram mentioned in the complaint.

"Second. Because his honor erred in admitting, against the objection of the defendant, testimony of Pete Thornton as to the condition of the weather at Killian's, S. C., upon the arrival of the funeral party, by permitting the following question and answer: 'Q. What kind of a night? A. Stormy and rainy.' It being respectfully submitted that said testimony was irrelevant and improper, in that (1) its object and effect was to show the mental suffering endured by the plaintiff; (2) that it appeared from the complaint that the damage sustained by the weather at Killian's, S. C., was not the natural, direct, or proximate result of the delay in the delivery of the telegram.

"Third. Because his honor erred in admitting, contrary to the objection of the defendant, the following question and testimony as to the condition of the weather at Killian's upon the arrival of the funeral party: 'Q. What was the condition of the weather? A. It was raining.' It being respectfully submitted that the said testimony was irrelevant and improper, in that (1) its object and effect was to show the mental suffering endured by the plaintiff; (2) that it appeared from the complaint that the damage sustained by the weather at Killian's, S. C., was not the natural, direct, or proximate result of the delay in the delivery of the telegram.

"Fourth. Because his honor erred in admitting, against defendant's objection, the following question and testimony of F. W. Brown in reference to the condition of Mr. Butler when he reached the house of witness: 'Q. What condition was Mr. Butler in when he got there? A. Pretty wet and cold.' It being respectfully submitted that said testimony was irrelevant and improper, in that (1) its object and effect was to show the mental suffering endured by the plaintiff; (2) it appeared from the complaint that the damages sustained by the plaintiff on account of the bad weather was not the direct, natural, or proximate result of the delay in the delivery of the telegram.

"Fifth. Because his honor erred in admitting, against the defendant's objection, the following question and testimony of plaintiff as to the disposition of the corpse upon its arrival at Killian's, S. C.: 'Q. When you ascertained that the body had been carried off, where did you go? A. As the night was so bad, I thought probably they had carried her to Mr. Thornton's, and I went to Mr. Thornton's, and they told me they had gone.' It being respectfully submitted that said testimony was irrelevant and improper, in that

(1) its object and effect was to show the mental anguish suffered by the plaintiff; (2) that it appeared from the complaint that the damage sustained by the weather at Killian's, S. C., was not the natural or proximate result of the delay in the delivery of the telegram.

"Sixth. Because his honor erred in admitting, against the objection of the defendant, testimony of plaintiff as to the condition of the weather and of plaintiff when he reached Brown's upon the arrival of the funeral party: 'Q. What condition were you in when you got there? A. Very wet.' It being respectfully submitted that said testimony was irrelevant and improper, in that (1) its object and effect was to show the mental suffering endured by the plaintiff; (2) that it appeared from the complaint that the damage sustained by the weather at Killian's, S. C., was not the natural, direct, or proximate result of the delay in the delivery of the telegram.

"Seventh. Because his honor erred in admitting, against the defendant's objection, testimony as to the absence of arrangements for the funeral of Mrs. Spivey, by permitting the following question and answer: 'Q. When you left home that night, had you the opportunity of seeing yourself the arrangements made for the funeral, or had you to leave that for some one else? A. I had to leave that for some one else to attend to.' It being respectfully submitted that the said testimony was irrelevant and improper, in that (1) its object was to show the mental suffering endured by the plaintiff; (2) because it appeared on the complaint that the absence of said arrangements was not proximately, directly, or naturally due to the delay in the delivery of the telegram."

Smythe, Lee & Frost, Geo. H. Fearons, and R. W. Shand, for appellant. P. H. Nelson and Melton & Belser, for respondent.

GARY, A. J. The first seven exceptions, which will be reported, raise questions that have been recently decided by this court in the case of *Young v. W. U. Tel. Co.*, 65 S. C. 93, 43 S. E. 448, and must be overruled.

The eighth exception is as follows: "Eighth. Because his honor erred in refusing the motion of the defendant for a new trial, whereas the court should have granted said motion on the grounds upon which it was based, and especially upon the grounds that no actual or compensatory damages were proved, and the verdict could be explained only upon the assumption that the jury intended to inflict punitive damages; and the court should have granted a new trial for the reason that a verdict awarding punitive damages against the defendant was illegal, in that there was no evidence of whatever character submitted to the jury from which it could be deduced that the defendant or its agents, in failing to deliver the telegram in



question promptly, acted willfully, intentionally, or wantonly, or with such a frame of mind as would make it liable for punitive damages." The allegations of the complaint are appropriate to an action for punitive damages. In the case of *Myers v. Southern Ry. Co.*, 64 S. C. 514, 42 S. E. 598, the principle is announced that, if the defendant's agent consciously invades the plaintiff's rights, his conduct is willful or wanton, and such as would subject the defendant to punitive damages. In the case of *Griffin v. Southern Ry. Co.*, 65 S. C. 122, 43 S. E. 445, the court says: "It is frequently difficult to tell whether an act of wrong is attributable to willfulness or mere inadvertence, which is the foundation of negligence; and, whenever the facts are susceptible of more than one inference, it is peculiarly the province of the jury to determine such question." These cases are cited with approval in the recent case of *Marsh v. W. U. Tel. Co.*, 43 S. E. 953. There was testimony tending to show that the defendant's messenger boy did not go to the house in which H. F. Jumper lived when the message was handed to him to be delivered to H. F. Jumper. If he failed to go to the house, and such failure was intentional, the plaintiff was entitled to recover punitive damages. These facts were properly submitted to the jury for its determination.

The ninth exception is as follows: "Ninth. Because it is respectfully submitted that there was no evidence before the jury which justified a verdict against the defendant for actual damages in any sum, and there was no evidence before the jury of any willful, intentional, or wanton conduct, or of a frame of mind on the part of the defendant or its agents which would justify a verdict for punitive damages, and therefore the verdict should have been set aside by his honor on the motion for a new trial." Whether there was any testimony to sustain a verdict is a question of law, but whether the verdict is justified by the testimony presents a question of fact, which cannot be considered by this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(66 S. C. 12)

#### LYNCH v. SPARTAN MILLS.

(Supreme Court of South Carolina. April 8, 1903.)

#### APPEALABLE ORDER—AMENDMENT OF COMPLAINT.

1. Plaintiff can appeal from an order requiring him to amend his complaint by stating what of the acts charged were negligent and what willful.

2. In an action by an employé to recover for personal injuries, it is error to require plaintiff to amend his complaint so as to state what of the acts alleged were negligent, what were wanton, what were willful, and what were done in utter disregard of the rights of the plain-

tiff, and in what particulars the machinery and appliances became unsound and unfit for use.

Appeal from Common Pleas Circuit Court of Spartanburg County; Townsend, Judge.

Action by J. H. Lynch against the Spartan Mills. From an order requiring plaintiff to amend his complaint, he appeals. Modified.

The plaintiff appeals from that part of an order requiring him to make his complaint definite and certain in the particulars therein mentioned. The first paragraph of the complaint alleges the corporate existence of the defendant. The other paragraphs of the complaint are as follows:

"(2) That on the 31st day of July, A. D. 1901, plaintiff was employed by defendant company as a picker in its said factory. This duty was to run the picker machine, keep it in clean condition, and sweep the floor around it, and see that it was kept running. That while plaintiff was so engaged in the line of his duty, cleaning one of the pickers on said day, the defendant carelessly, wantonly, willfully, and negligently, and in utter disregard of the rights of plaintiff, caused its belt which connects the wheel of the picker upon which the plaintiff was working with the shafting overhead to break, and the buckle joining the same to come unfastened, thereby causing said belt to jump from the pulleys, and to catch the right arm of plaintiff, with which he was cleaning his machine, drawing said arm onto the wheel, and tearing and lacerating the flesh, breaking the bones therein, and horribly mangling and bruising the entire arm, also wounding his right shoulder and head, causing the plaintiff intense bodily suffering and great mental anguish, permanently injuring the right arm of plaintiff and rendering the same useless for life; to his great damage in the sum of \$20,000.

"(3) That defendant company willfully, wantonly, recklessly, negligently, and in utter disregard of the rights of plaintiff failed to furnish a sound and suitable belt and buckle joining the same to run the said picker machine, and connect the same in a safe manner with the overhead shafting, and failed to notify or warn plaintiff of the extra hazard by reason thereof, and through its said failure and negligence, and from no fault of plaintiff, said belt and machinery, through its defects, came apart, and without warning to plaintiff, and while he was in discharge of his duty, caught his arm, drawing it violently onto the wheel and under the belt, breaking the bones therein, and horribly tearing and lacerating the flesh thereon, and rendering the same useless to plaintiff for life, and further bruising and wounding the shoulder and body of plaintiff, causing him intense bodily suffering and great mental anguish; to his great damage in the sum of \$20,000.

"(4) That defendant company willfully, wantonly, recklessly, and negligently, and in utter disregard of the rights of plaintiff, fail-

ed to inspect the machinery and appliances connecting the machine where plaintiff was at work in the discharge of his duty with the overhead shafting, and by reason thereof the said machinery and appliances became unsound and unsafe and unfit for the purposes for which they are used, thereby causing the injury to plaintiff heretofore described; to his great damage in the sum of \$20,000."

The defendant served the following notice of motion:

"(1) Please take notice that on the complaint herein we will move before his honor Judge D. A. Townsend, at Union, S. C., Thursday, 17th April, 1902, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order requiring you to make the complaint herein more definite and certain by alleging and stating definitely and certainly in the second paragraph of the complaint what acts of the defendant were careless, what were wanton, what were willful, and what was done in utter disregard of the rights of the plaintiff, and what act or acts caused its belt to break and the buckle joining the same to become unfastened.

"(2) By alleging in the third paragraph of the complaint what acts of the company were willful, what were wanton, what were reckless, what were negligent, and what was done in utter disregard of the rights of the plaintiff, so as to fail to furnish a sound and suitable belt and buckles joining the same, and in what particulars said belt and buckles were unsound.

"(3) By alleging definitely and certainly in the fourth paragraph of the complaint what acts of the defendant were willful, what acts were wanton, what acts were reckless, and what acts were negligent, and in what manner it failed to inspect the machinery and appliances connecting the machine where the plaintiff was at work.

"(4) By stating definitely and certainly and in what particular the machinery and appliances became unsound and unfit and unsafe for the purposes for which they were used.

"(5) And to extend the time within which to answer."

His honor the circuit judge granted the following order:

"The motion is granted as to the first and fourth particulars.

"As to the second, it is granted as to what acts of the defendant were willful, wanton, or reckless, and as to what acts were negligent, and as to the particulars in which, etc., belt and buckle were unsound. The motion is refused as to the third particular, for the reason that only one act of the defendant is alleged in the fourth paragraph of the complaint, to wit, the failure to inspect the machinery and appliances. It is true that this one act is alleged to have been willful, wanton, and reckless, and also negligent, but there is no motion, or rather no notice of a motion, to strike out any part of said para-

graph. Time to answer is extended until the expiration of twenty days after the day of service of the amended complaint herein."

The plaintiff appealed upon exceptions assigning error in the following particulars:

"(1) In granting the motion of the defendant as to the first and fourth particulars, thereby holding that the complaint did not state with sufficient distinctness and certainty in the second paragraph of the complaint what act or acts of the defendant were careless, what were wanton, and what was willful, and what was done in utter disregard of the rights of the plaintiff, and what act or acts caused its belt to break and the buckle to become unfastened.

"(2) His honor also erred in holding that the complaint should have stated more definitely and certainly in what particular the machinery and appliances became unsound, unfit, and unsafe for the purpose for which they were used, as these facts are stated with sufficient definiteness and certainty in paragraphs 3 and 4 of said complaint.

"(3) That his honor erred in granting the motion of the defendant in the second particular, thereby requiring plaintiff to state separately what acts of the defendant were willful, what were wanton or reckless, and what were negligent, and as to the particulars in which the belt and buckle were unsound, as the complaint as a whole alleges with sufficient definiteness and certainty all of the foregoing facts, and further particulars would be a matter of proof, rather than pleading."

Evans & Finley, for appellant. C. P. Sanders, for respondent.

GARY, A. J. When the case was called for hearing in this court the defendant interposed the preliminary objection that the order was not appealable. We will first dispose of that question. The act of 1898, p. 693, is as follows:

"Section 1. That in all actions ex delicto, in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained, and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court.

"Sec. 2. That in all cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instruction of the court and recover such damages as he has sustained,

whether such damages arose from one or another of such acts or wrongs alleged in the complaint."

In *Procter v. Ry. Co.*, 64 S. C. 491, 42 S. E. 427, it was held that this statute permits the jumbling together in one statement of all acts of negligence and other wrongs. Under section 11 of the Code of Procedure the plaintiff had the right to appeal from said order if it involved the merits. In the case of *Blakely & Copeland v. Frazier*, 11 S. C. 122, the court uses this language: "The term 'merits' is not very clearly defined. It certainly embraces more than the questions of law and fact constituting the cause of action or defense. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground of privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing a proper judgment, he is presumably entitled to such appeal in order to secure that without which the judgment could not be rightfully had. The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. \* \* \* It may be concluded from the foregoing that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court." The order deprived the plaintiff of the right to jumble in one statement all acts of negligence or other wrongs, and its practical effect was to compel the plaintiff to formulate his allegations so as to set out two or more causes of action. It was, therefore, appealable.

We will next consider the question raised by the other exceptions. In *Pom. Code Remedies* it is said: "The fundamental and most important principle of the reformed pleading, the one from which all the others are deduced as necessary corollaries, is the following: The material facts which constitute the ground of relief should be averred as they actually existed or took place, and not the legal effect or aspects of those facts, *and not the mere evidence or probative matters by which their existence is established.*" (Italics ours.) Section 526 of the same work shows that "those important and substantial facts should be alleged which either immediately form the basis of the primary right or duty, or which directly make up the wrongful acts or omissions of the defendant, *and not the details of the probative matters or particulars of evidence by which these material elements are to be established.*" (Italics ours.) The foregoing language from *Pom. Code Rem.* is quoted with approval in *Bolin v. Ry. Co.*, 65 S. C. 22, 43 S. E. 665. See, also, *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545. The exceptions are therefore sustained.

It is the judgment of this court that the order of the circuit court be modified in the particulars hereinbefore mentioned.

(117 Ga. 541)

## J. R. COOK &amp; CO. v. FINCH.

(Supreme Court of Georgia. April 7, 1903.)

## SALE—ACCEPTANCE—WAIVER OF DEFECTS.

1. Where property is bought under the implied warranty of the law that it is reasonably suited to the use intended, an acceptance by the purchaser of the property waives all defects which might have been discovered by the exercise of ordinary care and prudence before delivery. In case of an express warranty that the property sold will be of a particular kind and quality, the purchaser has a right to rely on the warranty, and may plead partial failure of consideration, growing out of defects discovered after acceptance, even though they would have become apparent upon an examination before delivery.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by B. F. Finch against J. R. Cook & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Hardeman & Moore, for plaintiffs in error.  
J. E. Hall and R. D. Feagin, for defendant in error.

COBB, J. Finch brought suit against Cook & Co. for \$150 on an open account for 100 cords of pine wood, at \$1.50 per cord. The defendants pleaded that they had made a contract with plaintiff to furnish them with 100 cords of pine wood at \$1.50 per cord; the wood to be delivered on the right of way of a railroad, and to be loaded by defendants on the cars. The plea further alleged: Without notice to defendants, and in violation of the contract, plaintiff had 79¼ cords of green pine wood loaded on 10 cars, averaging 8 cords to the car, whereas 10 cords should have been put on each car; freight and trackage being charged by the car, and not by the cord. Defendants had sold the wood to Stratton's Brickyard for \$2.75 per cord, and, on account of the failure of plaintiff to comply with his contract, defendants lost \$38.75—the amount of profits which they would have made on their contract for the sale of the wood. The wood was bought by defendants from plaintiff for immediate use as firewood, and plaintiff well knew this fact, and that the wood actually furnished was unsuited to the use intended; the wood delivered being worth only 75 cents per cord on the right of way of the railroad. The wood was conveyed on the cars to Stratton's Brickyard, and the persons in charge of the yard refused to take it, on account of its green condition. The defendants thereupon put the wood on the market, and sold 5 cars of it for \$79.50, and 5 cars for \$94; making a total of \$173.50. From this amount defendants claim the right to deduct \$82.50 expended for freight, \$10 for trackage to the brickyard, and \$15 for trackage from the brickyard to the points where it was sold by them. They claim also the right to deduct \$38.75, the amount of profits

alleged to have been lost by reason of the failure of plaintiff to comply with his contract; thus leaving a balance of \$27.25, which is admitted to be due, and which is tendered to plaintiff in full settlement of the contract. The evidence substantiated the material allegations of the plea as to the character of the contract between plaintiff and defendants. There was evidence that the wood was delivered on the right of way of the railroad in accordance with the contract, and was subsequently loaded on 10 cars, and shipped to the defendants, at Macon, and side-tracked at Swift's Creek, a few miles below Macon. When notified that the cars were at that place, the defendants paid the freight, and ordered the wood shipped to Stratton's Brickyard. When the evidence is considered as a whole, it demanded a finding that the defendants received only 80 cords of wood. While plaintiff does testify that he shipped 100 cords, his testimony shows that he was at home, sick, when the wood was shipped; and he says 100 cords were shipped, because the pile of wood from which they were taken consisted of "about 112 or 115 cords," and after the shipment he "estimated there were 12 or 15 cords left on the ground." In view of other evidence, positive and direct in its character, that there were only 80 cords on the cars, a finding that there were 100 was not warranted. There was some conflict in the evidence as to the quality of the wood, the person who bought five cars of the wood from the defendants testifying that it was "half dry," and burned very well in a brick kiln, while there was evidence that all of the wood was green, the twigs having green straw on them. The evidence also demanded a finding that the wood was sold by the defendants at the prices mentioned in their plea, and that they paid the amounts claimed to have been paid for freight and trackage. The evidence further showed that the defendants never saw the wood, except when it was on the train going to Stratton's Brickyard. The jury returned a verdict for the plaintiff for \$150 principal and \$13.56 interest, and, defendants' motion for a new trial having been overruled, they excepted.

Complaint is made that the court erred in charging the jury as follows: "There is a duty on purchasers to discover any defect that may be ascertained by ordinary diligence, and if you find that the defendants, by the exercise of ordinary diligence, could have discovered the defects in the wood, if there were any defects, before the same was delivered, then I charge you the defendants are estopped from setting up such defects as a defense." And also in charging: "If there were defects in the wood, and the defendants could not, by the exercise of ordinary diligence, have discovered the defects before delivery, you would be authorized to reduce the agreed price to what the wood was worth in the market." The plea of the

defendants, properly construed, did not set up an express warranty by the plaintiff that the wood would be dry pine, and it is clear that no such warranty was shown by the evidence; one of the defendants testifying that "there was nothing particular said about whether the wood was to be green or dry." There was, however, an implied warranty, raised by the law, that the wood was reasonably suited to the use intended; and, according to the evidence, it was intended to be used as firewood. The Code provides that, "if there is no express warranty, the purchaser must exercise caution in detecting the defects." Civ. Code 1895, § 3555. "An implied warranty of the fitness of property sold for ordinary use does not embrace defects discoverable by ordinary care." *Hoffman v. Oates*, 77 Ga. 701. "The law of implied warranty will not avail against patent defects, nor against latent defects which are either disclosed, or are discoverable by the exercise of caution on the part of the purchaser." *Lunsford v. Malsby*, 101 Ga. 41, 23 S. E. 496. "The law imposes upon the vendee the duty of exercising caution in detecting defects, and hence it is a well-established rule that where the defect is patent, or could have been discovered by the exercise of ordinary diligence, there can be no recovery upon the ground of implied warranty." *Snowden v. Waterman*, 105 Ga. 387, 31 S. E. 110. It follows, therefore, that, where goods purchased under an implied warranty that they are reasonably suited to the uses intended are accepted by the vendee, he will be precluded from pleading, in an action on the contract of purchase, a partial failure of consideration, growing out of any patent defects in the goods, or any latent defects which might have been discovered before the sale by the exercise of ordinary care and prudence. Even an inspection, however, will not deprive the purchaser of the protection of a warranty as to latent defects which could not have been discovered by the exercise of ordinary prudence. *Miller v. Moore*, 83 Ga. 684, 692, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329. But where a purchaser receives goods without inspecting them, or inspects them in a careless and indifferent manner, he will not, when sued on the contract, be heard to set up defects which he would have discovered before the delivery and acceptance of the goods, had he used proper diligence. Where, however, there is an express warranty that goods sold will be of a particular kind and quality, the purchaser has a right to rely on this warranty, and an acceptance will not prevent him from pleading the defective condition of the goods. The rule that the purchaser must exercise caution in detecting defects is, by the very terms of the section of the Code cited above, confined to cases of implied warranty. See, also, in this connection, *Miller v. Moore*, supra, and *Snowden v. Waterman*, supra. Civ. Code 1895, § 3557, provides that "after ac-

ceptance of goods purchased the presumption is that they are of the quality ordered, and the burden is on the buyer to prove the contrary. Partial payments with knowledge of the defective condition will not estop the buyer from pleading partial failure of consideration." We think it is clear that this section relates to cases of express warranty. The use of the words "of the quality ordered" necessarily implies that there was an express understanding between the parties that the goods would be of a particular quality. See *Atkins v. Cobb*, 58 Ga. 86 (5), 89, from which the section of the Code just quoted was codified. See, also, *Florence v. Pattillo*, 105 Ga. 581, 32 S. E. 642.

Applying what is said above to the facts of this case, we think the charges given by the court were correct expositions of the law, and were adjusted to the issues raised by the pleadings and the evidence. There being no express warranty that the wood sold the defendants would be dry pine, and they having accepted it without an inspection, they are precluded from pleading as a defense that the wood was in fact green pine, and not dry pine. This was manifestly a patent defect, which would have been disclosed by the most casual inspection; the evidence in behalf of the defendants showing that the twigs had green straw on them. The sale was completed when the wood was delivered on the cars, the plaintiff having at that time performed everything that he contracted to do. The fact that it was not convenient for the defendants to go down and examine the wood is no fault of plaintiff's. Having bought on an implied warranty, they took the risk, when they accepted it and ordered it shipped forward, that it would prove reasonably suited to the use intended. And even if, under the facts of the case, they were under no duty to inspect the wood until after it was side-tracked a few miles below Macon. It does not appear that they made the slightest effort to examine it then or at any other time. So far as appears from the evidence, they never did make an inspection of the wood. And even after the persons who had bargained with them for the wood had refused to accept it, the defendants acted on the assumption that they were bound by their contract with plaintiff, and actually sold the wood in the market at a reduced price. Under these circumstances, the plaintiff is not chargeable with the expense incurred in conveying the wood to the brickyard, and from there to the points where it was delivered to the purchasers from the defendants. As stated above, however, the evidence demanded a finding that the defendants received only 80 cords of wood. Acceptance would not prevent them from pleading this defect in quantity, as there was an express warranty that the amount furnished would be 100 cords. The defendants are therefore liable to plaintiff for the value of 80 cords of wood, at the contract price per

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cord. Direction will be given that if the plaintiff will write off from the amount recovered the sum of \$30, with interest thereon for the time interest was calculated on the principal amount of the verdict, the judgment of the court below, refusing to grant a new trial, stand affirmed, and that, if this is not done, the judgment be reversed; the costs of this writ of error and of the motion for a new trial to be taxed, in either event, against the defendant in error.

Judgment affirmed, on conditions. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 567)

**GEORGE D. MASHBURN & CO. et al. v. DANNENBERG CO.**

(Supreme Court of Georgia. April 8, 1903.)

**SALE ON CREDIT—REPRESENTATIONS AS TO SOLVENCY—FRAUD—RIGHTS OF VENDEE—SALE TO BONA FIDE PURCHASER—RESCISSION—ANTECEDENT DEBT—MORTGAGEE OF VENDEE—PURCHASER AT FORECLOSURE—LIS PENDENS—CONVERSION—CONTRIBUTION—DAMAGES.**

1. Whether such a time has elapsed after a statement to a commercial agency of a person's financial ability that no one should act thereon as a basis of credit, cannot be fixed by any arbitrary rule, but must be determined in each case according to its circumstances.

2. Where several such statements are made, and at the time the credit is extended some of them were too old to be acted on, and others not, but credit is extended on each, in order to reclaim the goods sold it is incumbent on the seller to show that they were sold on the faith of the statements which had not become stale.

3. Representations as to financial standing and worth, made to induce a sale on credit, when acted on by the seller to his injury, will, if untrue, constitute such a fraud as will avoid the sale, at the option of the seller, though the buyer did not know they were false.

4. A vendee who has obtained title to property under a sale induced by fraud is the owner of the property until the seller elects to rescind the sale, and a bona fide purchaser, without notice of the fraud from such a vendee, will acquire a good title.

5. The right of the seller to rescind the sale for fraud is superior to the right of a mortgagee whose mortgage was taken to secure an antecedent debt.

6. An antecedent debt, within the meaning of the rule just stated, is a debt contracted before the sale sought to be rescinded.

7. The right of the seller to rescind the sale and reclaim the goods is inferior to the rights of a mortgagee of the property, whose debt was created after the sale, and upon the faith of the mortgagor's ownership, and without notice of the fraud which had been perpetrated upon the seller; and in such a case it would be immaterial whether the creation of the debt and the execution of the mortgage were contemporaneous, or the creation of the debt antedated the mortgage, provided the mortgage was taken before the right of rescission was exercised, and without notice of the fraud.

8. What would be the status of a mortgagee who extended credit without notice of the fraud, but who had notice at the time the mortgage was taken, is not now decided.

9. In a suit by the seller, brought to rescind the sale and reclaim the goods, against a mortgagee of the vendee, the plaintiff carries the

¶ 5. See *Chattel Mortgages*, vol. 9, Cent. Dig. § 238.

burden of proving either that the mortgagee knew of the buyer's fraud, or that the debt which the mortgage was given to secure was created before the sale.

10. A transferee of such a mortgage stands in no better position than the mortgagee.

11. One who purchases in good faith, without notice of the fraud, at a foreclosure sale had under such a mortgage, will obtain a good title, although the mortgage may have been given to secure an antecedent debt.

12. Even if the doctrine of *lis pendens* is applicable to personal property, it has no application in a case where the pleadings do not describe the property in such a way that the identity of the property can be ascertained.

13. One who, as the result of a fraud upon the owner, comes into possession of property of another, and attempts to create a lien thereon to secure a debt which was in existence before the lienor acquired possession, and the lienor, who causes the property to be seized under the lien, and the purchaser at the sale had thereunder, who at the time of the sale had notice of the invalidity of the lien, are joint wrongdoers; and the owner may proceed against one or any number of them, at his option, and the failure to hold any of them liable will not release the others.

14. Where, in a suit for the wrongful conversion of personal property, brought against several persons as joint wrongdoers, a general verdict for a named sum is rendered against the defendants, the plaintiffs can look to any one of them for the entire amount of the verdict; and the question as to whether the other defendants shall be liable to contribute to the one who is compelled to pay, and in what proportion, does not concern the plaintiff.

15. The measure of damages in a suit brought to recover personal property which has been wrongfully converted, where the plaintiff elects to take a money verdict, is the highest proven value of the property at any time between the date of the conversion and the trial, or its value at the date of the conversion, with interest from that date.

16. False representations as to the financial standing and worth of a merchant, contained in a statement made by him to a mercantile agency, to be used as a basis for credit, will constitute a fraud upon any subscriber of such agency acting on the statement, though the merchant did not know when he made the statement that such person was a subscriber of the agency.

17. Where it is material to ascertain whether a representation made by a person as to the amount of his assets in a given year was false, his tax returns for that year are admissible in evidence.

18. The principles above laid down control the case on all material points, and, other than as above dealt with, the assignments of error made in the record do not require any extended discussion.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; D. M. Roberts, Judge.

Action by the Dannenberg Company against George D. Mashburn & Co. and others. Judgment for plaintiff. Defendants bring error. Reversed.

J. H. Martin, for plaintiffs in error. Harde-man, Davis, Turner & Jones, and W. L. Grice & Sons, for defendant in error.

COBB, J. On January 21, 1898, the Dannenberg Company presented to the judge of the superior court of Pulaski county a petition, in which it was alleged that at different times during the year 1897 the plaintiff had

sold to George D. Mashburn & Company, a mercantile partnership doing business in Hawkinsville, Ga., and composed of George D. Mashburn and J. P. Doster, certain articles of merchandise on credit; that the credit thus extended was based solely upon certain written statements as to their assets and liabilities made by Mashburn & Co. to a named association of merchants, of which plaintiff is a member; that these statements were false; that the goods sold to the firm have become mingled with their general stock, and it is impossible for plaintiff at this time to designate the portion of such goods remaining unsold; that on January 6, 1898, the partnership executed to the Hawkinsville Bank & Trust Company (hereinafter referred to as the bank) a mortgage on their general stock to secure an alleged indebtedness of \$6,000, and on January 10, 1898, executed similar mortgages to Mrs. Mary C. Fitzgerald and D. T. Mashburn to secure an alleged indebtedness of \$1,991.28 to the former and \$2,009.46 to the latter; that the mortgage in favor of the bank has been foreclosed, and the sheriff is in possession of the stock of goods, and plaintiff is unable to obtain access to them to identify the goods sold by it; that, by reason of the false and fraudulent representations above referred to, the title to the goods did not pass; that, Mashburn & Co. being insolvent, unless the sale be rescinded, and plaintiff be allowed to reclaim its goods, it can realize nothing on its claim. The prayers of the petition were that a receiver be appointed to take charge of the stock of merchandise; that plaintiff be allowed to examine the stock of goods, and set aside such of the goods sold by it as remain in the stock; that such goods be sold separately from the remainder of the stock, and the fund thus arising be held by the receiver until plaintiff can obtain a judgment rescinding the sale; that the mortgages above described be declared void in so far as they cover the goods sold by plaintiff, and identified by it; that the sale be rescinded, and plaintiff be allowed to recover the identified goods; that the sheriff be enjoined from proceeding with the mortgage foreclosure, and with the sale of the goods thereunder, and that the mortgage creditors be enjoined from enforcing their mortgages, especially in so far as they undertake to create a lien upon plaintiff's goods; that Mashburn & Co. be enjoined from further incumbering their property. Process was prayed against Mashburn & Co., the members of the firm, and D. T. Mashburn, Mrs. Mary C. Fitzgerald, the Hawkinsville Bank & Trust Company, and Vaughn, sheriff. Attached to the petition were accounts showing that the defendants Mashburn & Co. had bought from plaintiff on March 16, 1897, merchandise amounting to \$230.75; on May 1st, \$119.65; on August 17th, \$399.46; and on October 25th, \$16.50. There were also attached to the petition copies of the statements made by them to

the association of merchants as to their financial standing; such statements being dated July 14, 1896, and May 11, 1897, and showing that in 1896 the defendants claimed to have assets over and above all liabilities amounting to \$20,000; and in 1897, \$30,000. On this petition the court passed an order granting the injunction prayed for, ordering the sheriff to allow plaintiff to examine the stock of merchandise and identify the goods sold by it, and to mark and set apart the same, and ordering that the sale by the sheriff proceed; the goods identified by plaintiff to be sold separately, and the proceeds of the sale turned over to the receiver named in the order, to be held subject to the further order of the court. At the February term, 1898, the plaintiff filed an amendment to its petition, alleging that the mortgages referred to in the original petition were given to secure a past-due indebtedness; that the mortgagees were not bona fide purchasers for value, and acquired no lien or equity in or to the property delivered to defendants Mashburn & Co. by plaintiff. It was further alleged in the amendment that the partnership on August 13, 1897, wrote to plaintiff a letter, in which certain statements as to their assets and liabilities were made, and that these statements were false and fraudulent, and caused plaintiff to extend credit to them. The defendants Mashburn & Co. answered the petition, denying all allegations as to fraud and misrepresentation, and averring that title to the goods sold them by plaintiff passed to them upon delivery of the goods. It was further alleged in the answer that a portion of the goods identified and set apart by plaintiff under the order previously granted has been paid for by defendants; that the stock of merchandise, other than the goods so set apart, has been sold by the sheriff, and did not bring enough to satisfy the mortgage of the bank; and that the goods set apart by plaintiff are not of sufficient value to satisfy the debt of the bank, which has a claim on the goods superior to that of plaintiff. The defendants holding mortgages answered separately that their mortgages were given to secure a valid and subsisting indebtedness, and that they had no knowledge of any claim of plaintiff to any of the goods in the stock mortgaged, nor any knowledge of any fraudulent statements made by Mashburn & Co. to induce plaintiff to sell them goods. At the hearing, on February 21, 1898, the judge passed an order denying the prayers for injunction and receiver, revoking the injunction previously granted, and discharging the temporary receiver previously appointed. At the August term, 1898, the plaintiff offered an amendment, alleging that the goods identified and set apart by plaintiff under the order of court had been sold under the mortgage execution of the bank to R. V. Bowen, for the sum of \$327.88, on March 17, 1898; that the bank's mortgage had, previous to the sale, been

transferred to Bowen; and that, while Bowen was not the only purchaser at the sale, he was the legal holder of the notes and mortgage of the bank, and received the proceeds of the sale. The plaintiff prayed that Bowen be made a party defendant, and required to answer at the next term of the court; that it have judgment against the defendants for the sum of \$438.16, the value of the property of the plaintiff wrongfully converted, as set forth in the amendment. This amendment was, so far as appears, allowed, without objection, on August 15, 1898. Bowen answered at the succeeding term of the court, setting up that he was a bona fide purchaser of the mortgage execution of the bank; that the sale was honest and fair, and there was nothing wrongful or fraudulent in the purchase of the goods; that he bought the property at the mortgage sale, and got a good title thereto, and the money arising from the sale was properly applied to his mortgage execution. The amendments filed by the plaintiff were also duly answered by the other defendants. Nothing seems to have been done in connection with the case until the August term, 1901, when it came on for trial, at which time the plaintiff further amended its petition, setting out a copy of a statement dated July 16, 1897, alleged to have been made by George D. Mashburn & Co., as to their financial standing and worth, to R. G. Dun & Co., a mercantile agency; their net worth being stated to be \$31,000. It is alleged that the plaintiff, in making the sales referred to in the original petition, also relied upon this statement, which was false, in that the assets were placed too high, and the liabilities too low. The defendants Bowen and D. T. Mashburn also filed at this term of the court an amendment to their answers, in which they alleged "that the goods sold by the sheriff, and selected as the goods sold by the plaintiff to Geo. D. Mashburn & Co. in the petition of plaintiff, are not the same goods"; that the bank took a mortgage on all the stock of goods of Mashburn & Co. on January 6, 1898, for money loaned by the bank to mortgagors after the sale of all the goods by plaintiff, believing at the time that Mashburn & Co. were the owners of the goods, and stood in the same position as a bona fide purchaser without notice; that these defendants are bona fide purchasers, for value, from the bank, and stand in its shoes; that the plaintiff has, in open court, released the bank, by announcing that it would not ask any judgment against it, and this act of the plaintiff releases these defendants, who hold and claim under the bank, and are entitled to the same rights, privileges, and protection as the bank was under its mortgage. It appears from the bill of exceptions that the plaintiff did, in open court, release the bank, as set forth in the foregoing answer of Bowen and Mashburn. The trial resulted in a verdict for the plaintiff for \$438.16, with interest, against



the defendants George D. Mashburn & Co., George D. Mashburn, J. P. Doster, R. V. Bowen, and D. T. Mashburn. The defendants filed a motion for a new trial, which was overruled; and they, together with the sheriff and Mrs. Fitzgerald, united in a bill of exceptions, in which they joined the bank as a coplaintiff in error, complaining of the judgment overruling the motion for a new trial.

In view of the state of the pleadings at the date of the trial, the case is to be treated simply as a suit brought for a wrongful conversion of personal property. The case of the plaintiff absolutely depends upon whether it sold the identical goods which were set apart by the sheriff upon the faith of statements of Mashburn & Co. as to their financial standing, and whether these statements were false. If it did not sell upon the faith of such statements, then its case fails, without reference to any other question. According to the testimony of the plaintiff's witness Chapman, none of the identified goods were embraced in any of the invoices dated prior to May 1, 1897. We will therefore eliminate the invoice of March 16, 1897, from this discussion. The only statement made prior to the sale of the goods contained in the invoice of May 1, 1897, was the one dated July 14, 1896, which was more than nine months before the date of the invoice. As to the sale of goods in this invoice, the right of the plaintiff to rescind depended upon whether the credit was actually given upon the faith of the statement made in the preceding year, and whether, under all the circumstances, the plaintiff had a right to act upon the faith of a statement made to a mercantile agency at such a distant day in the past, and whether a merchant making statements to such agencies intends for them to be relied upon after the lapse of such a time. No arbitrary time can be fixed when a statement to a mercantile agency will become stale, and persons should no longer act upon them, but whether such a time has elapsed must be determined by the jury according to the circumstances of each case. See, in this connection, *Waldrop v. Wolff*, 114 Ga. 613, 40 S. E. 830, (4). As to the other invoices, there were other statements, claimed to have been relied on as a basis of credit, which were not so remote from the date of sale. The jury should have been instructed that, if the identified goods were sold upon the faith of statements on which the plaintiff had a right to rely as a basis of credit, the plaintiff had a right to rescind the sale of all such goods, and recover the same, as against Mashburn & Co., if the statements were false, but that if a portion of such goods were sold upon the faith of statements of the character just indicated, and a portion were sold upon the faith of statements made at such a time prior to the date of sale that it could not, under all the circumstances, have been reasonably expected or intended that such state-

ments would be made the basis of a credit after the lapse of such a time, the plaintiff would have no right to rescind as to such of the goods as were so sold, and that it was, under such circumstances, incumbent upon the plaintiff to separate the goods it was entitled to recover from those it was not entitled to recover, and, failing to do this, the action would fail.

There was evidence from which the jury could find that the plaintiff, in extending credit to Mashburn & Co., relied upon statements made by them to the mercantile agencies as a basis for credit, and that these statements were false. There was also evidence which would support a finding that as to some of the sales, even if not as to all, the statements relied on were made at such a time that plaintiff had a right to act on them, and that Mashburn & Co. intended they should be acted on by those to whom they applied for credit. The misrepresentations, under such circumstances, constituted, in law, a fraud upon the plaintiff, whether Mashburn & Co. knew of their falsity or not. This being so, the plaintiff was entitled, as against them, to rescind the sale and retake possession of such of the goods as were in the stock at the time the suit was filed, and could be identified by it, if, in making the sale of such goods, plaintiff had a right to rely upon the statements acted on by them. *Newman v. Clafin Co.*, 107 Ga. 89, 32 S. E. 943. There was also evidence from which the jury could find that the goods identified and set apart by the plaintiff under the order of court were sold by the plaintiff, and had never been paid for. This being so, the plaintiff was entitled to recover at least a portion of the goods, unless some one or more of the defendants holding mortgages had obtained a valid, subsisting lien thereon, or unless Bowen and D. T. Mashburn were to be regarded as bona fide purchasers, without notice of the fraud of Mashburn & Co. It has been repeatedly ruled by this court that a creditor who takes a mortgage, to secure an "antecedent debt," on goods which, although in the possession of the mortgagor, were obtained as a result of fraudulent misrepresentations as to his financial standing and ability to pay, which induced the seller to act to his injury by parting with the possession of the goods, did not acquire any lien on the goods, as against the seller's right to rescind the sale on account of the fraud. *Dinkler v. Potts*, 90 Ga. 103, 15 S. E. 690; *Exchange Bank v. Clafin Co.*, 100 Ga. 640, 28 S. E. 439; *Atlanta Brewing Co. v. Bluthenthal*, 101 Ga. 541, 28 S. E. 1003; *Newman v. Clafin Co.*, 107 Ga. 89, 97, 32 S. E. 943; *Matthews v. Kennedy*, 113 Ga. 378, 38 S. E. 854. See, in this connection, *Jones, Chat. Mortg.* (4th Ed.) § 81. This doctrine rests in part upon the theory that the debt of the mortgage creditor was not contracted "on the faith of the property in the possession of the debtor." See *Matthews v. Kennedy*, *supra*. A person in possession of personal



property is presumptively the owner thereof. One in possession of goods as the result of a sale brought about by fraud is the owner until the seller elects to rescind the sale. Civ. Code 1895, §§ 3540, 2696. Hence, when goods are sold and delivered to a merchant, to be paid for at a future time, the title to such goods is vested in the vendee, notwithstanding the sale was brought about by the perpetration of a fraud; and, while the vendor may rescind the sale and reclaim the goods if the credit was induced by fraudulent misrepresentations upon the part of the vendee, the vendor cannot, in such a case, follow the goods in the hands of an innocent party, who has, for a valuable consideration, come into possession of them, or who, for a like consideration, has acquired a lien on them. An examination of the cases above cited will show that, in every instance where the creditor was not allowed to enforce his lien, the debt which the mortgage was given to secure was contracted before the goods came into possession of the mortgagor. In *Dinkler v. Potts*, supra, the rule is laid down that the seller's right to rescind for fraud is superior to the right of a mortgagee whose mortgage secures an "antecedent debt." It is insisted that the word "antecedent," in this ruling, referred to the date of the mortgage. We think it refers, not to the date of the mortgage, but to the date of the sale; that is, an antecedent debt is one created before the date of the sale sought to be rescinded. A debt created after the sale, on the faith of the property in the possession of the vendee, although not secured by mortgage until some time after the debt was created, is not an antecedent debt, within the meaning of the rule, provided, of course, the mortgage was executed before the seller exercised his right to rescind. An examination of the case of *Exchange Bank v. Claflin Co.*, supra, will, we think, show this. It was there said: "A title obtained by fraud is voidable in the vendee, and is good only when set up by a bona fide purchaser without notice. Civ. Code 1895, § 3540. A creditor by mortgage, who did not extend credit on faith of the property, title to which was obtained by fraud, is not such a purchaser, as will be protected."

The present case was tried on the theory that the word "antecedent," as used in the cases above cited, related to the date of the execution of the mortgage, and this erroneous conception of the law affected numerous rulings and instructions of the court, and because of this erroneous theory a new trial necessarily results. There was no evidence showing that the bank had notice of the fraud perpetrated by Mashburn & Co. upon Dannenberg, either at the time credit was extended, or at the time the mortgage was executed. What would have been the status of the bank if it had acquired notice of the fraud after the credit was extended, but before the mortgage was taken, need not now be determined.

If the debt of the bank antedated the sale of the goods by plaintiff to Mashburn & Co., and the bank, after notice of plaintiff's intention to rescind the sale and retake its goods, either caused the goods to be seized on the mortgage execution, or, if at that time the goods had been seized, caused them to be retained by the sheriff, this act on the part of the bank was such a trespass as would render it liable to the plaintiff for such damages as it sustained on account of this wrongful act. If Bowen, when he took a transfer of the mortgage from the bank, had notice of the plaintiff's having elected to exercise its right to rescind the sale to Mashburn & Co., and, as transferee of the mortgage, caused the property to be seized, and became the purchaser at the sale, either alone or jointly with another, he would be liable to the plaintiff for the trespass thus committed upon its property. If D. T. Mashburn became a joint purchaser at the sale with Bowen, and had notice of the facts above referred to, and took possession of the property jointly with Bowen, he would thus render himself liable as a trespasser jointly with Bowen, the bank, and Mashburn & Co. On the other hand, if the bank extended credit to Mashburn & Co. on the faith of the stock made up in part of plaintiff's goods, and took a mortgage on the stock to secure the debt then contracted, having no notice either at the time the credit was extended or the mortgage was taken of the fraud of Mashburn & Co., neither the bank, nor any one claiming under it, would be liable to the plaintiff. If the facts were such as to render the bank liable, as a trespasser, for either causing the execution to be levied, or causing the goods to be retained under levy, and Bowen and D. T. Mashburn became the purchasers at the sale, without notice of the fraud that had been perpetrated by Mashburn & Co. upon the plaintiff, they would not be liable to plaintiff.

If the bank extended credit to Mashburn & Co. on the faith of their ownership of the stock of goods, and the goods of the plaintiff were in the stock at the time the credit was extended, and the bank had no notice of the fraud which Mashburn & Co. had perpetrated upon the plaintiff, either at the time the credit was extended, or when the mortgage was taken, then the rights of the bank, as well as of its transferee, would be superior to the right of the plaintiff to rescind the sale; and the purchasers at the foreclosure sale would get a good title to the goods of the plaintiff, even if it should appear that the transferee at the time of the transfer knew of the fraud which had been perpetrated by Mashburn & Co. upon the plaintiff, and even though the purchasers at the foreclosure sale had full notice of the fraud. A mortgagee being, under such circumstances, entitled to the same rights as a bona fide purchaser without notice, the doctrine that a purchaser with notice from a

purchaser without notice would get a good title is applicable. As it was not contended at the last trial, and probably will not be contended on another trial, that the bank had notice of the fraud of Mashburn & Co. at the time it extended credit to them, it is not necessary to determine what would have been the effect upon the rights of the transferee and the purchasers at the sale of the bank's having had notice of the fraud, if the transferee of the mortgage or the purchasers had at the date of the transfer or at the date of the sale no notice of the fraud. Of course, if the purchasers had notice at the time of their purchase that the plaintiff had exercised its right to rescind the sale, and had filed a suit for this purpose, they would be liable to plaintiff for whatever damages it sustained as a result of their taking possession of the goods. While it is not conceded that the purchasers had actual notice of the filing of the suit, it was undisputed that there was such a suit pending at the time of the sale, and it therefore becomes necessary to determine how far the mere pendency of this suit would be notice to the purchasers.

There seems to be much conflict among the authorities as to whether the doctrine of *lis pendens* is applicable to personal property of any character. Bennett, *Lis Pendens*, § 79 et seq.; 21 Am. & Eng. Enc. L. (2d Ed.) p. 626 et seq. The doctrine seems to extend to purchasers at judicial sales under judgments or decrees. 21 Am. & Eng. Enc. L. (2d Ed.) pp. 645, 646. Even if it be conceded that the doctrine of *lis pendens* does apply to personal property, we do not think the pendency of the suit brought by the plaintiff in this case affected Bowen and D. T. Mashburn, as purchasers at the foreclosure sale, with notice of the claim of plaintiff to the particular goods sold. In order to have had this effect, it was absolutely necessary that the property bought at the sale under the mortgage should have been sufficiently described in the pleadings to put the public on notice that the plaintiff claimed title to it. The rule has been thus stated: "A *lis pendens* will be created where the property involved in suit is described, either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status, and by such reference that upon inquiry the identity of the property involved in litigation can be ascertained." Bennett, *Lis Pendens*, § 93. The purchaser need look no further than the pleadings and exhibits in the suit, and if there is not enough in these to put a prudent person on inquiry, the prosecution of which would lead to notice, the purchaser will be protected. *Id.* § 93a. Applying these rules to the present case, we do not think the description of the goods sought to be recovered was sufficient to affect the public with

notice. The petition makes no effort whatever to describe the goods which it is alleged the plaintiff has a right to recover. On the contrary, the plaintiff's inability to do so is admitted, and it prays that it may have access to the stock of goods belonging to Mashburn & Co., in order to examine the same, and segregate the goods which it claims the right to recover. The invoices attached to the petition as exhibits merely indicate the class of goods sold by plaintiff to Mashburn & Co. on various dates. There is no attempt whatever to allege what part of these goods have been sold by Mashburn & Co., or, indeed, that any of the goods still remain in the stock. The prayer of the petition is that plaintiff may be allowed to examine the stock, and to identify and set aside such of the goods "as may remain in said stock." The mere fact that goods bearing the plaintiff's mark, and similar to those sold to Mashburn & Co., are offered for sale under legal process after the filing of the plaintiff's petition, is no notice whatever to prospective purchasers that they constituted a part of the stock of Mashburn & Co., and were disposed of by them after the filing of the suit. Nor would the mere stamp of the plaintiff's mark on the goods be sufficient to put a prudent person even on inquiry to ascertain in whose possession they were when seized under legal process, the process and the proceedings connected with the sale being apparently regular and valid. The mortgage to the bank purported to constitute a lien on the entire stock of goods of Mashburn & Co. in their possession at the time the mortgage was executed. As we have seen, it was in fact a valid lien on all of the goods sold by plaintiff, except such as were sold after the debt which the mortgage was given to secure was created. It is apparent, therefore, that the pendency of the suit would not be sufficient to affect persons claiming under the bank's mortgage with notice of the particular goods upon which it did not constitute a lien. The burden was upon the plaintiff to show a right to the possession of the goods in controversy. The presumption is that the possession of the defendants who had control of the goods was lawful and valid, and the mortgages of the other defendants being on their face valid, and *prima facie* constituting liens on the goods, the burden was on the plaintiff to establish a state of facts which would invalidate the mortgages so far as its goods were concerned. The burden is on any one attacking an instrument apparently valid on its face to show its invalidity, and to do this he must introduce evidence which clearly and satisfactorily establishes this fact. See *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 190, 37 S. E. 485, 81 Am. St. Rep. 28, (3). The question is, therefore, whether the plaintiff carried this burden. There was no effort made to charge the bank with knowledge of the fraud of Mashburn & Co. The bank's

mortgage was dated January 6, 1898. The evidence shows that on May 1, 1897, Mashburn & Co. bought goods from plaintiff amounting to \$119.65; on August 17th, \$399.46; on October 25th, \$16.50. It probably can be derived from the evidence that a part of the May bill was paid, but this is immaterial. On May 14, 1897, credit was extended to Mashburn & Co. by the bank to the amount of \$2,000; on June 15th, \$2,000; on June 29th, \$1,000; on July 28th, \$1,000. The evidence also shows that some small amounts—it does not appear how much—were loaned by the bank after August 18th. It appears from the testimony that these various sums were loaned by the bank on the faith of Mashburn & Co.'s ownership of the stock of goods in their store. Under this state of facts, the lien of the bank's mortgage attached to such of the goods as were in the stock when the respective loans above referred to were made, and to the extent of the amount of such loans. The plaintiff certainly was not entitled to recover, as against the bank, any of the goods sold on May 1st, and as there was evidence from which a jury could find that some of these goods were among the identified goods, and there was nothing to show what was the quantity, it is impossible from the evidence to tell just how much it ought to have recovered.

It appears from the record that the plaintiff announced in open court that it would not ask any judgment against the bank, and it is contended that this released Bowen and D. T. Mashburn. We do not think the release of the bank had this effect. When a tort is committed by two or more persons, each contributing to the injury as a tortfeasor, the party injured may, at his election, hold them liable in separate suits, or may sue all or any two or more of them jointly in the same suit. Several persons acting independently, but causing together a single injury, are joint tortfeasors, and may be sued either jointly or severally. 15 Enc. P. & P. 557, 558. The general rule is thus stated in *Brooks v. Ashburn*, 9 Ga. 298: "Where an immediate act is done by the co-operation or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the party sought to be charged ordinarily and naturally produced the acts of the others." Applying this rule to the facts of the present case as claimed by the plaintiff, we think it clearly appears that Mashburn & Co., the bank, and Bowen and D. T. Mashburn were all joint tortfeasors. The wrong which the plaintiff complained of was that it was deprived of its property. This wrong began with the act of Mashburn & Co. in making false representations which induced

the plaintiff to extend them credit, and ended with the sheriff's sale, which resulted in Bowen and D. T. Mashburn coming into possession of the property claimed by the plaintiff. There was a series of independent acts by the different parties, but all contributed to, and in part brought about, the final result, which placed Bowen and D. T. Mashburn in possession of goods which the plaintiff claimed to be its property. The wrongful act of Mashburn & Co. in making the false representations, and in giving a mortgage on the goods to secure an antecedent debt, the wrongful act of the bank in requiring the sheriff to retain the property under the levy of the mortgage execution after it had notice that the lien of its mortgage was not superior to the plaintiff's right to recapture its goods, the wrongful act of Bowen, as transferee of the mortgage, in causing the property to be sold at sheriff's sale after full knowledge of all the facts necessary to charge him with notice of the plaintiff's title, and the wrongful act of Bowen and D. T. Mashburn, who, after a like notice, came into possession as pretended purchasers at the sheriff's sale, and converted the same to their own use, all combined to bring about the tort by which the plaintiff complains that it was deprived of its property. It may be that some or all of these wrongdoers have been guilty of a complete conversion, as against the plaintiff, independently of the acts of any of the others, but it is also true that the concurrent acts of all have contributed directly to the consummation of the final wrong; that is, the conversion of the property by Bowen and D. T. Mashburn, the pretended purchasers at the sheriff's sale. Under such circumstances, the plaintiff had a right to choose whom it would hold liable for the wrong that had been perpetrated upon it. Any one of them who was guilty of a complete tort could have been sued alone, or any two or more of them who contributed to a complete tort by independent acts could be sued jointly, or all who had any direct connection with the final and ultimate wrong could be made defendants in one suit. *Dacey*, Part. Act. (2d Am. Ed.) p. 448 et seq.; *Barb. Part. Act.* (2d Ed.) p. 317; *Graham v. Gold Mining Co.*, 71 Ga. 296 (3a); *Central of Ga. Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250. The plaintiff elected to bring suit against Mashburn & Co., the bank, Bowen, and D. T. Mashburn. At the trial it was announced that the plaintiff did not ask a judgment against the bank. While the bank was not stricken from the record as a party to the case, the case proceeded after this announcement as if the bank was no longer a party. Inasmuch as the plaintiff had a right of election in the first instance as to whom it would sue, and as, under our system of amendments, it had an undoubted right to strike from the record at any time before verdict any party defendant in the

case, we think the practical effect of this announcement was to eliminate the bank as a party, and it was not essential that it should have been formally stricken from the record. The latter course would certainly have been more regular, but the practical effect of each is the same.

It is therefore to be determined whether, in a suit brought against several persons as joint tortfeasors, a dismissal by the plaintiff as to one of them would operate as a release of the others. Did the release of the bank have the effect of depriving the other defendants of any right as against the plaintiff which they would have had if the bank had remained a party, and liable in the suit? It is contended that the other defendants would have had a right to call upon the bank to contribute its proportionate part to the amount which would be assessed against them as damages, and that the release of the bank had the effect of depriving them of this right. At common law, joint tortfeasors were not entitled to contribution. Dicey, Part. Act. (2d Am. Ed.) p. 449; Cool. Torts (2d Ed.) p. 134 et seq.; Chattahoochee Brick Co. v. Braswell, 92 Ga. 633, 18 S. E. 1015. This rule of the common law is still of force in Georgia, except so far as it has been modified by what is contained in Civ. Code 1895, §§ 3915, 3916, which are as follows:

"Sec. 3915. Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally.

"Sec. 3916. If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution."

It has been held that section 3915 is not applicable to suits for injuries to the person. *Hunter v. Wakefield*, 97 Ga. 544, 25 S. E. 347, 54 Am. St. Rep. 438, and cases cited. Each has been several times treated as being applicable to actions of trespass to land, and for the purposes of this discussion it will be assumed that they are equally applicable to a case of the character disclosed by the present record. The sections certainly provide for contribution among joint trespassers against whom a judgment has been entered, and to this extent change the common law. They do not, however, purport to change so much of the common-law rule as gives to a person injured by the acts of several persons, under circumstances where they can be treated as joint wrongdoers, the right to elect how many and whom he will sue. This rule is still of force in Georgia, as we have before shown, and the sections of the Code must be construed in the light of this fact. Being in derogation of common law, they must be strictly construed; and it is clear that they provide for the right of contribu-

tion only among those who are sued, and against whom judgment has been rendered. While, therefore, if the bank had remained a party, and had been included in the judgment, the other defendants could have called on it to contribute, the provisions of the Code do not give them the right to look to the bank for any part of the judgment rendered against them alone. But it does not follow that this affords them any ground of complaint against the plaintiff. The right of contribution among joint tortfeasors is absolutely dependent upon the right of election which the law gives the plaintiff. It exists among those whom he elects to sue jointly, and does not exist as to those whom he fails to join as defendants to the suit. Under no other construction could the right of contribution and the right of election harmonize, and both are equally the law of this state. As we have stated above, the announcement of the plaintiff that it would not hold the bank liable was the same, in effect, as if the bank had been formally stricken by amendment as a party defendant to the case; and, when the bank was thus released, the case stood as if it had never been sued. The plaintiff having exercised its right not to sue the bank, or—what is the same thing in effect—having determined not to hold it liable after it was sued, the defendants against whom judgment was rendered cannot complain because the consequence of this election deprived them of a right which they would have had if the plaintiff had seen fit to elect to hold the bank liable in the suit. It was distinctly ruled in *Southwestern Railroad v. Thornton*, 71 Ga. 61, 65, that the injured party had this right of election, and that the question of contribution among the defendants was no concern of the plaintiffs. Where goods wrongfully taken from the true owner have passed through the hands of several wrongdoers, the owner can elect which one he will sue, and he need not join the others as defendants. Certainly he can proceed against the one who at the time of the suit has the property in his possession. Bowen was made a party defendant without objection, and after he was made a party the case proceeded as an ordinary action to recover the possession of property which had been converted by the defendants to their own use. At the time the amendment was offered, the sale had taken place, and Bowen and D. T. Mashburn were in possession of the plaintiff's goods.

The plaintiff in an action of trespass or trover may join as defendants all who participated in the wrongful acts, and recover a general verdict for a named sum against all. Whether the defendants would be entitled to contribution, and, if so, in what proportion, was no concern of the plaintiff. See, in this connection, Civ. Code 1895, §§ 3915, 3916; *Southwestern Railroad v. Thornton*, 71 Ga. 61. The plaintiff could look to any one of the defendants for the whole amount due it,

and it was not necessary that the verdict should specify how much each defendant would be liable for as between themselves.

The plaintiff having elected to take a money verdict, the measure of damages was either the highest proven value of the goods at any time between the date of the conversion and the trial, or the value of the property at the date of the conversion, with interest from that date. Civ. Code 1895, § 3917; *Holmes v. Langston*, 110 Ga. 867, 36 S. E. 251, and cases cited; *Midville, etc., R. Co. v. Bruhl* (Ga.) 43 S. E. 717. We do not think the fact that there was a sale of the property by the sheriff, and that plaintiff bid at the sale, would change this rule. The amount of plaintiff's bid might throw some light on the value of the property at that time, but would not estop it from attempting to prove a higher value.

The foregoing disposes of the main contentions raised in the case. The motion for a new trial contains nearly 40 grounds. Some of these complain of the admission of evidence which is not set out in the motion either literally or in substance. Others complain of the refusal of the court to permit certain questions to be propounded, but do not state what answers were expected. None of these grounds can be considered. Such of the other grounds as present questions necessary to be dealt with, and which are not alluded to in the foregoing discussion, will now be considered.

The court erred, we think, in ruling out the testimony of D. T. Mashburn, to the effect that he kept the books of the firm, and that the statements made by the firm as a basis for credit did not overestimate the business. This was not a mere conclusion on the part of the witness, but a statement made by one who was in a position to know the truth of the matter under investigation—one who was as conversant with the affairs of the partnership as were the members themselves. It was not a mere opinion, but a positive statement of a fact, founded on an actual examination of the affairs of the firm.

It was also error to admit evidence as to the agreement between D. T. Mashburn and Bowen that Bowen was to bid in the goods and turn them over to Mashburn, who was to collect the debts due the firm, and settle up those due by them. This evidence was irrelevant, and shed no light on the issues involved, and may have operated to the prejudice of the defendants.

There was no error in admitting evidence relating to the statement made by Mashburn & Co. to the Credit Clearing House, a mercantile agency. If Mashburn & Co. made the statement to this company as a basis for credit, it was immaterial that they did not know plaintiff was a subscriber of this agency. The statement was made for the purpose of being used by all merchants who might be correspondents of the mercantile

agency, and the misrepresentations would constitute a fraud on any one of such persons acting on them to his injury. See 14 Am. & Eng. Enc. Law (2d Ed.) p. 151; *Benj. Sales* (Bennett's 7th Ed.) p. 469, notes. *White v. Magarahan*, 87 Ga. 217, 13 S. E. 509.

There was no error in admitting testimony as to how much of the firm's indebtedness had been paid. This was of little importance, but might have had some slight bearing on the question at issue as to the amount of assets the firm had prior to its failure.

There was no error in admitting the tax returns of Mashburn & Co. for the year 1896. They were competent upon the question as to the amount of the firm's assets in that year. See *Smith v. Haire*, 58 Ga. 446; *Tolleson v. Posey*, 32 Ga. 372.

It was argued that as plaintiff, through its authorized agent, bid at the sheriff's sale, it would be estopped to attack the validity of the sale. If the purchaser at the sale was misled by the presence of the agent of plaintiff as a bidder into a belief that the plaintiff was acquiescing in the sale, and thereby recognizing the right of the bank to foreclose its mortgage, or, by appearing as a bidder, was waiving its rights under the pending suit, such conduct might raise an estoppel. We, however, find nothing in the present record requiring a ruling on this subject. See, in this connection, *Osborn v. Elder*, 65 Ga. 360; *Byars v. Curry*, 75 Ga. 515.

Those portions of the charge to which exceptions were taken are sufficiently covered in that part of the foregoing discussion which involves the merits of the case. If there was any error committed, other than as above indicated, it will, no doubt, be corrected on another trial. Let a new trial be had in the light of what is herein laid down.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

#### On Rehearing.

COBB, J. Application is made for a rehearing upon the propositions laid down in the 5th, 6th, and 7th headnotes. This raises the question as to what is an "antecedent" or "pre-existing" debt, within the meaning of that rule which asserts that a mortgagee who takes a mortgage to secure a pre-existing or antecedent debt is not a bona fide purchaser for value. It is contended that a mortgagee is not a bona fide purchaser, within the meaning of this rule, unless he pays value at the time his mortgage is taken; that is, unless the consideration of the mortgage passes at the date of its execution, the mortgage is given to secure an antecedent debt. In 1 *Jones on Mortgages*, § 460, it is said: "He [the mortgagee] must have parted with some value or some right upon the faith of the mortgage, and at the time of it, to entitle him to protection as a purchaser. He must have received some new consideration, or must have relinquished some security for a

pre-existing debt due him." In 2 Mechem on Sales, § 924, it is laid down that a seller who has been induced to make the sale by the fraud of the vendee may recover the property from purchasers, pledgees, mortgagees, or others who have acquired a lien on it as security for, or who have taken the property in payment of, an antecedent debt, "unless they have at the time parted with value, released securities, or otherwise changed their position to their prejudice, in reliance upon the vendee's apparent power to transfer the goods to them." In 14 Am. & Eng. Enc. L. (2d Ed.) p. 288, it is stated: "A mortgagee who takes the deed as security for money presently loaned is a purchaser, to the extent of his interest in the premises." The expressions "at the time" and "presently," as well as similar expressions in some of the decided cases, seem to give support to the contention made by the applicant for a rehearing. These expressions must, however, be construed in connection with the facts of the cases which are cited to sustain them, or in which they are used. In all of the cases cited which have been examined, as well as in others to which our attention has been called, it appeared, either distinctly or by inference, that the antecedent or pre-existing debt referred to was a debt created before the fraudulent sale. Certainly in none of them was it shown that the debt was created or the credit extended after the sale. The identical question involved in this case, as to whether, when the debt was created or the credit extended after the sale, and on the faith of the mortgagor's apparent ownership of the property, a mere lapse of time between the creation of the debt or the extension of credit and the execution of the mortgage will make the mortgagee the holder of a mortgage given to secure an "antecedent" or "pre-existing" debt, seems never to have been raised in any case. It is certainly one of first impression in this court. Generally the credit is extended and the mortgage taken at the same time. In *Chance v. McWhorter*, 26 Ga. 315, it was held that a vendor's lien upon land for the unpaid purchase money will not be set aside in favor of a mortgage given by the vendee to secure an "antecedent debt." It appears from the statement of facts in that case that the debt which the mortgage was given to secure was contracted "long before the sale" of the land. In *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855, it was simply held that a judgment creditor was not a bona fide purchaser for value, even though he extended credit upon the apparent unincumbered ownership of property, and that therefore the holder of a mortgage had a right to reform it as against the judgment creditor. While a judgment creditor has thus been held not to be a purchaser for value, it has nevertheless been often held that when such a creditor had extended credit upon the faith of property, title to which was in the debtor, the rights of the creditor are

superior to the rights of one who, having a secret equity in the property, has permitted the debtor to take title in his own name, and exercise acts of ownership in connection therewith. See *Gorman v. Wood*, 68 Ga. 524; *Burt v. Kuhn*, 113 Ga. 1144, 39 S. E. 414, and cases cited. *Gentry v. Cowan*, 66 Ga. 722. There are cases holding that a creditor who accepts goods from a fraudulent vendee will be protected, though the goods were taken in payment of a pre-existing debt; this term being apparently used to indicate a debt contracted before the fraudulent sale. See, for example, *Shufeldt v. Pease*, 16 Wis. 659, and cases cited; *Lee v. Kimball*, 45 Me. 172; *Butters v. Haughwout* (Ill.) 89 Am. Dec. 401. These decisions are, however, contrary to many of the decisions of this court, and are opposed to the great weight of authority. Where a sale is agreed upon, and it is the intention of the parties that title shall pass under the sale, and possession of the goods is delivered to the vendee, he is the owner of the goods, notwithstanding the sale may have been brought about by the perpetration of a fraud. In such a case the fraud does not render the sale void, but only voidable at the instance of the vendor. 2 Mechem, Sales, § 908; *Kerr, Fraud & Mistake*, p. 328; *Henderson v. Gibbs* (Kan.) 18 Pac. 929; *Civ. Code* 1895, § 3532, which provides that fraud "avoids the sale" manifestly means renders it voidable at the election of the vendor. It certainly does not mean to deprive him of the right to affirm or ratify the contract if he so desires. The rule would be otherwise, however, if the parties did not intend that title should pass, but the purpose was merely to deliver possession pending negotiations of sale. *Benj. Sales* (Bennett's 7th Ed.) § 433. We can see no reason why one who extends credit on one date to a fraudulent vendee on the faith of his ownership of property, without notice of the fraud, and then, on a subsequent date, and also without notice, takes a mortgage to secure this debt, should not be treated as standing upon the same footing as one who extends credit without notice of the fraud, and on the faith of the vendee's ownership, and immediately takes a mortgage to secure the debt. The distinction between cases like the present and those where the credit was extended before the sale is apparent. In the latter case the credit cannot be extended on the faith of the debtor's ownership of the property, and in the former it can. The rule which would exclude an ordinary creditor extending credit on the faith of the debtor's ownership, under the strict definition of a bona fide purchaser, is a harsh one; and when such a creditor afterwards, and before he discovers the fraud, obtains a lien by contract to secure his debt, he is, in our opinion, as much entitled to protection as if the execution of the instrument creating the lien and the creation of the debt had been contemporaneous. If he acts to his in-

jury in extending credit in good faith on the vendee's possession of, and apparent indefeasible title to, the goods, he ought to be protected, if he subsequently, and in good faith and without notice, takes a security which would bring him within the class denominated "bona fide purchasers." On the general subject as to who is a purchaser, see *Benj. Sales* (Ed. supra) p. 477.

The conclusions stated in the original opinion, upon which a rehearing is asked, still seem to us, upon further investigation, to be sound, and no sufficient reason has been given why a reargument of the case should be had. Application denied.

(132 N. C. 1063)

### STATE v. MEHAFFEY.

(Supreme Court of North Carolina. May 12, 1903.)

#### RAPE—INSTRUCTIONS—EVIDENCE—SUFFICIENCY—PENDENCY OF CIVIL ACTION.

1. On a prosecution for assault with intent to rape it was not error to refuse to charge that rape is a most detestable crime, and that the heinousness of the offense may transport the jury, and even the judge, with so much indignation that they may be overhastily carried on to a conviction on insufficient evidence; the court having properly cautioned the jury throughout the charge, and concluded by stating that the jury should review the evidence calmly, and without prejudice or bias.

2. On a prosecution for assault with intent to rape, the question whether defendant intended to have intercourse by force was for the jury where there was any evidence thereof.

3. If at any time during any assault by a man on a female he has an intent to ravish her, he is guilty of an assault with intent to rape, irrespective of what causes him to abandon his purpose.

4. A criminal appeal will not be continued in the Supreme Court because of the fact that a civil action is pending.

Douglas, J., dissenting.

Appeal from Superior Court, Catawba County; Long, Judge.

J. T. MehaFFEY was convicted of assault with intent to rape, and he appeals. Affirmed.

L. L. Witherspoon and W. B. Gaither, for appellant. W. C. Feimster and the Attorney General, for the State.

CLARK, C. J. Indictment for assault with intent to commit rape. There are five exceptions, three of which are to the refusal to charge as prayed, and the other two are to the charge. The court gave the following instructions at the request of the defendant: "(1) That, in order to convict for an assault with intent to commit rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. (2) It is not proof of guilt merely that the facts are consistent with guilt. They must be inconsistent with innocence. It is neither charity nor common sense nor law to

infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an attempt, which, though immoral, is not criminal, we are bound to infer that intent. (3) A conviction of an assault with intent to commit rape by force is not warranted by proof that the defendant, against the will of the female upon whom the crime is charged to have been committed, indecently fondled her with intent to induce her thereby to submit to his embrace. It must appear that his intent was to accomplish his purpose by force, and against her will, and at all events, notwithstanding any resistance on her part." The defendant further requested the following instruction: "(4) The crime which is charged in the bill that the defendant intended to commit is a most detestable crime. The heinousness of the offense may transport the jury, and even the judge, with so much indignation that they may be overhastily carried on to a conviction on insufficient evidence. Blk. Com. 215." The defendant excepts to the court not using this exact phraseology, but the above was not laid down by Mr. Justice Blackstone as substantive law, nor as a consecrated formula for instructions to the jury. All that the defendant was entitled to was proper caution, which appears fully throughout the charge and in the above prayers that were given; and besides, his honor in conclusion cautioned the jury: "It is your duty, gentlemen of the jury, to review this evidence without bias or prejudice, calmly and deliberately, and endeavor to ascertain the truth. If there has been anything said by counsel in the heat of debate and in the ardor of argument calculated to prejudice the cause of the state or the cause of the defendant, it is your duty to dismiss that part of the argument, and consider only such argument as assists you to determine what the facts are in this case, and the law as given to you by the court;" and much more to same effect. The judge is not required to give an instruction in the very words asked. *State v. Hicks*, 130 N. C. 705, 41 S. E. 803, and cases there cited.

The fifth prayer for instruction was: "Considering the evidence asked by the state in this case, it is not sufficient to authorize the jury in rendering a verdict of guilty of an assault with intent to commit rape as charged in the bill of indictment." This was properly refused. The intent is necessarily an inference to be drawn from the defendant's acts, and it must be drawn by the jury, and not by the judge, when there is any evidence. The prosecutrix, a young girl barely 14 years of age, was an employé of the defendant, a mature man of 54, who employed attention, gifts of money, and association with her, which the evidence tended to show was with a design to have carnal intercourse with her. The evidence also tended to show that, failing to seduce her by these means, he sought a retired place and opportunity to gratify his

passions at all events, where her outcries were heard only by her younger sister, who had been working with her in the field; that she was a girl of good character, and made no assignation with him; that he sent her to the cotton house to empty some baskets; that he went in behind her, closed the door, and when she started out he jerked her down, put his hand on her private parts, also caught her in his arms, and felt her breasts. He then put his hands where his pants unbuttoned. She screaming, and crying and trying to get loose. Her little sister, who was the only person near by, testifies that she heard the outcries. The prosecutrix says she was screaming as loud as she could, crying and trying to get away; that the defendant got his finger inserted in her person twice; that finally for a few minutes, the defendant desisted, and she does not know why, unless because she was crying and screaming so loud. Whether he desisted for that reason, or because at his age he could not accomplish his purpose after so vigorous an opposition, or because he was physically unable to overcome her opposition, or because he did not intend to have intercourse with her by force, was a matter for the jury alone, and was properly left to them in connection with all the other evidence in the case. *State v. Matthews*, 80 N. C. 417; *State v. Horne*, 92 N. C. 805, 53 Am. Rep. 442; *State v. Kiger*, 115 N. C. 746, 20 S. E. 456; *State v. Finger*, 131 N. C. 781, 42 S. E. 820. It is true he desisted—that is to say, he did not succeed in having sexual intercourse with the girl. If he had, he would have been on trial for the capital felony, and not for the intent. But his failure is not conclusive of the absence of intent, so that the court should have charged the jury, as prayed, that he did not have such intent. If his purpose was only seduction, why did he persist in using force after her tears and outcries and struggles had showed that she would not consent. If he at any time during the assault (which the defendant admits) had such intent, he was guilty, no matter what caused him to abandon his purpose. There was other evidence—as the attempt of the defendant afterwards to buy the silence of the prosecutrix, and his admission of illicit intercourse with another girl. His intent could only be found by a jury, and the three instructions above set out, given at the request of the defendant, and the judge's charge also, fully instructed them as to what the nature of the intent must have been.

The defendant also excepted to the charge because the judge instructed the jury: "But if you find there was no assault upon the prosecutrix with intent to ravish, as alleged, and above explained, and if you further find that he never committed an assault upon her amounting to a simple assault as above explained, then your verdict should be 'Not Guilty.'" This was substantially the sixth prayer asked by the defendant, and the only

real objection is that it was too favorable to the defendant, for his own testimony admitted the assault.

The last exception—that "the court failed to collate the evidence and bring it together in one view on each side, with such remarks and illustrations as would properly direct the attention of the jury to each material matter in issue"—is equally without merit. The charge is sent up, and is a very full, careful, able, and just presentation of the contentions of the parties and of the law applicable to each phase of the facts as the jury might find them to be.

At the opening of the case in this court, the defendant moved for a continuance on the ground that a civil action was pending, and it might prejudice the verdict in that case if the verdict and judgment in this should be affirmed. There is no precedent to justify such motion, and we know of no reasoning which would have justified granting it. Should an appeal in a criminal case be held up for such reason, the state might be prevented several years from enforcing justice till the appeal in a civil case should get here. Should an appeal in a civil case also be held up till a criminal action is disposed of? If both cases must be disposed of in this court at the same term, the same would be true in the court below, with great inconvenience to the administration of justice, and would be impracticable also for the further reason that in many counties civil and criminal business is tried at separate terms, and even when tried at the same term one case must be tried before the other. The opinion in this case, so far as it refers to the facts, cannot be evidence in the trial of the civil action, and the fact of the verdict in this case, if the appeal were held up by a continuance, would be, if it gets to the knowledge of the jury, as effective as our affirmation on appeal that the judge committed no error of law in the trial, which is the only matter before us. We notice the matter, as the motion is a novelty in this court, and is without merit to sustain it.

Affirmed.

**MONTGOMERY, J.** I am compelled to concur in the opinion of the court because the trial was regularly conducted, and no fault can be found with any of the rulings of his honor. But I feel constrained to say that the evidence, in my opinion, did not justify the verdict.

**DOUGLAS, J. (dissenting).** The grossly indecent nature of the assault, and my personal feeling towards any one who would betray or abuse a child, make me hesitate to dissent from the opinion of the court; and yet, as a naked question of law, I see no evidence that the defendant intended to ravish. Bad as the facts are, they are all consistent with his innocence of the grave crime with which he is charged. From the state's



testimony alone it seems that he had the girl in his power, and that he desisted without any outside interruption, and without any actual attempt upon her person. There is no evidence that his clothing was unbuttoned, or that he was prepared to complete the crime. His fondling the girl would itself tend to prove that his purpose was persuasion. I do not mean to say that he was innocent of all crime. He was clearly guilty of an aggravated assault, and should be punished accordingly; but he should not be subjected to the terrible consequences of so heinous a crime as that of which he has been convicted without competent evidence of his guilt. Seven years in the penitentiary to one of his age may be a life sentence, and, in any event, a conviction of an attempt to commit what is generally regarded as the highest crime known to the law fixes upon him the lifelong brand of infamy. Nor will he be the only sufferer, as even the innocent of kindred blood will share in his shame. In our detestation of the crime we should not lose sight of the fearful injustice that would result from an unjust conviction.

(132 N. C. 598)

**McENTIRE v. LEVI COTTON MILLS CO.**  
(Supreme Court of North Carolina. May 12, 1903.)

**EVIDENCE—DECLARATIONS OF AGENT.**

1. In an action by the employé of a corporation to recover for services rendered, neither the president nor superintendent can, after answer filed, make any admission or declaration which will bind the company in reference to the cause of action; such admissions of an agent being receivable against his principal not as admissions or declarations, merely, but as part of the *res gestæ* accompanying the transaction.

Appeal from Superior Court, Rutherford County; E. B. Jones, Judge.

Action by H. A. McEntire against the Levi Cotton Mills Company. Judgment for plaintiff, and defendant appeals. Reversed.

Eaves & Rucker, for appellant. McBrayer & Justice, for appellee.

**MONTGOMERY, J.** The plaintiff brought this action in the court of a justice of the peace to recover of the defendant \$8.35 for work and labor done in the defendant's cotton mill. Judgment was rendered against the defendant for the amount claimed by the plaintiff. The defendant's defense was that, by a rule of the company, the usual and customary pay day of the defendant for work in the factory was on the 14th of April, and, as the action was commenced before the pay day (i. e., before the amount was due), the plaintiff could not recover. On the appeal of the defendant, the jury answered the issue: "Is the defendant indebted to the plaintiff, and, if so, in what amount? Yes; \$8.35." In the superior court a witness (Wood) testi-

fied that he heard M. Levi, president of the cotton mills, and R. H. Smith, the superintendent, testify in the justice's court. Wood was then permitted to testify, over the defendant's objection, that he heard Smith say, in the trial before the justice, that he (Smith) had discharged the plaintiff from service at the mill; that Levi, in the justice's court, did not deny owing the amount sued for, but claimed that the amount was not due until the 14th of April. The evidence of Wood was not competent. When the defendant company filed its answer to the claim of the plaintiff, the power of the president or superintendent to make any further admission or declaration which could bind the company in reference to the cause of action had passed. The admissions or declarations of the agent are received in evidence against the principal not as admissions or declarations, merely, but as parts of the *res gestæ*; hence only such as accompany the transaction in which the agent acted can be proved. What the agent said at a subsequent time is inadmissible. *Rice on Evidence*, 446. Whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents. And (Story) "where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*." *Greenleaf on Ev.* § 184c; *Branch v. R. Co.*, 88 N. C. 573; *Craven v. Russell*, 118 N. C. 564, 24 S. E. 361. It makes no difference that the agents, Levi and Smith, were officers of a corporation. The same rule applies. *Smith v. R. Co.*, 68 N. C. 108; *Rumbough v. Imp. Co.*, 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

New trial.

(132 N. C. 655)

**HARRILL v. SOUTH CAROLINA & GEORGIA EXTENSION RY. CO. OF N. C.**

(Supreme Court of North Carolina. May 12, 1903.)

**DEATH—TRANSITORY ACTION—ACTION IN ANOTHER STATE—ADMINISTRATOR—APPOINTMENT—EVIDENCE—RES GESTÆ.**

1. Where the statutes of South Carolina, where plaintiff's intestate was killed by reason of defendant's alleged negligence, authorizing a recovery for death, are substantially the same as the statutes of North Carolina on such subject, and do not require that the action shall be brought by an administrator appointed in South Carolina, the action, being transitory, may be properly brought by an administrator appointed in North Carolina in the courts of that state.

2. Defendant's section master flagged intestate's engine as it approached a bridge which the section master deemed unsafe by reason of a flood then existing. Intestate and others examined the bridge, after which he attempted to cross, and when the engine had crossed that part of the bridge over the water and had

¶ 1. See *Evidence*, vol. 20, Cent. Dig. § 923.

¶ 1. See *Death*, vol. 15, Cent. Dig. §§ 36, 38.

struck the trestle over the ground one of the bystanders exclaimed, "Jake is safe." Instantly thereafter the trestle gave way, and the engine and tender were pulled back into the water, killing intestate. The bystander testified that he made such exclamation because he thought intestate had the engine on solid ground. *Held*, that such exclamation was admissible as *res gestae* to show the dangerous condition of the bridge and the effect intestate's effort to cross had on the bystanders.

Appeal from Superior Court, Rutherford County; Winston, Judge.

Action by R. M. Harrill, as administrator of Jake Metcalf, deceased, against the South Carolina & Georgia Extension Railway Company of North Carolina. From a judgment in favor of plaintiff, defendant appeals. Reversed.

P. J. Sinclair, G. W. S. Hart, N. W. Hardin, and W. A. Henderson, for appellant. Justice & Pless and McBrayer & Justice, for appellee.

**MONTGOMERY, J.** This action was brought by the plaintiff to recover damages of the defendant, a domestic corporation of North Carolina, on account of the death of his intestate, Jake Metcalf, alleged to have been caused by the negligence of the defendant. The intestate was a resident of South Carolina, and was killed in that state, while engaged in trying to drive an engine and cars over the railroad bridge and trestle at Buffalo creek. The bridge and trestle were on the line of the railroad of the South Carolina & Georgia Extension Railway Company of South Carolina, a domestic corporation of that state. The allegation of the plaintiff in his complaint is that the intestate at the time of his death was in the service of the defendant, and was running a train of cars and engine from Blacksburg, in South Carolina, to Marion, in North Carolina. The plaintiff was qualified as administrator of the intestate in Rutherford county, N. C.

The first question we are called upon to decide is whether or not the plaintiff can maintain his action in this state. The statute laws of South Carolina, following the text of what is known as "Lord Campbell's Act," give the right of action to an administrator in cases where death has ensued upon injury caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party to maintain an action and recover damages in respect thereof. Those statutes are substantially like the statutes of North Carolina on that subject, and the method of distribution of recoveries is the same in both states. The contention of the counsel of the defendant is that, as the right of action arose in South Carolina, where the death occurred, that right was an asset in the state of South Carolina, and it could be controlled and recovered only by an administrator appointed in South Carolina; and it was argued by the

counsel that this court should adopt that construction of the South Carolina statutes for the reason that the Supreme Court of South Carolina had made a decision to that effect in the case of *In re Estate of Mayo*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. If such had been the construction of the South Carolina statute, we would feel bound to follow that construction in the present case; but upon a careful reading of that case we cannot agree with the counsel as to their interpretation of the same. Unembarrassed, then, as we think, by any decision of the court of South Carolina on the exact point, we are free to give the statute such construction as we think may be reasonable and just for all concerned, and at the same time consonant with the meaning and intention of the lawmaking power.

The South Carolina statutes do not say that in such cases the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction. If they did, we would be controlled by the requirement. The liability of the person or corporation being fixed and made absolute where death arises from their negligence, a right of action has accrued, and it seems to us that that liability can be enforced in any court which may have jurisdiction of the subject-matter and can acquire jurisdiction of the offenders, and where the laws are the same as where the liability occurred. The action certainly is in the nature of trespass to the person, and all such actions have been uniformly held to be transitory. In North Carolina, as we have seen, our statute law is substantially, if not exactly, like the statutes in this respect in South Carolina, and how can it be said that our courts will not be permitted to enforce a liability, purely personal, recognized by the laws of both states, and not required by the law of the state where the liability was fixed to be enforced by a particular person in the latter state only? We think the action was properly brought in this state. Upon facts similar to the facts in this case there are many decisions of the courts confirming our view of this matter. *Leonard v. Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Wooden v. W. N. Y. & P. R. Co.*, 13 L. R. A. 458; *Dennick v. Railroad*, 103 U. S. 11, 26 L. Ed. 439, and cases there cited; *Nelson v. C. & O. Railroad*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. In the last-mentioned case the plaintiff was killed in West Virginia, administration was granted in Virginia, and the action was brought in Virginia. The statutes in both states were copies, substantially, of Lord Campbell's Act. The court said there: "The plaintiff in this action is the duly appointed administrator of the deceased, and is therefore entitled to sue, for the statute of West Virginia does not say that suit shall be brought only by a personal representative appointed there; and, as the rights of the parties are determined by the statute of that

state, a recovery in this action would be to the same use as would be a recovery in West Virginia. It would seem, therefore, to follow that a recovery in this action would be a complete bar to another action, here or elsewhere, for the same wrong; for it is not to be presumed that the rule of comity upon which a statute of one state is enforced in another would be so far disregarded by the courts of the former state as not to give free force and effect to the proceedings in the latter state wherein a recovery is made."

There is a question of evidence involved in the appeal which presents error so clear and so serious that a new trial would have to be ordered if there was no other error in the record. The whole evidence tended to show that at the time the intestate lost his life there was a great flood in the creek. The section master flagged down the train as it approached the trestle, and the section master, the conductor, the intestate, the train hands, and neighboring people went out on the bridge and trestle to make an examination. The section master testified that he advised the intestate not to attempt to cross, for the waters were higher than ever before known; the bridge was already out of line, and had subsided in places, and the whole surroundings were dangerous. He said further, and so did the conductor, that the intestate went to his engine, and without signal from the conductor moved the engine forward over the bridge. The evidence then was that moving very slowly (the train hands having gotten off the cars and walked on over the bridge) the engine had crossed over that part of the bridge over the water and had struck the trestle on the ground, when one of the bystanders (Jones) and others exclaimed, "Jake is safe." The trestle instantly gave way, and the engine and tender were pulled back and fell into the water. Jones testified that: "Just before the engine went down, I said that 'Jake was safe,' because I thought he had her on the main land. I thought he was on solid ground. I looked carefully on the movement across the trestle, because I did not know what was going to happen. I could not tell what was going to happen. The track was not in good shape." That exclamation "Jake is safe" was competent evidence going to show the dangerous condition of the bridge, and the peril of crossing, and the effect the effort to cross had on the bystanders. Especially so as one of the witnesses said that the bridge and trestle were not, apparently, seriously out of order. The evidence was clearly a part of the *res gestæ* under the rule in its strictest construction. His honor admitted it as evidence, but in his charge he instructed the jury not to consider it as evidence.

We might content ourselves with what has been written, for a new trial must be had for the reasons assigned, but it is well to add that we read no evidence more than a scintilla to the effect that the defendant was

employed at the time of his death by the defendant company. And we might as well add that on the plaintiff's own evidence it was not certain that his death was not caused proximately by his own negligence, but we will leave that matter open.

New trial.

DOUGLAS, J., concurs in result.

(132 N. C. 604)

GROSS et al. v. SMITH et al.

(Supreme Court of North Carolina. May 12, 1903.)

GIFTS—PERSONAL PROPERTY—DELIVERY—EVIDENCE—DECLARATIONS OF DECEDENT—QUESTION FOR JURY.

1. In an action to recover a cow, alleged to have been given to plaintiff by her father during his lifetime, from a purchaser from the father's administrator, declarations of the father that the cow belonged to plaintiff, that he had given it to her, and that he could not sell it, were competent to show a delivery of the cow to plaintiff by showing a completed gift prior to the making of such declarations.

2. Plaintiff claimed that while she was under age, living with her father, he gave her the cow sued for, which was thereafter kept in the father's pasture. On several occasions the father pointed out the cow, and said that he had given her to plaintiff; that the cow did not belong to him, and that he had given each of his children a cow. After the father's death, the cow remained on deceased's farm in the possession of plaintiff's husband, and there was evidence that decedent's administrator, before selling the cow to his codefendant, admitted that she belonged to plaintiff. *Held*, that whether there had been a sufficient delivery of the cow to plaintiff to constitute a valid gift in her father's lifetime was a question for the jury.

Appeal from Superior Court, Rutherford County; Winston, Judge.

Action by Nannie Gross and others against John Smith and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

The plaintiffs brought this action for the recovery of a cow, which they allege to be in the possession of the defendant Smith. It appears that the cow was sold by the defendant W. F. Snider, as administrator of J. B. Snider, and bought by John Smith, his codefendant. The feme plaintiff claims ownership of the cow by virtue of a parol gift from her father. In order to establish her title to the cow, she introduced evidence tending to prove that her father had frequently stated that the cow was not his, but belonged to her, and that he had given it to her; and when the father was asked to sell it to other persons he always replied that he could not do so, as it was not his cow, but belonged to his daughter, Nannie. The feme plaintiff was under age, and lived with her father, and the cow was kept in her father's pasture during his lifetime. On several occasions, while the cow was in the pasture, he pointed her out, and said that he had given her to the feme plaintiff, and that it was not his cow. He further stated

that he had given each of his children a cow, and that this cow was the one he had given to the feme plaintiff. After the death of J. B. Snider, the cow remained on his place, but in the possession of the feme plaintiff's husband. There was also evidence tending to show that the defendant W. F. Snider, administrator of J. B. Snider, before the sale to his codefendant, had admitted that the cow belonged to the feme plaintiff, and L. H. Gross, the husband of the feme plaintiff, testified upon his examination that the feme plaintiff claimed the cow because her father had given the cow to her when she was under age and was living with him as a member of his family. There was no objection to any of the testimony. The defendants, at the close of the testimony, moved to dismiss the complaint, or for judgment as in case of nonsuit under the statute. The motion was overruled, and the defendants excepted. No testimony was introduced by the defendants. The court charged the jury in substance as follows: "That, to constitute a gift of personal property, there must be a change of possession. If the plaintiff's father pointed out the cow, and said to her, 'That is your cow; I give it to you,' and then retained possession of the cow, it was not a gift, and the plaintiff cannot recover. In order to constitute a valid parol gift of the cow, the jury must find that the father parted with the possession and control of the cow, and let the possession and control pass to the feme plaintiff. If the plaintiff never had possession before the death of her father, no subsequent possession would complete the gift; but the gift, to be effectual, must have been absolute when made, and must have been accompanied by a transfer of possession, the delivery being the essential element of the gift." The court further charged the jury that the burden was upon the plaintiff to satisfy them of the delivery, which was required to make a valid gift. The jury rendered a verdict in favor of the plaintiff, and judgment was entered accordingly. The only exception is the one taken to the refusal of the court to dismiss the action.

Eaves & Rucker, for appellants. McBrayer & Justice, for appellees.

WALKER, J. (after stating the case). We think there was evidence sufficient to be submitted to the jury upon the question of the parol gift. There can be no doubt that delivery of possession is essential to constitute a valid gift. "The necessity of delivery," says Chancellor Kent, "has been maintained in every period of English law." 2 Kent, Com. 438; 2 Blk. 441. But the question in this case is whether there was a delivery in fact. The declarations or admissions of the intestate and the other testimony are not conclusive upon that question, but the jury must find the fact of delivery from all the evidence. When the intestate said that he

had given his property to his daughter, and that it belonged to her, his declaration included the idea or admission that he had before that time delivered it to her, for the transfer of possession was essential to constitute the gift. This court, in *Tiddy v. Graves*, 127 N. C. 502, 36 S. E. 127, held that where, in order to vest in the husband an estate by the curtesy, it was necessary to be shown that the marriage took place prior to the date of the adoption of the Constitution in 1868, an admission that the husband was tenant by the curtesy was equivalent to a statement of the fact that the marriage had occurred prior to that time. All courts hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the acts, conduct, and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct, and declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony. In *Rooney v. Minor*, 56 Vt. 527, it was held that the admissions of an intestate that she had made the gift did not prove the fact in the sense that it was conclusive, but that it was some evidence, to be weighed by the jury, upon the question of delivery. It tended to show the fact, though it was not sufficient in law to constitute a gift *inter vivos* unless the jury should find therefrom that there had been a delivery. This is the very point in our case. In *Sprouse v. Littlejohn*, 22 S. C. 358, the same question was involved, and the court held that, while a gift of personal property is not complete without delivery, declarations of the alleged donor to the effect that he had given the property was competent evidence from which the jury might determine whether the gift had been made. The court says: "It is true that delivery must be proved, but this is a question of fact for the jury; and, inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'give' or 'I have given' may sometimes be intended to include the delivery, and when such declarations have been used by the donor, and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery, and it ought not to be laid down as a rule of law to govern the jury that such declarations in themselves are insufficient to prove the gift." In *Davis v. Boyd*, 51 N. C. 249, 251, Ruffin, C. J., speaking for the court, said that the declarations of the plaintiff that he had given the property to the defendant, and "had made him a good title, as he thought," were not sufficient to establish such a gift. But a careful reading of that case will disclose that the distinguished chief justice placed the decision upon the ground that it appeared in the case

affirmatively that there had not been, and could not have been, any delivery, and he would seem to imply that, had it not been for this fact, the declarations would have been competent, and, if the jury believed them to be true, they were sufficient in law to support a finding that there had been a valid gift of the property by delivery of possession. We conclude that in this case the declarations of the father of the feme plaintiff that he made a gift to her of the cow were competent, and they were properly submitted to the jury for their consideration in connection with the other evidence bearing upon the question of delivery. The cases cited by the learned counsel of the defendant can be distinguished from our case. If they are closely examined, it will be found that the declarations under consideration in those cases were held to be insufficient in themselves to establish a delivery. We are of the opinion that the case was correctly tried in the court below, and the verdict and judgment must stand.

No error.

(132 N. C. 600)

SMITH et al. v. HUFFMAN et al.

(Supreme Court of North Carolina. May 12, 1903.)

JUDGMENT—RES JUDICATA—PROBATE DECREE  
—SALE OF DECEDENT'S LAND—COL-  
LATERAL ATTACK.

1. An order confirming the sale in probate court of a decedent's realty recited that notice had been issued to all defendants to show cause on December 23d why the sale should not be confirmed, except to two, as to whom notice was issued to show cause on the 26th; that these last two filed an answer, and that the hearing was had on the 24th by consent; that "from the report of administrators, and the answer of said defendants appearing to be reasonable, and no sufficient cause being shown why said sale should not be confirmed," it was ordered confirmed. *Held*, that the defendants so answering could not collaterally attack the decree of confirmation.

Appeal from Superior Court, Burke County; Justice, Judge.

Action by John Smith and others against Amos Huffman and others: Judgment for defendants, and plaintiffs appeal. Affirmed.

John T. Perkins, for appellants. Avery & Ervin and A. O. Avery, for appellees.

CONNOR, J. In 1878 David Vanhorn and wife executed a deed for the land sued for in this action to Nancy Smith, a married woman, mother of the plaintiff. Vanhorn died intestate in 1884. In 1885 his administrator filed a petition, before the clerk of the superior court of Burke county, against the heirs at law of David Vanhorn (including Mrs. Nancy Smith), to sell intestate's lands to pay debts. No answer was filed by Mrs. Smith. An order of sale was made, and the two tracts in controversy were sold to Wil-

liam Vanhorn. The proceeding was in all respects regular, except that, upon the coming in of the report of sale, notice was issued to the defendants in said proceeding to show cause at the courthouse in Morganton on the 23d of December, 1885, why the sale should not be confirmed. Copies of this notice were served on Waits Smith and wife, Nancy Smith, on December 5, 1885. In response to said notice the said Waits and Nancy Smith, on December 22, 1885, filed an answer, in which they alleged that as to lots 2 and 5, being the lots in controversy in this case, "David Vanhorn did not die seised of the said two tracts, but had sold the same to the feme respondents for valuable consideration, by deed duly probated and delivered, and now recorded, long before his death. That the feme respondent, by virtue of said deed, is owner in fee of said two tracts of land." On December 24th an order was made in the cause, reciting as follows: "This cause coming on to be heard this day, by consent, and it appearing that the administrators of David Vanhorn have sold the first, second, third, fourth, and fifth tracts of land described in the petition, in manner and form as follows, to wit: \* \* \* And it further appearing that notice was issued to all of the defendants except Waits Smith and wife, Nancy Smith, to show cause on the 23d day of December, 1885, why said sale should not be confirmed, and notice having issued to Waits Smith and wife, Nancy Smith, to show cause on the 26th day of December, 1885, why said sales should not be confirmed, the said last-named defendants having filed an answer to said notice and said sales, from the 'report of administrators,' and the answer of said defendants appearing to be reasonable, and no sufficient cause being shown why said sales should not be confirmed: It is now, on motion of I. T. Avery, attorney for plaintiffs, administrators, ordered, adjudged, and decreed that said sales be in all respects confirmed." The order further directed the administrators to execute deeds to the purchasers. This cause was heard before his honor Judge Justice, upon a motion to restrain the defendants from cutting timber on the said tracts of land in controversy, on the 20th of January, 1903. His honor made the following order: "I find from proofs, by affidavit, and deed offered by plaintiff, and the affidavits and copy of record and deeds offered on the part of the defendant, that the plaintiff has failed to show a prima facie title to the land in controversy, the plaintiffs being estopped by the record offered by defendant to claim title to said land against the defendants." His honor proceeds to refuse the motion for an injunction, and requires the defendants to execute a bond conditioned to pay plaintiffs such damages as they may recover in this action. The plaintiff appeals.

We are of the opinion that his honor's ruling is correct. The petition alleges that Da-

¶1. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 1535, 1554.

vid Vanhorn died seised of the land in controversy. Nancy Smith was a party to this petition, and filed no answer. Judgment was thereupon rendered directing a sale of the land. This judgment was strictly in accordance with the allegations of the complaint, and, until vacated, is conclusive upon the parties thereto of the facts alleged in the petition and found to be true. The court could not, in this proceeding, inquire into or make any order affecting the integrity of the judgment. *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480. There is certainly no irregularity in the record anterior to the final decree confirming the sale. It is true that the decree recites that the notice issued to Nancy Smith was returnable on the 26th day of December. Her answer is filed on the 22d, and the order made on the 24th of December, 1885, confirming the sale, recites that it was "heard by consent." This recital is conclusive on us that the time for hearing the motion for confirmation was consented to by all parties, and, although it is adjudged that the answer of Nancy Smith is reasonable, it is expressly adjudged that, "no sufficient cause being shown why said sale should not be confirmed," the order of confirmation is made. If it had been irregular to hear the order before the 26th of December, such irregularity could be cured by the consent of the parties, and the recital in the judgment that such consent had been given is conclusive in this action. *Chambers v. Penland*, 78 N. C. 53. It will be observed that the plaintiff declares upon a legal title, making no reference to the proceeding instituted by the administrator of David Vanhorn, for any irregularity or for infirmity in that record. If she desired to attack the record for fraud, she could have specifically alleged such vitiating facts, and asked to have the sale and proceeding set aside. This she has failed to do. If she complains of irregularities in the proceedings, she can only take advantage thereof by a motion in the cause. These principles have been so thoroughly settled by numerous decisions of this court that it is not necessary to review the authorities. *Morris v. White*, 96 N. C. 91, 2 S. E. 254. We concur with his honor that upon the record before us the plaintiff is estopped from asserting title to the land in controversy. "A purchaser at a judicial sale will be protected if the sale was authorized by a judgment of a court having jurisdiction of the subject-matter and the person, although the judgment may be impeached for irregularity." *Dickens v. Long*, 112 N. C. 311, 17 S. E. 150.

The plaintiff suggests that there is nothing in the record to identify any of the land therein mentioned as the tracts sued for, or to have put Mrs. Smith on notice that her lands were sought to be sold in that proceeding. The complaint describes the land in controversy, and the defendant expressly claims title to the same land in the proceed-

ings referred to. His honor heard the case upon this assumption that these were the lands in controversy, and we see nothing to suggest the contrary.

Judgment affirmed.

(123 N. C. 612)

**PIPES v. NORTH CAROLINA MICA MINERAL & LUMBER CO.**

(Supreme Court of North Carolina. May 12, 1903.)

**STATUTE OF LIMITATIONS—PLEADING—SUFFICIENCY.**

1. Code, § 138, requires the defense of limitations to be set up by answer. *Held*, that an averment that "for a further defense alleges \* \* \* that more than three years have elapsed since the date of the alleged promise before this action was brought" was sufficient, without adding that defendant therefore pleaded the statute in bar of the action.

Appeal from Superior Court, McDowell County; Hoke, Judge.

Action by C. S. Pipes against the North Carolina Mica Mineral & Lumber Company. Judgment for defendant, and plaintiff appeals. *Amrmed*.

Justice & Pless, for appellant. P. J. Sinclair, for appellee.

CLARK, C. J. The only exception is as to the sufficiency of the plea of the statute of limitation, which is as follows: "And for a further defense alleges: \* \* \* Third, that more than three years have elapsed since the date of the alleged promise before this action was brought and the services rendered as alleged." His honor properly held that this was sufficient, without labeling the plea by adding thereto, as plaintiffs contend should have been done, the words, "and therefore plead the statute of limitations in bar to this action." The plaintiffs rely upon *Pope v. Andrews*, 90 N. C. 401, *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243, and *Lassiter v. Roper*, 114 N. C. 18, 18 S. E. 946, but in those cases the defendant merely pleaded "the benefit of the statute of limitations," omitting the facts which the court held were the essential matter to be pleaded. Here the defendants pleaded "as a further defense that three years had elapsed since the date of the alleged promise and before this action was brought," thus pleading the essential matter of fact, and leaving out the allegation that therefore he was entitled to the benefit of the statute of limitations, which was a matter of law, and need not be pleaded, and which, when pleaded alone, without allegation of the facts, was held in the above cases to be insufficient to set up the defense. "Under the Code it is the facts, and not the conclusions of law, which should be set out in the pleadings." *Crawford v. McLellan*, 87 N. C. 169. The statute of limitations must be set up by the answer (Code 1883, § 138), but this has been sufficiently done by pleading as a defense the facts upon which the stat-

ute of limitations arises as a conclusion of law.

No error.

(132 N. C. 605)

**McBRAYER v. HAYNES.**

(Supreme Court of North Carolina. May 12, 1903.)

**CHATTEL MORTGAGES—PRIORITIES—PAYMENT OF FIRST MORTGAGE—BURDEN OF PROOF.**

1. The holder of a first chattel mortgage who is sued by a junior mortgagee for possession does not occupy the position of an intervener, and the burden of showing that the first mortgage has been satisfied is on the plaintiff in the action.

Appeal from Superior Court, Rutherford County; E. B. Jones, Judge.

Action by T. C. McBrayer against R. R. Haynes. Judgment for plaintiff, and defendant appeals. Reversed.

McBrayer & Justice, for appellant.

**WALKER, J.** The plaintiff brought this action against the defendant for the recovery of two mules, and alleged that he was entitled to them by virtue of two mortgages executed by one J. C. Phillips to him. The defendant denied the plaintiff's title and right of possession, and averred that J. C. Phillips had, prior to the date of his mortgages to the plaintiff, executed two mortgages to the Gaffney Live Stock Company for the same mules, to secure a debt due by him to said company, which were registered before those of the plaintiff. These mortgages of Phillips to the live stock company were duly assigned to the defendant. The plaintiff alleged that the debt secured by them had been paid, and that, the mortgages being thereby satisfied, he was entitled to recover under the mortgages made to him. Upon the issue thus raised between the parties, the court instructed the jury to find as a fact whether the mortgages under which both claimed embraced the same mules, and to find further whether the mortgages under which the defendant claimed had "been paid off and discharged, as contended by the plaintiff," the defendant contending that they had not been discharged. The court further charged the jury that the defendant occupied the position of an intervener, and in that capacity he asserts his title to be superior to that of the plaintiff, and that the defendant must satisfy them by the greater weight of evidence that he purchased the notes and mortgages from the live stock company, and that the same are still due and unpaid; and, if he had so satisfied the jury, they should answer the first issue "no"; and, if they find that the notes and mortgages had been paid, they should answer the issue "yes." If they answered the issue "no," the plaintiff would not be entitled to recover. The first issue was in the following form: "Have the notes and mortgages executed by Phillips to the

Gaffney Live Stock Company been paid?"

We think that the latter part of this instruction was erroneous. The defendant was not an intervener in any view of the case. He was brought into court by the plaintiff and called upon to defend his title, and he did not, as the court supposed, come in voluntarily and assert ownership to the property. The court correctly charged the jury to find as a fact whether the defendant's mortgages conveyed the property in dispute, and then to find, further, whether they had been discharged by payment of the debts secured by them, "as contended by the plaintiff." The error consisted in imposing the burden of proof as to the fact of payment upon the defendant. When the defendant introduced the mortgages under which he claimed the mules, and showed that the mules were conveyed by these mortgages, he was entitled to recover, unless the plaintiff could show that the debt secured by the mortgages had been paid. The burden of establishing the plea or allegation of payment is always on him who relies upon it. *Zachary v. Phillips*, 101 N. C. 571, 8 S. E. 859; *Stronach v. Bledsoe*, 85 N. C. 473; *Bank v. Walker*, 121 N. C. 115, 28 S. E. 253; *Hudson v. Wetherington*, 79 N. C. 8.

It is familiar learning, and a maxim of the law, that the burden of proof rests, not upon him who denies, but upon him who affirms, and the form of the issue can make no difference in the application of the principle. If the affirmative of the issue is really with a party, and it is essential that he should establish it in order to recover, the burden of proof is necessarily upon him. *Hudson v. Wetherington*, supra. If a party would avoid the legal effect upon his fortunes in a case of any fact admitted, or confessed, or established by his adversary, the burden of course is upon him to do so. *McQueen v. Bank*, 111 N. C. 509, 16 S. E. 270; *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292; *Ferree v. Cook*, 119 N. C. 161, 25 S. E. 856.

The court had charged the jury, with reference to the plaintiff's right to recover, as follows: "The court charges you that, if the plaintiff has shown by the greater weight of evidence that the mules in controversy are the same mules conveyed in the mortgages executed by J. C. Phillips to the plaintiff, then the plaintiff has made out a prima facie case, and nothing else appearing, would be entitled to recover." Why was not this same rule applicable to the defendant's position when he had introduced his mortgages, which antedated those of the plaintiff? He was equally entitled to recover, unless the plaintiff could avoid the legal consequences of this proof. When the plaintiff introduced his mortgages, and showed that they conveyed the property in dispute, the burden then rested on the defendant to meet the case thus made by the plaintiff, and assail his title, or show that he, the defendant, had

a better title. When he introduced his mortgages and showed that they covered the property, he thereby proved a better title than that of the plaintiff, who derived his title under mortgages of a subsequent date, and the burden therefore shifted back to the plaintiff to impeach the defendant's title by showing payment of the debt secured by his mortgages, or in some other way.

But it seems to us that the very question now presented was decided in *McIver v. Smith*, 118 N. C. 73, 23 S. E. 971. That was an action brought by the vendee of a mortgagor against the purchaser at a sale, under a power contained in the mortgage, to have the sale declared invalid, as the plaintiff alleged that nothing was due on the mortgage. The defendant, who was the purchaser at the sale, averred in his answer that there was an amount due on the mortgage notes at the time of the sale which was equal to the amount of his bid, and this court held that the burden was on the plaintiff to show that the debt secured by the mortgage had been paid. The two cases cannot be distinguished in principle.

For the error in the charge as indicated, a new trial is awarded. New trial.

(132 N. C. 548)

**SPRINGS et al. v. SCOTT et al.**

(Supreme Court of North Carolina. May 5, 1903.)

**WILL—EXECUTORY DEVISE—CONTINGENT REMAINDERS—SALE—INVESTMENT OF PROCEEDS—STATUTE—CONSTITUTIONALITY—APPLICATION TO ESTATES ALREADY CREATED—SUPERIOR COURT—JURISDICTION.**

1. A gift of real estate to a son, conditioned that he should only receive the interest during his life, which at his death should be paid to his children until they became of age, and, if no children or heirs of his body, to be equally divided among his brothers and sisters or their heirs, created an executory devise, in the event of the death of the son without issue, to his brothers and sisters in fee.

2. Though a proceeding for an order to sell real estate, invoking the equitable powers of the court, should have been instituted in the superior court in term instead of before the clerk, such court having obtained jurisdiction by appeal, it will be retained, and all necessary amendments will be deemed to have been made, or, if necessary, be made in this court.

3. Real estate limited to a tenant for life, with remainder to children or issue, and, on failure thereof, over to persons all or some of whom are not in esse, may be ordered sold by the court when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and the purchaser will acquire a perfect title against all persons in esse or in posse.

4. Where an estate is vested in a trustee to preserve the contingent remainders and limitations, the court may, on petition of the life tenant and the trustee, with such of the remaindermen as may be in esse, order a sale, and bind all persons either in esse or in posse.

5. Laws 1903, c. 99, § 1, which provides that when there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency

has not yet happened which will determine who the remaindermen are, the court has power to order a sale, is constitutional.

6. The act applies to estates created prior to its enactment.

7. Where real estate is sold under order of the court, the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Proceeding by E. B. Springs and others against J. M. Scott and others to obtain an order for the sale of real estate. From a judgment of the circuit court affirming a judgment of the clerk directing the sale of land, defendants appeal. Modified and affirmed.

Burwell & Cansler, for appellants. Jones & Tillett, for appellees.

CONNOR, J. This is a special proceeding instituted in the superior court of Mecklenburg county for the purpose of obtaining an order for the sale of the land described in the petition for partition. The plaintiff and the feme defendant are the children and devisees of Julia Springs, deceased; the plaintiff E. B. Springs appearing in his own behalf and as trustee of Alva C. Springs. The petitioners aver that they, together with the feme defendant, are seised as tenants in common of a lot in the city of Charlotte, under the provisions of item 5 of the will of their mother, the late Julia B. Springs, which is in the following language: "I give and bequeath unto my son Alva C. Springs one hundred dollars. I also wish his expenses paid here and back to his home when I die. I also give him equal with the rest of the children, but he can only receive the interest during his life; at his death the interest will be paid to his children until they are of age, and if no children or heirs of his body, it must be equally divided among his brothers and sisters or their heirs. I appoint Eli Springs his trustee." Alva C. Springs has no children, and the said parties desire to have partition of the land; that it is for the best interest of all concerned that the partition be made, and, owing to the number of shares and the character of the property, actual partition cannot be made, and it is necessary to have a sale for partition. The defendants demur to the petition, and for cause of demurrer say: (1) That it appearing from the plaintiff's complaint, and particularly from the will of said Julia B. Springs, that the interest therein devised to Alva C. Springs is for his life only, and that after the death of Alva C. Springs there is a limitation over to his children until they are of age, and, if no children or heirs of his body, to his brothers and sisters or their heirs, it cannot now be known who the heirs are who will be entitled to take upon the death of said Alva C. Springs. (2) That the heirs of said Alva C.



Springs are not made parties to this action, and that the said heirs are necessary parties. (3) That this court has no jurisdiction to order a sale of the land described in the complaint." The court overruled the demurrer, and directed a sale of the land. The defendants appealed to the judge, who affirmed the judgment of the clerk, and directed that the cause be retained for further hearing upon the coming in of the report. From this judgment the defendants appealed to this court.

The only question is whether, in the absence of any child of the said Alva to represent those next in remainder after his death, the court has the power to order the sale of the land. This would, under the decisions of this court, present a very serious, if not insurmountable, difficulty, but for the presence of the trustee to represent and preserve the interest of such children as may be born to the said Alva C. Springs. To the suggestion that this proceeding, invoking the equitable powers of the court, should have been instituted in the superior court in term, in which we concur, it is sufficient to say that the case, now being in the superior court by appeal, will be retained, and all necessary amendments will be deemed to have been made, or, if necessary, be made in this court. *Elliott v. Tyson*, 117 N. C. 116, 23 S. E. 102, in which the authorities are collected. The power of the court to order the sale of real estate limited by deed or will to persons not in esse or upon contingent remainders has been so often before this court that it would seem there could be no doubt as to the law in this state. It is manifest that in the opinion of the profession the question is not regarded as at rest. The eminent counsel who argued this case so informed us. There is a large quantity of real estate in this state, especially in the towns and cities, the title to which is in such a condition, by reason of contingent limitations, that it can neither be sold nor improved, thereby being a burden on those who own the life estate, bringing no income, and entailing a heavy expense to them by way of taxes and assessments for paving and other public improvements. We are told by counsel that the decisions of this court are not in accord with those of other jurisdictions in regard to the power of the court to order the sale of property the title to which is thus fettered by limitations. Our attention was called in the argument and brief of counsel to an act of the General Assembly passed at its last session, Laws 1903, c. 99, and the plaintiffs insist that, as this proceeding was instituted since the ratification of the act, the court, if it should be of the opinion that under the law as it existed prior thereto the plaintiffs are not entitled to relief, will find in the act the power to give the relief demanded. In *Watson v. Watson*, 56 N. C. 400, this court held that "a court of equity has no power to order the sale of land, for the purpose of converting it into a more beneficial property, when it is limited

in remainder to persons not in esse." The doctrine of this case was very materially modified by the court in *Ex parte Dodd*, 62 N. C. 97, in which the same will was before the court. That was a petition for the sale of land. The devise was to "Orren L. Dodd during his life, and at his death in fee simple to his child or children, if he has any living at his death, or the issue of any of the said Orren who may predecease him; falling such issue, however, the whole shall belong to and be equally divided amongst the children of his brother Dr. Warren Dodd." The petitioners, beside Orren, were his children, who were under age and represented by guardian. Dr. Warren Dodd had no children, and was never married. Battle, J., says: "It is certain that if the land be devised to a person for life, with an executory devise in fee to his children, the court cannot order a sale of the land before the birth of any child, because, not being in esse, there can be no one before the court to represent its interests. Such was the case in *Watson v. Watson*. But, if there be any children in esse in whom the estate in fee can vest, a sale may be ordered, because, if their interests require it, they may be represented by their guardians, and this may be done although all of the children of the class may not yet have been born. Such is the case now before us, with the exception that there is an executory devise, to the unborn children of another person, depending upon the event of the tenant for life dying without leaving issue. Can this latter circumstance make any difference? We think not, because the first class of children are the primary objects of the devisors bounty, and as they have vested remainders in fee, and as their interests, as well as that of the tenant for life, will be promoted by having their land sold and the proceeds invested in other lands or in stocks or other securities for their use, the court of equity is authorized, under the general power conferred by the act of 1827 [Laws 1827, p. 27, c. 33], to which we have referred, to order the sale." It would seem that this language, which we have quoted at length because of its importance in the settlement of this question, can have no other meaning or construction than that, if the class first in remainder is represented, the court will take jurisdiction, although there "is an executory devise to the unborn children of another person." This, as we shall see, is in accordance with the authorities, both English and American.

In *Williams v. Hassell*, 74 N. C. 434, Reade, J., in discussing the power of the court in such cases, cites *Watson v. Watson*, supra. He makes no reference to *Ex parte Dodd*, supra. He notices the dictum in *Watson v. Watson*, and then draws a distinction between a case in which the remainder is to all the children of the life tenant, and one in which the remainder is to such children of his or her as may be living at his or her

death, in which case, as it cannot be known who will be in the class when the life estate falls in, there can be no one to represent the class. *Ex parte Miller*, 90 N. C. 625; *Young v. Young*, 97 N. C. 132, 2 S. E. 78; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295. It will be observed that the petition in that case was for a sale, there being no suggestion of a reinvestment of the proceeds to preserve the limitations. In *Ex parte Dodd* the fund was ordered to be reinvested. The doctrine of representation is recognized in *Branch v. Griffin*, 99 N. C. 183, 5 S. E. 393, 398; *Overman v. Sims*, 96 N. C. 451, 2 S. E. 372. In *Aydlett v. Pendleton*, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776, the decision was based upon the ground that some of the parties interested objected to the sale. *Shepherd, J.*, says: "Thus it will be seen that even according to this construction of a deed there are future contingent interests, and, though these may be represented by some person in esse, it cannot authorize the court in decreeing a sale for partition when there is objection by some of the parties interested. It is true that in some instances a person may represent the interests of those of his class who are not in esse, but the court only decrees a sale in such cases where the interests of the parties will be materially and essentially promoted." The decision in *Overman v. Sims*, supra, is based upon the ground that no children had been born to the life tenant. *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30. In *Overman v. Tate*, 114 N. C. 571, 19 S. E. 706, the same limitation was dealt with by the court as in *Overman v. Sims*. In this case the sale was ordered. It appeared that a child had been born to the life tenant, *Annie Tate*. *Shepherd, C. J.*, says: "The attention of the court in *Overman v. Sims*, supra, does not seem to have been directed to the fact that the limitations were in trust, nor was the child of *Annie*, now *Mrs. Weaver*, born at that time. These considerations render it unnecessary to review the former decisions of this court." In this case the ulterior limitation or executory devise was to *Thomas R. Tate* in fee, whose heirs were parties to the proceeding. So that the question decided in *Ex parte Dodd* was not presented.

Without discussing the case of *Hodges v. Lipscomb*, 128 N. C. 57, 38 S. E. 281, it is sufficient to say that the syllabus, "The courts will not decree a sale of land when it is limited in remainder to persons not in esse," is misleading. That was not the real ground upon which the case was decided. There was no trustee before the court in that case.

In *Justice v. Gulon*, 76 N. C. 442, the land was conveyed to a trustee for the benefit of the plaintiff for life, with remainder to her children who should survive her, to be equally divided between them, with a provision that if either of the children should die before the mother, leaving a child or children,

they should represent their parent. The trustee died, and, upon petition, the court appointed a trustee, but refused to order a sale of the land for reinvestment. The life tenant had children. This court affirmed the judgment. It is evident from the opinion that the court, as in *Overman v. Sims*, supra, overlooked the fact that there was a trustee and the limitations over were in trust. In *Simpson v. Wallace*, 83 N. C. 477, there was no trustee.

In *Smith v. Smith*, 118 N. C. 735, 24 S. E. 666, it is impossible to tell what the limitations were. It is simply stated that the lands were conveyed to certain persons "in trust for certain individuals therein mentioned, with limitations and contingent interests to numerous other persons therein named." It does not appear whether the trustees were parties, or whether there was any one in esse to represent those first in remainder. The opinion is equally indefinite, and does not cite *Ex parte Dodd*, but does cite *Watson v. Watson* and *Justice v. Gulon*. The court overlooked the decision in *Overman v. Tate*. It must be conceded that these cases are in conflict with the current of authority in this state. It is unfortunate that a question of so great practical interest, involving the security of title to valuable real estate, should be in even apparent conflict.

In *Finch v. Finch*, 2 Vesey, Sr., 491, Lord Hardwicke says: "It is admitted to be necessary to bring the first person in entitled to the remainder and inheritance of the estate, if such is in being. \* \* \* If there is no first son in being, the court must take the facts as they stand. It would be a very good decree, and no son born afterwards could dispute it, unless he could show fraud, collusion, or misbehavior in the performance of these trusts."

We have not discussed these cases for the purpose of overruling them, but to classify and distinguish them, and to show that the language used in *Ex parte Dodd* in respect to the power of the court to order a sale of land where there is an executory devise to persons unborn, there being members of a class next in remainder to a life tenant, has not been overruled or doubted. That question is not presented or decided in any of the cases we have cited. The importance of this will be manifest when we come to inquire into the validity of the statute of 1903.

For the same purpose we desire to cite some well-considered cases from other states: In *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455, the court says: "In the English court of chancery the general rule is that in actions affecting the title of land it is sufficient to bring before the court the person entitled to the first estate of inheritance, with those claiming prior interests, omitting those who might claim in remainder or reversion after such vested estate of inheritance. A decree against the person having the first estate of inheritance would bind those in remainder or reversion, although the

estate might afterwards vest in possession. \* \* \* I think, therefore, that under the general principles of equity practice, independent of our statute, a decree for partition in this case would be binding as well upon those who are parties to the suit as those who may hereafter come into being, entitled under the will to an interest in the premises. And, as the Legislature has provided that a sale of the lands may be made in cases where partition cannot be had, I can see no reason why the judgment for a sale should not be made as conclusive as a judgment in partition." The statute under consideration was very much as ours in respect to the procedure, and received the approval of the court. This case was cited and approved in *Monarque v. Monarque*, 80 N. Y. 322. As late as 1892, in *Kent v. The Church*, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693, Earle, C. J., says: "When an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place, and are secured in some way for such persons."

In *Baylor's Lessee v. Dejarnette*, 54 Va. 152, the power of the court to order a sale in cases where property was thus fettered with limitations underwent a most exhaustive investigation, and in an able opinion the power was sustained. This case presented the exact question which we have before us.

In *Faulkner v. Davis*, 59 Va. 651, 98 Am. Dec. 698, after a full examination and review of the authorities, both English and American, Moncure, P., says: "It seems to me, therefore, that the case of *Baylor's Lessee v. Dejarnette* is a direct, binding authority in favor of the doctrine of representation before referred to, and of its application to such a case as this."

The Supreme Court of Illinois, in *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, quoting from *Voris v. Sloan*, 68 Ill. 588, says: "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, when the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency. \* \* \* From very necessity, a power must exist somewhere in the community to grant relief in such cases of ab-

solute necessity, and under our system of jurisprudence that power is vested in the court of chancery." \* \* \* The question remaining to be determined is whether the decree is binding upon any child or children that may be born to the defendant in error." This question is answered by the court in the affirmative.

In *Bofl v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627, the same question was before the court. The chancellor says: "It is necessary to the best interest of society, as I have before intimated, that there should be power lodged in some judicial tribunal authorized in certain exigencies to unfetter the titles of estates, otherwise they might be shackled to an inconvenient extent. In England, the tenant for life, by suffering fine and recovery, in which he alone is a party, may cut off all contingent limitations and remainders. In that country, courts of equity are in the habit, under certain contingencies, of doing the same thing in respect to the title, but with a more just regard to the rights of the remaindermen; for when that court, by a sale, divests the title of the contingent remaindermen in the property, it preserves them for the fund." The power of the court of chancery in the state was sustained.

At the April term, 1901, of the Supreme Court of Tennessee, in *Ridley v. Halliday*, 106 Tenn. 607, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. Rep. 902, Beard, J., reviews the English and American cases upon the subject, and says: "A chancery court has inherently, without the aid and in the absence of any inhibition of statute, jurisdiction and power to bind and conclude by its decree, converting realty into personalty, the rights and interests, whether legal or equitable, vested or contingent, of all persons, whether in esse or in posse, and whether sui juris or under disability, who are before the court, either by service of process or by 'virtual representation'; but it must satisfactorily appear that such conversion is for the best interests of all the parties, and the decree must award the several parties the same interest in its proceeds which they enjoyed in the realty, and provide for the protection of the same." He further says: "We have examined the cases from North Carolina referred to in the able and exhaustive brief of counsel for the appellants, and, while they are entitled to great consideration, we think they are overborne by the weight of authority." 15 Enc. Pl. & Pr. 646, 647.

We might, but for the length of this opinion, cite authorities from almost every state in the Union, and from the English Reports, showing a uniform current of the best-considered judicial opinions upon this very important question. This is important as bearing upon the constitutional question raised by the demurrer in regard to the validity of the act of 1903, the first section of which is as follows: "That in all cases where there is a vested interest in real estate, and a con-

tingent remainder over to the persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court at term time, which proceeding shall be conducted in the manner pointed out in this act; provided that this provision shall not apply to any case where the courts now have power to order a sale of contingent interests in land." (The other section prescribes the mode of procedure.) As *Alva C. Springs* has no child living, this case cannot be brought within the rule laid down in *Ex parte Dodd*, and, although there are many authorities holding that the presence of the life tenant is sufficient to sustain the jurisdiction, we do not propose to go beyond the principle of that case. Therefore, but for the presence of a trustee, the plaintiff would not be entitled to relief. It is said, however, that the language of the will does not vest in *Eli Springs* any title to the property, and that he, therefore, cannot represent the interests of all parties in esse and in posse. The language of the will indicates a purpose on the part of the deviser that the property shall be sold and converted into money. She says: "But he can only receive the interest during his life. At his death the interest shall be paid to his children until they are of age." We assume, though it is not so stated, that she had other property which was given to her children by her will. If she had contemplated that the title to this real estate should continue in common to all of her children during the life of *Alva*, and until all of his children should arrive at full age, such purpose would have been indicated in unmistakable terms. If we correctly construe the will, *Eli Springs*, in order to discharge the trust imposed upon him, must take hold and invest the money upon which interest is to be paid. We think the words, "I appoint *Eli Springs* his trustee," sufficient to vest in him such interest in the property as may be necessary to enable him to execute the trust, and that he is authorized to represent all parties in interest. *Overman v. Tate*, supra. If this should not be so, we think that the claim to relief is afforded by the act of 1903. The demurrer suggests that "it is doubtful whether the Legislature had the power to pass a law interfering with or changing the rights of the parties to this property." We are thus confronted with the constitutional question as to the power of the Legislature to pass the act, and its application to wills and deeds executed prior to its passage. It is, of course, conceded that the Legislature has no power to destroy or interfere with vested rights. Are such rights as may accrue to any children who may hereafter be born to *Alva C. Springs* within the meaning of this constitutional provision? This court in 1798, in *Lane v. Davis*, 2 N. C. 277, held that the act of 1784 destroying estates tail was valid to bar a remainder de-

pendent upon an estate tail in possession of a tenant in tail at the time of the passage of the act. *Minge v. Gilmour*, 2 N. C. 279; *Cooley*, Const. Lim. § 440. "A bare expectancy is not such a vested right as will be protected by the constitutional provision." *Bass v. Nav. Co.*, 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247. It is well settled that courts of equity, as they existed in this state prior to the Constitution of 1868, possessed the power to order the sale of lands of infants and tenants in common when partition was impracticable, and to administer trusts. We cannot do better than refer to the learned and exhaustive argument of Mr. Moore in *Ex parte Dodd*, supra. It is equally clear that the superior courts under our present judicial system have the same power and equitable jurisdiction as the courts of equity had prior to 1858. *Barcello v. Hapgood*, 118 N. C. 726, 728, 24 S. E. 124.

"Where property has been settled by will or deed for life, with limitations over to persons not in being, who are incompetent to exercise a legal judgment, the Legislature may authorize a sale, and the reinvestment of the proceeds for the same uses, if such a course will be for the benefit of all concerned, or beneficial to some of them and not injurious to the rest." *Hare's Am. Const. Law*, 816. "Such a sale simply turns the property into another form where it may bear fruit for the first taker, who would otherwise have a barren inheritance, and be postponed, as regards real and substantial benefit, to persons yet unborn. It cannot, however, be properly exercised unless the proceeds can be placed in trust and held securely for the executory devisee or remainderman." *Id.* 817.

In New York the question has received a careful consideration. In the case of *Brevort v. Grace*, 53 N. Y. 245, 252, after declaring that courts of equity have the power to authorize the sale of lands belonging to infants in esse, the court proceeds to say: "Doubts were expressed in some of the cases whether this power extended to those not in being who might thereafter be entitled to some estate in the premises. The reason upon which the rule is based as to the former applies with equal force as to the latter. In both, there is a want of capacity to manage and preserve the property so as to protect the interests of those who are or may become entitled thereto, hence the necessity of devolving this duty upon the sovereign. For this purpose the Legislature, under our system, represents and possesses the powers of sovereign authority, and may discharge the duty by either general or special laws as will best protect the rights of those interested, although it is obvious that the former should be preferred in all cases when practicable."

In *Sohler v. Genl. Hospital*, 3 Oush. 483, 497, the court says: "The Legislature authorizes a sale, taking care that the proceeds

shall go to the trustees duly appointed, in pursuance of the will of Benja Joy, for the use and benefit of those having the life estate and of those having the remainder under the will. This is depriving no one of his property, but is merely changing real into personal estate for the benefit of all parties in interest. This part of the resolve, therefore, is within the scope of the power exercised from the earliest time, and repeatedly adjudged to be rightfully exercised by the Legislature. \* \* \* It is deemed indispensable that there should be a power in the Legislature to authorize a sale of the estates of infants, insane persons, and persons not known or not in being, who cannot act for themselves. The best interests of those persons, and justice to others, often require that such sales should be made. It would be attended with incalculable mischief, injuries, and losses, if estates in which persons are interested who have not capacity to act for themselves, or are not in being, could under no circumstances be sold and perfect titles affected. But in such cases the Legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

In *Pennsylvania, in Estep v. Hutchman*, 14 Serg. & R. 435, Gibson, being then Chief Justice, the court says: "Even in England, an act of Parliament is sometimes necessary to assist the almost unlimited power of the chancellor. A conveyance made by persons authorized by the Legislature must then, it would seem, be *prima facie* evidence of good title in the vendee against all claiming under the vendor." The constitutionality of an act upon this subject was sustained by the court. See, also, *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479.

Article 2, § 15, of the Constitution, provides that "the General Assembly shall regulate entails in such manner as to prevent perpetuities." While it is not necessary to hold that this language gives to the Legislature the power to pass either general or special laws destroying entails created before the enactment of such statutes, it would seem that the power is conferred to enact general laws vesting in the courts the power to deal with and regulate the sale of property entailed, to the end that perpetuities may be prevented. This construction of the provision is not only consistent with, but it would seem necessary to effectuate, the policy of the law to prevent entails hampering the sale of property, thus preventing its free alienation and improvement. This has always been recognized and enforced as a fundamental principle of American law. We think, both upon principle and authority, the statute is constitutional, and authorizes the sale of real estate conveyed or devised before its enactment.

The importance of this question, and the apparently unsettled condition of the law in

this state, leading to the passage of the act of 1903, we think, justifies the length of this opinion and the citation of the authorities. The act carefully prescribes the procedure, and, if the courts shall be diligent to ascertain the facts in each case, and proceed with caution in making orders therein, the purpose of the Legislature will be accomplished without doing violence to, but rather in accordance with, the principles of our jurisprudence, and the preservation and protection of the rights of parties. In this cause it will be advisable, when it shall come before the court, to set out in detail the condition of the property and of the parties, and in all respects conform to the procedure provided by the act.

Upon a careful examination of the cases in our own Reports and those of other states, we are of the opinion:

1. That, without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse, and a party to the proceeding, to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse.

2. That, when the estate is vested in a trustee to preserve contingent remainders and limitations, the court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be in esse, proceed to order the sale, and bind all persons either in esse or in posse.

3. That since Acts 1903, c. 90, the court has the power, when there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, to order the sale by conforming to the procedure prescribed by the act.

4. That the act is constitutional, and applies to estates created prior to its enactment.

Of course, in each of the classes named, the decree must provide for the investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests.

In the case before us, the judgment must be so modified that the judge of the superior court of Mecklenburg county, in term, shall require the pleadings to be amended to conform to the procedure provided by the act of 1903, and that all further proceedings, orders, and decrees be in accordance therewith. The plaintiffs will pay the costs of this court, to be recovered by them from the commissioner upon the sale of the property in controversy.

Judgment modified and affirmed.

(132 N. C. 1060)

**STATE v. BRADLEY.**

(Supreme Court of North Carolina. May 12, 1903.)

**INTOXICATING LIQUORS—CRIMINAL PROSECUTION—STATUTORY PROVISIONS—SPECIAL VERDICT—SUFFICIENCY.**

1. In a prosecution for retailing liquor without a license the court could not enter judgment on a special verdict finding that defendant sold a quart of whisky about a year prior to the finding of the bill, for which he was paid 30 cents. The jury should have found every fact, either by proof or presumption, essential to defendant's guilt.

2. An indictment charging defendant with retailing without a license "a quantity of spirituous liquor by small measure, to wit, by the measure of a pint," may be sustained either under Code, § 1076, making it a misdemeanor to sell spirituous liquor by small measure in any other manner than is prescribed by law, or under Laws 1901, pp. 139, 152, c. 9, §§ 70, 103, prescribing a license tax for persons selling liquors, and making it a misdemeanor to practice a trade, profession, or use any franchise without having paid the tax and obtained a license.

Appeal from Superior Court, Polk County; E. R. Jones, Judge.

Eli Bradley was acquitted of selling liquor without a license, and the state appeals. Reversed.

The Attorney General, for the State. J. E. Shipman, for defendant.

CONNOR, J. The defendant was charged in the usual form of indictment with retailing without license "a quantity of spirituous liquor by small measure, to wit, by the measure of a pint." The jury returned for a special verdict "that the defendant sold one quart of whisky to J. B. Constant, in Polk county, about one year prior to the finding of the bill, for which said Constant, in Polk county, paid the defendant thirty cents. If, upon the above facts, the court be of the opinion that the defendant is guilty, the jury so find; otherwise, not guilty." His honor held that the defendant was not guilty, and so adjudged. The solicitor for the state appealed.

We are of the opinion that his honor could not have adjudged the defendant guilty upon the special verdict, and that he could not render any judgment thereon. The offense charged is selling liquor without having a license to do so. It is true that it has been the settled law in this state for more than 50 years that "proof of the existence of a license to retail must come from the defendant" (State v. Emery, 98 N. C. 668, 3 S. E. 636), and upon proof of sale, in the absence of such proof, the jury must find the defendant guilty. If, however, the jury shall, instead of returning a general verdict, find a special verdict, they should find every fact, if it exists, either by proof or presumption, essential to the defendant's guilt; otherwise the court should set the finding aside and

direct a venire de novo. State v. Bloodworth, 94 N. C. 918; State v. Bray, 89 N. C. 480; State v. Corporation, 111 N. C. 661, 16 S. E. 331; State v. Oakley, 103 N. C. 408, 9 S. E. 575. The bill of indictment is drawn under the provisions of section 1076 of the Code, which makes it a misdemeanor to sell "spirituous liquor by the small measure in any other manner than is prescribed by law." The charge is that the defendant sold "by the measure of a pint." It may, if the allegations are found to be true, be sustained either under that section or section 103, c. 9, p. 152, Laws 1901. Section 70 of this statute, being the revenue law of that year, prescribes: "Every person \* \* \* selling spirituous \* \* \* liquors \* \* \* shall pay a license tax semiannually on the first days of January and July as follows: First, for selling in quantities of five gallons or less, fifty dollars for each six months; second, for selling in quantities of five gallons or more, one hundred dollars for each six months," etc. Section 103 makes it a misdemeanor to practice any trade or profession or use any franchise without having paid the tax and obtained a license as required, etc. It would seem that, in view of the new classification of dealers in spirituous liquors, a sale of five gallons or less would be by small measure. This is the principle of construction adopted in State v. Shaw, 13 N. C. 198. We have said this much because we presume the appeal is taken for the purpose of having our opinion on the question.

For the defect in the special verdict there must be a venire de novo.

(132 N. C. 580)

**JOYNER et al. v. SUGG et al.**

(Supreme Court of North Carolina. May 5, 1903.)

**HOMESTEAD—CONVEYANCE BY HUSBAND—CONSTITUTION—CONSTRUCTION—RECONVEYANCE TO WIFE—DEATH OF HUSBAND—MERGER OF ESTATE.**

1. Const. art 10, § 2, provides that a homestead not exceeding \$1,000 in value shall be exempt from sale under execution or other final process, and sections 8 and 5 continue the exemption during the widowhood of the owner's wife, unless she be the owner of a homestead in her own right, and during the minority of his children. Section 8 declares that nothing in the foregoing sections of the article shall prevent the owner from disposing of the homestead by deed, but that no such deed shall be valid without the voluntary signature and assent of the owner's wife, signified on her private examination. Held, that such provisions only prohibited a conveyance of the homestead without the joinder and privy examination of the wife, which would transfer the owner's homestead right of exemption, and hence, where an owner conveyed land subject to his homestead right, and the land was subsequently reconveyed to his wife, subject to the homestead exemption, on the husband's death the wife's homestead right was merged in the fee acquired by her under the deed.

Douglas, J., dissenting.

¶ 1. See Intoxicating Liquors, vol. 29, Cent. Dig. § 345.

On petition for rehearing. Granted, and former opinion reversed, and judgment below affirmed.

For former opinion, see 131 N. C. 324, 42 S. E. 828.

WALKER, J. This is a petition to rehear and review the judgment of this court rendered at the last term in the above-entitled case. It involves a matter of the greatest importance, as it relates to the ever-recurring question of the extent of the homestead right, and requires us to declare and decide what are the nature and characteristics of that creature of the Constitution known as the "homestead," and what right in or control or dominion over it the owner has and enjoys under the terms of the instrument by which it was brought into existence.

The facts in regard to this particular case, as we gather them from the record, are those stated by the court in the prevailing opinion delivered at said term, with slight modifications, not now, perhaps, material to be considered, in connection with the question to be discussed and decided on the rehearing, and are as follows: "Blaney Joyner in 1893 executed a deed of trust to Allen Warren to secure creditors, in which was included the land in controversy, which was conveyed 'subject to and reserving however his [Blaney Joyner's] homestead rights therein as secured by the laws of North Carolina.' After due advertisement according to the terms of the trust, the land was sold 'subject to the reserved homestead right of Blaney Joyner,' and was bought by R. L. Davis, with whom Blaney Joyner had arranged that it should be bought for his benefit, and the deed therefor was made by Allen Warren, trustee, to said Davis, 'subject to the homestead right of Blaney Joyner,' and coupled with a parol trust to convey the same to whomsoever Blaney Joyner might direct; and, by direction of Blaney Joyner, said Davis conveyed the land, 'subject to said Blaney Joyner's homestead right,' to his wife, J. A. E. Joyner. Blaney Joyner and his wife united in a mortgage to secure to said Davis the payment of the purchase money, which was subsequently paid off by Mrs. Joyner, after the death of her husband, as appears by the testimony of W. G. Lang in the record. Blaney Joyner died without issue, and the plaintiffs are his heirs at law. J. A. E. Joyner died subsequently, in 1901, having devised the land to her nieces, the defendants, who are in possession of the premises."

It was held by this court (131 N. C. 324, 42 S. E. 828) that there was no parol trust created by Mrs. Joyner, and that the parol trust raised by the agreement between R. L. Davis and Blaney Joyner was performed by the execution of the conveyance of Davis to J. A. E. Joyner, as directed by Blaney Joyner, so that the question as to the trust is now out of the case, and we have only to determine whether the deed of trust, and the

subsequent deed of the trustee to Davis, and of Davis to Mrs. Joyner, vested in her the title to the land described in the deeds, subject only to the right of Blaney Joyner to have and occupy a part of the land, to the value of \$1,000, exempt from sale under execution, for the time fixed in the Constitution, or whether the deeds conveyed all of said lands, except the part subject to the exemption, the said part being so excepted from the deeds as that no interest whatever therein vested in Mrs. Joyner. In other words, does the Constitution forbid the sale of the land itself, allotted as property, which shall be exempt from sale under execution, without the joinder of husband and wife in the deed, and the privy examination of the wife thereto, or does it merely prohibit any conveyance, without such joinder and privy examination, which will transfer or convey this right of exemption, leaving the husband free to convey all other interests he may have in the excepted part, to take effect in possession when the exemption has ceased? We unhesitatingly adopt the latter construction as the one which was clearly contemplated by the framers of the Constitution, which has met with legislative sanction, as we shall hereinafter show, and which has been uniformly adopted by this court until this case was decided at the last term.

It is provided in article 10 of the Constitution as follows:

"Sec. 2. Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

"Sec. 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

"Sec. 5. If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

"Sec. 8. Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

It is perfectly obvious from a bare perusal of these sections that the sole object of the

framers of the Constitution was, not to set apart property which should not be sold by the owner, but to exempt the property from execution, and thereby put it beyond the reach of creditors for the time specified. Their only care and solicitude were to protect him who had been or might be overtaken by misfortune, and to save his family from utter impoverishment and destitution. They did not intend to tie the hands of the head of the family so that he could not dispose of his property, as they well knew that the *jus disponendi* would always be one of the most valuable qualities of the estate; but it was their purpose to bind the hands of the creditor so that he could not lay them upon the exempted property of the debtor in the time of his adversity, and to suspend his right to proceed against that property for the satisfaction of his claim during the period of exemption. This constituted their chief, and, indeed, their only, aim and purpose, and it was never intended that this humane and beneficent provision of the organic law should be so interpreted as to take away from the owner of the right of exemption any part of his almost equally valuable right of alienation.

The framers of the Constitution meant exactly what they said and ordained—that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment, without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and, if there were children, then during the minority of the children, or any one of them. The leading idea, if not the only one, was to create an exemption, and not an estate, and an exemption, too, for a limited period, leaving the estate which the debtor already had in the land unimpaired. We have said that no new estate was created, for we are told that an estate is the interest which the tenant has in his land, and no interest has been created here, but merely a right of exemption, or a privilege of protection against creditors; leaving the debtor at full liberty to deal with his estate at his own free will, provided he does not alien this right of exemption or interfere with its enjoyment without the consent of his wife, to be signified in the manner prescribed.

We find, therefore, that, as regards the property allotted for the purpose of exemption, the debtor acquires no new right, interest, or estate in it, as he is supposed already to have the entire estate, but something collateral to it; and if this something, which we may call a right of exemption, or a determinable right of exemption, or a quality annexed to the land, whereby it is exempted, is preserved to him and his family intact, he may convey or transfer his estate or interest in the land, as he could do

if this right did not exist, without infringing upon any provision of the Constitution. The land is his, and he holds it with all the rights and incidents of ownership, among which stands pre-eminent the right of alienation, as essential to his power and dominion over it; and the lawmakers could not have intended to put any restriction upon this right, for it would be against the policy of the law to do so, except in so far, and only in so far, as it might be necessary to protect the owner against his creditors. If he does not interfere with the right of exemption, why may he not do with his own as he pleases in all other respects, and why may he not sell and convey, without the joinder of his wife, all of his interest in that which it is not necessary for him to keep in order to secure to himself and his family the full enjoyment of this right of exemption? When it is admitted to be a mere determinable right of exemption, as we understand it is in the opinion of this court delivered at the last term, the result we have reached, and not the one stated by the court in that opinion, is, we think, the natural and inevitable conclusion that follows from the admission. The true idea is well expressed by the court in *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437: "The *jus disponendi* is a vested right, and protected by the Constitution, and is restricted only by provisions for dower and homestead, which restrictions must be so construed as to carry out the kindly purpose for which they were created, with no more restriction of the power of alienation than is necessary to make them effectual."

We have thus far stood upon "the reason of the thing," and the letter and spirit of the Constitution. But if there can be any doubt or uncertainty in regard to this matter, why may we not call to our aid the interpretation placed, impliedly, at least, upon this constitutional provision by the Legislature? It was provided by Acts 1869-70, c. 121, § 1 (*Battle's Revisal*, c. 55, § 28), "that it should not be lawful to levy upon or sell under execution for any debt the 'reversionary interest' in any lands included in a homestead until after the termination of the homestead interest therein." While the words "reversionary interest" are here used to describe a right which the owner has in the land subject to the determinable exemption, and were inappropriate, in a technical sense, for that purpose, because the homestead is not an estate, and the interest or estate of the owner in the land is in no way divided up or changed, yet it appears clearly from the act that the Legislature thought that, under the Constitution, the owner had a salable interest in the exempted land, distinct from the right of exemption. If this is not so, and the land itself, or the part of it allotted for the purpose of exemption, was in the mind of the Legislature as being that thing which constituted the "homestead," why should it speak of a "reversionary interest,"



which implies that there is a preceding particular estate or interest, and undertake to protect that "reversionary interest" from sale under final process? It is utterly impossible to conceive that the Legislature, in staying the sheriff's hand until the right of exemption has expired, could have had any other idea than that the Constitution created only a right of exemption, which left the land in the hands of the debtor exposed to sale, subject only to that privilege or right of exemption, and the exempted land which was thus liable to be sold was misnamed a "reversion." It expressed the right idea with the wrong word, but nevertheless it placed the unmistakable interpretation upon the Constitution which we have adopted. It would have been idle to protect from sale under execution something that did not exist and could not be sold, and it will not be imputed to the Legislature that it intended to do a vain thing. This court, speaking by Ashe, J., in *Adrian v. Shaw*, 82 N. C. 476, says: "In this state it is held that the homestead right is a quality annexed to land, whereby the estate is exempted from sale under execution for debt, and it has its force and vigor in and by the Constitution. If it was intended by the framers of the Constitution that all of the interest of the owner in the homestead land should be exempted from sale, it was not necessary to pass the act of 1869-70, as the Constitution sufficiently protected it." It was only upon the supposition that there was an interest in the exempted land which was left exposed to sale that made it necessary to pass the said act. That statute was remedial in its nature. The old law was the Constitution, which declared that a certain part of the land should be set apart, and to it should be attached a right or privilege of exemption only; thereby rendering it liable to sale subject to that exemption. The mischief was that sales under execution had been and were then being made, which were recognized as valid by the courts, and which were considered as injurious to the homesteader, and to remedy this evil the statute was enacted. It was not declaratory, because, if the framers of the Constitution intended that "the estate in the land, in its entirety, should be set apart and exempted," this, as we have said, was all-sufficient, without a statute to forbid its sale under execution, as we know that the Constitution does that in express and positive terms.

But let us examine the question in the light of the decisions of this court:

The case of *Jenkins v. Bobbitt*, 77 N. C. 385, is directly in point, and has never been overruled or questioned. It is well to reproduce a part of what is said in that case by Pearson, C. J., for the court: "We think it clear that this section refers exclusively to the disposition of the homestead estate by the owner thereof, and has no reference whatever to any conveyance he may make

of his estate in reversion. By the proper construction, this section should read, 'But no deed purporting to dispose of the homestead made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law.' Read in this way, there is sense to it; but to make it apply to a disposition of the reversion, as well as a disposition of the homestead estate, incurs the censure of the rule, 'Hæret in litera, hæret in cortice.' \* \* \* As the owner of an estate in reversion on a homestead estate had a right to make a voluntary alienation, it follows that his creditors had a right to have it sold under execution. Hence the necessity for the statute (*Battle's Revisal*, c. 55, § 26). If the wife had the power to put a veto upon the sale of the reversion by refusing to give her assent, that act would not have been needed. But such a power on the part of the wife, to object either to the voluntary disposition of the reversion by the husband, or to an involuntary disposition of it by execution, was not then suggested by any one. \* \* \* A sale by the owner of the homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. It is his property. Why should he not have a right to dispose of it? The right seems to be conceded by his honor, unless it be restrained by the section of the Constitution upon which we have commented." The principle of that decision has, as we think, been applied by this court in the following cases: *Poe v. Hardie*, 65 N. C. 447; *Hager v. Nixon*, 69 N. C. 108; *Barrett v. Richardson*, 76 N. C. 429; *Littlejohn v. Egerton*, 77 N. C. 379; *Gheen v. Summey*, 80 N. C. 187; *Murphy v. McNeill*, 82 N. C. 221; *Adrian v. Shaw*, 82 N. C. 474; *Wyche v. Wyche*, 85 N. C. 96; *Grant v. Edwards*, 86 N. C. 513; *Keener v. Goodson*, 89 N. C. 273; *Lowdermilk v. Corpening*, 92 N. C. 333; *Rogers v. Kimsey*, 101 N. C. 559, 8 S. E. 159; *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Long v. Walker*, 105 N. C. 90, 10 S. E. 858; *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922; *Banking Co. v. Whitaker*, 110 N. C. 345, 14 S. E. 920; *Davis v. Smith*, 113 N. C. 94, 18 S. E. 53; *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814; *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635; *Bevan v. Ellis*, 121 N. C. 224, 28 S. E. 471; *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877. These and many other cases either directly or indirectly recognize the right of the owner of the homestead land to sell the same subject to the right of exemption, and thereby to convey what was once called, in default of a better word, the "reversion"; and in several cases it has been said by this court that article 10, § 8, of the Constitution, by which it is required that there shall be the signature and assent and

privy examination of the wife to any valid deed conveying the homestead, applies only when the exempted land has been actually allotted and set apart to the homesteader. *Mayho v. Cotton*, 69 N. C. 294; *Hughes v. Hodges*, 102 N. C. 247, 9 S. E. 437.

In *Bank v. Green*, 78 N. C. 252, this court, by Bynum, J., says: "There is some misconception as to the nature of the homestead law. The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion over it and power of disposition are precisely the same after as before the assignment of the homestead. The law is aimed at the creditor only, and it is upon him that all of the restrictions are imposed, and the extent of these restrictions is the measure of the privileges secured to the debtor." "The homestead has been called a 'determinable fee,' but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts, in respect to the particular property allotted to him." Id.

In *Hinsdale v. Williams*, 75 N. C. 431, Pearson, C. J., for the court, says: "But a sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it."

In *Ladd v. Byrd*, 113 N. C. 468, 18 S. E. 666, the court states the principle as follows: "Prior to the passage of the act of 1870, when the reversionary interest could still be sold under execution, the judgment creditor might, at his option, recognize the claim of the debtor to a homestead by exposing to sale only such reversionary interest, without affecting the validity of the sale, or in any way impairing the right of the purchaser to possession of the land on the expiration of the prescribed period of exemption. *Long v. Walker*, 105 N. C. 91 [10 S. E. 858]; *Wyche v. Wyche*, 85 N. C. 96; *Barrett v. Richardson*, 76 N. C. 423. When made expressly 'subject to the homestead,' it was held that the sale was valid, and 'passed the reversionary interest only.'"

In *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, the court distinctly recognized and applied the principle that the homestead is not a new estate, but merely a determinable exemption from the payment of debts, and that the land might be conveyed subject to this right of exemption. "The reversionary interest in the homestead land," says the court, "may be owned by one person, while the homestead interest or estate is held by another;" citing several cases. And again: "The exemptionist may sell the land on which the benefit rests, subject to the judgment, but also protected for the time being by the suspension of the lien." While there was a dissenting opinion in that case, it was upon a question not presented in this

case, and as to the principle here involved the justices were unanimous.

In *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877, the court says: "A sale of the reversionary interest in land by an assignee in bankruptcy, in which a homestead has been allotted, is fully recognized in our courts. *Windley v. Tankard*, 88 N. C. 223; *Murray v. Hazell*, 99 N. C. 163, 5 S. E. 428. The laws of North Carolina prohibit a sheriff from selling the reversionary interest in homestead lands under execution, but they do not prevent the homesteader himself from conveying it. *Jenkins v. Bobbitt*, 77 N. C. 385."

In *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635, there was a wide divergence of views developed, but no principle theretofore established by the court in regard to the right of exemption was overruled or even modified. There was a concurrence in opinion of three of the justices, to the effect that a valid sale could be made by the husband of the land allotted as a homestead, without the joinder of his wife, subject to the right of exemption, though it was decided that, upon the special facts of that case, a good title could not be made. This resulted from the opinion of Clark, J., that the right to a homestead was a mere "stay of execution," which is personal to the owner of the land, and also inalienable. In other respects he concurred with *Montgomery and Avery, JJ.*; and, had it not been for his view of the law in the respect indicated, which does not affect the matter under consideration in this case, the judgment in that case would have been the reverse of what it was. Viewed in this light, the decision is a direct authority in favor of the defendants' contention in the case at bar.

In *Hughes v. Hodges*, 102 N. C. 247, 9 S. E. 440, it is said: "Neither is it material that the wife of the defendant did not, by deed, assent to his receiving a homestead in the Swamp place. Section 8, art. 10, of the Constitution, applies only to a conveyance of the homestead after it is laid off." *Mayho v. Cotton*, 69 N. C. 294. The court, in *Hughes v. Hodges*, supra, clearly recognizes the right of the owner of the land to convey it, subject to the right of exemption, without the joinder of his wife. Page 245, 102 N. C., 9 S. E. 437. It is not necessary to hold that there is no reversionary interest, or nothing substantially equivalent to it, for the debtor to sell, as his right of exemption can be fully protected and preserved without such a holding.

In *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772, it appeared that at the time two mortgages on land, which was of less value than \$1,000, were made, the mortgagor was married; that he acquired the land in 1869; that he and his wife lived upon the land, and had no children; and that he owed no debts, except those mentioned in the mortgages. The mortgages were foreclosed, and the purchaser sued the mortgagor for possession. It

was held that the purchaser acquired a good title, as against the defendant, subject only to the wife's contingent right of dower, although she had not joined in the mortgages, and that he was entitled, therefore, to recover the land. The case is directly in point, and it is impossible to distinguish it from our case.

The case of *Markham v. Hicks*, 90 N. C. 204, was relied on as an authority sustaining the conclusion of the court at the last term; but the Chief Justice did not think that it was in point, or at least not sufficient for that purpose. In referring to that case, he said: "While the court recognizes that the homestead is not an estate, it seems to me that it fails to recognize the results that follow from the changes in its opinion." What is stated in *Markham v. Hicks*, supra, in reference to the homestead, is utterly inconsistent, we think, with the decision in *Murphy v. McNeill*, 82 N. C. 221, and was directly repudiated by the court in *Ladd v. Byrd*, 113 N. C. 468, 18 S. E. 666. See, also, in the same connection, the strong language of the court in *Jones v. Britton*, 102 N. C. 183, 9 S. E. 554, 4 L. R. A. 178, citing *Jenkins v. Bobbitt*, 77 N. C. 385, and *Littlejohn v. Egerton*, 77 N. C. 379. In that case the court takes a view of the act of 1870, forbidding the sale of "reversionary interests," differing widely from that expressed by Smith, C. J., in *Markham v. Hicks*, supra.

The argument that, if the owner of the land is allowed to sell subject to the right of exemption, the property would not bring much, and would be bought only by speculators, and result in a sacrifice to the homesteader, could apply, if at all, only to forced sales made under execution or other final process, and not to voluntary sales; for in the latter case the owner can sell for his own price, or refuse to sell at all. He has the power to make his own terms. Therefore what is stated in the opinion of the court at the last term in regard to such sales can have no application to this case. When the argument was used by Dick, J., in *Poe v. Hardie*, 65 N. C. 447, and by Reade, J., in *Hinsdale v. Williams*, 75 N. C. 430, they were speaking with reference to the act of 1870, and referring only to forced sales. In *Bank v. Green*, 78 N. C. 252, Bynum, J., says: "The court should not listen to an argument based upon advantage to the debtor, or be influenced by considerations of benefit to him, but should construe the law as it is written. The courts cannot, by judicial legislation, even, do so bold a thing as to confer new rights and exemptions, in the face of plain legislation by the lawmaking power. \* \* \* Such an argument should not be addressed to a court which cannot make, but only construe and administer, the law as it is written. If worthy of consideration, it should be directed to the Legislature as a reason for changing the law."

We cannot understand why a conveyance

of land subject to the owner's right of exemption should not be permitted to have full force and effect, and to convey all the interest he has in it, subject only to his right to use and enjoy it during the period of the exemption. This is all that the Constitution secures to him, and every principle of law and public policy requires that his right of alienation should be as little hampered as possible. But we have said, and we now repeat, that the prohibition of section 8, art. 10, of the Constitution, against the conveyance by the husband, without the voluntary signature and assent of the wife, to be signified by her privy examination, was not intended to become effective until the homestead is actually allotted to the owner of the land. It is provided by that section that no owner of a homestead shall convey it without the assent of his wife, and this necessarily implies that there has been an actual allotment, as no one can be said to be the owner of that which does not exist. The right to the homestead always exists, and is guaranteed by the Constitution, but the homestead itself cannot come into existence until it has been "selected by the owner" of the land, and actually allotted, and thereby identified as his homestead. *Mayho v. Cotton*, and *Hughes v. Hodges*, supra. This very question was involved in *Hager v. Nixon*, 69 N. C. 108, and the meaning of the words of the Constitution, "owner of a homestead," as used in the several sections above quoted, was clearly defined. In that case the husband died without owing any debts, and without having had any homestead set apart to him. His wife and minor children applied for the allotment of a homestead, and the court decided that section 5, by which it is provided that "if the owner of a homestead die, leaving a widow," she shall have the benefit of the homestead during her widowhood, meant that the homestead must have been allotted to the husband, and he must in that way have become the "owner of a homestead," before she could have the benefit of it. "It is implied," says the court, "that the ancestor had been the owner of the homestead, by which, in this connection, must be meant a part of his property set apart and designated as exempt, and not merely land occupied and owned by him." *Id.* p. 110. The words "owner of a homestead" are used in section 8, by which the sale of the homestead without the assent of the wife is forbidden; and as the court has said in *Hager v. Nixon*, supra, that the same words in all of the sections must of necessity receive the same construction, the restraint of alienation imposed by section 8 can apply only to a homestead which has been actually allotted. See, also, *Bruce v. Strickland*, 81 N. C. 267. The prohibition of that section cannot, therefore, affect this case, as there had been no allotment of the homestead when Blaney Joyner executed the deed of trust to Allen Warren.

It follows from what we have stated that J. A. E. Joyner acquired a good title to the land in question by the sale and deed to her, subject to Blaney Joyner's homestead right, or his determinable right to use and occupy the same exempt from the claims of his creditors; and, this right having expired at his death, the "homestead" right of J. A. E. Joyner merged in the fee simple she acquired by the deed, and gave her a good and indefeasible title to the land which she devised to the defendants. They are therefore entitled to the same as against the plaintiffs.

The former judgment of this court is reversed, and the judgment of the lower court is affirmed. Petition allowed.

CONNOR, J., having been of counsel, did not sit in the hearing of this case.

DOUGLAS, J. Still adhering to the views contained in the opinion of the court as delivered by me at its last term, I am compelled to dissent from the present opinion of the court. Here my dissent would end if the present opinion simply expressed its present views, but, as it is in greater part a critical review of the former opinion, I deem it proper to say something further. The opinion of the court speaks of the construction "which has been uniformly adopted by this court until this case was decided at the last term." This alleged uniformity of construction I have been utterly unable to discover. It may exist somewhere, but, if so, in a state too intangible for my mental grasp. Perhaps it shares the ethereal existence of that quality of exemption which is said to be capable of existing independently of the substance which it qualifies. The case of *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635, in which a distinguished member of the bar wittily said that there were five dissenting opinions, may be cited as an example of uniformity. The court again says that the framers of the Constitution "never intended that this humane and beneficent provision of the organic law should be so interpreted." Perhaps not. My only way of knowing their thoughts is from their written words. In the construction of the constitutional provisions creating the homestead, there are two different views, either of which might reasonably be followed, but they are antagonistic. If one is right, the other must be wrong; and it seems to me that the effort to combine these inconsistent principles is the real cause of the confusion that has arisen in the construction of the homestead, and is the vital error in the present opinion of the court. The homestead must be either a mere quality annexed to land, or a particular estate carved out of the fee. The very definition of the one excludes the other. A quality in itself has no independent existence, but must remain annexed to the subject which it qualifies. The qualities of a horse are generally

considered as including strength, speed, endurance, gentleness, and intelligence. The owner cannot sell the horse, and still keep these qualities for himself. The qualities must go with the horse, or cease to exist. On the contrary, no one would include the mane and tail of a horse among his qualities. They are parts of the horse, and can be cut off and separated from the horse. So, if the homestead is a mere quality annexed to land, it must remain with the land; but, if it is a particular estate carved out of the fee, it may exist and be conveyed independently of the reversion. We adopted the former view as being more logical, in view of the repeated decisions of this court; but I readily admit that the latter is not unreasonable, provided it is not confused with a lot of inconsistent qualities.

The logical result of the present opinion of the court is to turn the homestead into an estate or interest in land. Its parts are (1) a particular estate for life to the homesteader; (2) a remainder to his children until they have become 21 years of age; (3) a contingent remainder to his widow during her widowhood, unless she has a homestead of her own; and (4) the ultimate fee or reversion, which may be retained or conveyed by the homesteader. This idea seems to have been running through the minds of the court, in one form or another, for many years, from their frequent use of the terms "homestead estate" and "reversion." The court principally relies upon the case of *Jenkins v. Bobbitt*, 77 N. C. 385, which it says "is directly in point, and has never been overruled or questioned." Then follows a long extract from that opinion, in which occur the following paragraphs: "As the owner of an estate in reversion after a homestead estate had a right to make a voluntary alienation, it follows that his creditors had a right to have it sold under execution." And again: "A sale by the owner of the homestead of his estate in reversion stands as at common law." This is a distinct recognition of two different estates carved out of the same fee. This court, in its present opinion, uses the following language: "If this is not so, and the land itself, or a part of it, allotted for the purpose of exemption, was in the mind of the Legislature as being that thing which constitutes the 'homestead,' why should it speak of a 'reversionary interest,' which implies that there is a preceding estate or interest." It may be asked why, if I am now willing to call it an estate, I did not so call it in writing the former opinion of the court? One sufficient reason was that this court, while frequently using the words "estate" and "reversion," had repeatedly declared in unequivocal terms that the homestead was merely a quality of exemption attached to land, which is utterly inconsistent with the idea of an estate. Now that this court has virtually turned it into an estate, by giving it all the elements that constitute an estate, I

think it should be called by its proper name.

Although feeling compelled to dissent from the opinion of the court, it is proper to say that I shall offer no further opposition to the adoption of the rule. It cannot be said that it is in violation of any of the constitutional or inherent rights of the citizen, and, as the personnel of this court insures the permanency of this opinion for many years to come, I shall not further attempt to weaken what I cannot change. Where no moral question is involved, the mere consistency of individual opinion bears no importance, compared to the necessity of establishing settled rules of property.

(53 W. Va. 318)

**CUNNINGHAM v. BOARD OF EDUCATION.**

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

**BOARD OF EDUCATION—MEETING—NOTICE.**

1. A meeting of two members of a board of education, at a time and place of which no notice was given to the other member of the board, and at which he was not present, is not a legal meeting, and any attempted official act thereat is null and void.

2. A board of education can perform official acts only when a quorum thereof are assembled as a board, by due notice to all the members, except that the president and secretary may sign orders upon the sheriff for any sum of money which may have been already ordered to be paid. Section 6, c. 45, Code 1899.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County; John Homer Holt, Judge.

Action by A. L. Cunningham against the board of education of Dry Fork district. Judgment for plaintiff, and defendant brings error. Reversed.

C. W. Dalley and Cunningham & Stallings, for plaintiff in error. W. B. Maxwell and E. D. Talbott, for defendant in error.

**McWHORTER, P.** This was an action of assumpsit by A. L. Cunningham against the board of education of Dry Fork district, in Randolph county, instituted in the circuit court of said county, for \$745, the contract price for "building upper story and vestibule and other repairs done to the public schoolhouse at Job, subdistrict No. 6, and furnishing material therefor, as per specification and details mentioned in the second count to the declaration." The defendant entered the general plea of non assumpsit, and tendered two special pleas in writing, and asked leave to file the same, which leave was granted and the pleas filed. The first was to the effect that, at the time and place of the supposed making of the contract in the declaration mentioned, there was no meeting of the board of education of the district of which all its members had notice; that Asa Cooper, a member of said board, at the time of making said supposed contract with plaintiff, had no notice of the time or place of meeting of said

board; that on the — day of July, 1899, and before plaintiff had attempted to carry out any part of said contract, the defendant, when all the members of said board were present at a meeting called for that purpose, and of which the plaintiff had notice, did then and there, by order entered of record, cancel the supposed contract, but notwithstanding said orders so entered by defendant, and notice thereof, plaintiff attempted to carry out said supposed contract, which defendant was ready to verify; and prayed judgment, etc. The second plea set up the same defense more elaborately, detailing how the meeting of May 24, 1899, at which the alleged contract was made, was brought about, etc., and the proceedings of the board in July, 1899, in repudiating the contract and giving plaintiff notice thereof, and setting up the defense that defendant by said contract created a debt against the district illegally, because of lack of funds to pay for the work ordered. And on the 16th of May, 1900, the defendant moved for and obtained leave to file additional pleas, good in law, at any time within the next 30 days from that date; and on the 22d of October, 1901, plaintiff moved to strike out said pleas filed, and six special pleas tendered to be filed, on the ground that said pleas filed and tendered to be filed did not constitute a defense to the action, which motion was overruled and plaintiff excepted, and to all of which pleas plaintiff replied generally. The said six special pleas were to the same effect as the said former pleas. The case was tried before a jury, and on the 24th of October, both parties having introduced all their evidence to the jury, the defendant demurred to plaintiff's evidence, in which plaintiff joined, and the jury returned a conditional verdict for the plaintiff, and assessed his damages at \$843, and the court took time to consider the demurrer to the evidence. On the 29th of January, 1902, the court overruled the demurrer, and entered judgment for plaintiff for the amount of the verdict. To the action of the court in overruling its demurrer to the evidence and in rendering judgment for the plaintiff, the defendant excepted, and was given 30 days in which to have its bill of exceptions signed up, which bills of exceptions were signed, sealed, and saved to the defendant on the 30th day of January, 1902.

Upon the trial the plaintiff introduced as a witness George M. Curtis, who was secretary of the board of education at the time the contract was made with Cunningham, on the 24th day of May 1899, for the work done on the schoolhouse at Job, for the price of which work this suit is brought. He introduced the record of said board, which shows that a meeting was held in Whitmer on Saturday, April 22, 1899, at which meeting A. E. White, president of the said board, and E. S. Nelson, a member thereof, were present; Asa Cooper, the other member of the board, not being present. The record further shows that the

said meeting of April 22d was held in pursuance to an order of adjournment dated December 31, 1898, at which the same two members, White and Nelson, were present, and at which Cooper was not present. At the meeting of April 22d the order was made to have the work done, which is charged for by plaintiff, the specifications whereof were entered of record, and the secretary directed to advertise "for bids to be filed on or before May 20th, at 1 o'clock, and not after." And it was ordered that the board do meet on the 20th day of May, 1899, at 1 o'clock, at Job. From some cause or other, not stated, no meeting was held on the 20th of May at Job or elsewhere, but the witness stated the following from the record: "Office of the Secretary of the Board of Education of Dry Fork District, Randolph County, West Virginia. Pursuant to a call by A. E. White, Prest. of said Board, the Board of Education of said district, convened at Job, said call being made to convene at Whitmer and in absence of Asa Cooper and A. E. White, who was sick and unable to come to said place, E. S. Nelson, met at two o'clock p. m., on the 24th day of May, 1899: Present A. E. White, Prest., and E. S. Nelson, member of said Board. \* \* \* The bids of G. S. Wilson, J. W. Munson and A. L. Cunningham, having been received and filed by Secretary of this Board, as heretofore ordered by said Board, the bid of G. S. Wilson being \$825.00, that J. W. Munson \$750.00, and that of A. L. Cunningham being \$745.00, for the contract for furnishing the materials for and constructing a second story addition and vestibule addition to, and making certain changes or alterations in the Job School Building in Sub District #6, of said District, according to the plans and specifications of said Board, as the same appears of record in the minutes of the proceedings of said Board of date April 22, 1899, and it appearing that A. L. Cunningham was the lowest responsible bidder, and he having tendered and filed a good and sufficient bond to secure the faithful performance of his contract, it is hereby ordered that said contract is hereby awarded to said A. L. Cunningham to build and furnish materials for the addition and alterations as to said Job School Building hereinbefore provided by reason of his said written bid filed as aforesaid, and when said work is completed, it is ordered that said A. L. Cunningham shall be paid said sum of \$745.00 by proper order drawn upon the building fund of said district, in the manner provided by law. It is ordered that this Board do now adjourn. A. E. White, Prest., Geo. M. Curtis, Secy." Witness Curtis further states that the meeting was held at Job at 2 o'clock; that there was a call by Mr. White, president, a copy of which witness mailed to Mr. Cooper at Harmon, but the meeting was to be held at the office of witness in Whitmer; that, on the day of meeting, President White sent word that he would not be able to attend on ac-

count of sickness, and "it was decided by Mr. Nelson, inasmuch as Cooper didn't come on the train, or did not appear at the time the meeting was to be held pursuant to the call, that we would go down to Job and meet with Mr. White, and transact this business, and, if Mr. Cooper was coming up horseback to Whitmer, we would be able to intercept him at Job, and if he was present at Whitmer he would be intercepted, and he could meet with the other two members there." Witness stated that Job was about five miles from Whitmer. Cooper lived at Harmon, which is about ten miles from Whitmer: Cooper testified that he got the notice of the meeting to be held on the 24th of May sent to him by mail by Curtis, two days after the meeting was to be held; and this is corroborated by Squire McDonald, who testified that he got Cooper's mail from the post office at Harmon, in which was included the postal card giving him notice of the meeting, and which he got from the post office one or two days after the date of the meeting, which card he gave to Cooper. The so-called action of the board at a meeting held on the 24th of May was the contract upon which plaintiff's claim is based, and which he put in evidence, and relies upon to establish his demand.

Section 6, c. 45, Code 1899, provides that "a quorum of a board of education shall consist of a majority of the members thereof and in the absence of the president one of said members may act as such; but they shall do no official business except when assembled as a board and by due notice to all the members, except that the president and secretary may sign orders upon the sheriff for any sum of money which may have been already ordered to be paid." The language of this statute is unequivocal. The members can do no official business except when assembled as a board, and by due notice to all the members. In *Honaker v. Board of Education*, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847 (Syl., pt. 1), it is held: "The board of education of a school district, composed of the president of the board of education and two commissioners, is a public corporation, created by statute (Code 1899, § 7, c. 45), with functions of a public nature expressly given, and having no other; and therefore it can exercise no power not expressly conferred or fairly arising by necessary implication, and it can exercise its functions in no other mode than in that prescribed or authorized by the statute." And point 2: "The members of the board, acting individually and separately, and not as a board, convened for the transaction of business, cannot accept a proposal or make any contract whatever that will bind them as a corporation." And in point 4 it is held that "all who deal with a board of education are charged with notice of the scope of their authority, and that they can bind their district only to the extent and by such con-

tracts as are expressly authorized by law." Of course, this means contracts which are made by the board when properly assembled as a board; all the members thereof having had due notice of such meeting. *Limer v. Trader's Company*, 44 W. Va. 175, 28 S. E. 730; *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W. Va. 380; *Wintz v. Board of Education*, 28 W. Va. 227; *Casto v. Board of Education*, 38 W. Va. 707, 18 S. E. 923. Cooper testifies that he had no notice of the meeting held by White and Nelson on the 22d of April, 1899, but it matters not about the meeting of April 22d, as the alleged contract was made on the 24th of May, at a meeting held at Job by two of the members of the board five miles from the place at which the meeting was called to be held, at Whitmer. There can be no question that Cooper, a member, had no notice, even of the meeting to be held at Whitmer, until a day or two after the meeting was held at Job. As it appears from the record that the contract sued upon attempted to be awarded by the board of education on the 24th of May, 1899, is clearly shown by the evidence adduced by the plaintiff himself to be utterly null and void, the demurrer to the evidence should have been sustained. It is unnecessary to look to the assignment of error because of the court's refusal to allow the defendant to offer in evidence before the jury an order made by the defendant on the 29th of July, 1899, and notice given thereof to the plaintiff, as set out in bill of exceptions No. 2.

For these reasons, the court reverses the judgment of the circuit court, and, proceeding to render such judgment as the circuit court should have rendered, sustains the demurrer to the evidence, and renders judgment for the defendant.

(53 W. Va. 150)

**MAXON'S ADM'X v. MAXON-MILLER CO. et al.**

(Supreme Court of Appeals of West Virginia. April 11, 1903.)

**CORPORATIONS—COMPENSATION OF PRESIDENT.**

1. A president of a corporation is not entitled to any compensation for services rendered as such president unless the same is allowed by the stockholders. Section 53, c. 53, Code 1899; *Ravenswood, S. & G. R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County; E. S. Doolittle, Judge.

Bill by Thomas Maxon's administratrix against the Maxon-Miller Company and others. Decree for plaintiff, and defendant the Springfield Malleable Iron Company appeals. Reversed in part, and affirmed in part.

George S. Wallace, for appellant. T. R. Sheppard, for appellee.

§ 1. See Corporations, vol. 12, Cent. Dig. §§ 1234, 1236, 1237.

DENT, J. The appeal of the Springfield Malleable Iron Company in the case of Thomas Maxon's administratrix against the Maxon-Miller Company from the circuit court of Cabell county presents the single question as to whether the allowance by the circuit court in its decree to the estate of Thomas Maxon, deceased, of the sum of \$257.18 as salary for said Maxon's services as president of such company, is supported by law. The record shows negatively that the stockholders never authorized such allowance to be made, either before or after the services were rendered. No brief is filed in behalf of the appellee. The appellant relies on the case of *Ravenswood, S. & G. Ry. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285, as being conclusive in the present case. In that case it was held that no allowance could be made to a president of a corporation, unless by resolution or by-law of the stockholders, for the reason that section 53, c. 53, Code 1899, provides that "there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders." For a full discussion of the matter, reference is made to the case cited. The statute governs this case, and determines it in favor of the appellant.

The decree complained of, therefore, in so far as it decrees to the estate of Thomas Maxon, deceased, the sum of \$257.18 for services rendered by him as president of the Maxon-Miller Company, is reversed, and in all other respects affirmed, with costs against the administratrix, to be paid out of any funds in her hands to be administered.

(53 W. Va. 151)

**ECLIPSE OIL CO. v. GARNER et al.**

(Supreme Court of Appeals of West Virginia. April 11, 1903.)

**OIL LEASES—CONSTRUCTION.**

1. A lessor executes at different times two sets of oil leases to two different lessees, reserving the usual royalty, and, after the first leases have been avoided by the execution of the second, the first lessee pays two years' rental or commutation money to the lessor, with full knowledge of the execution of the second leases. Such payment does not entitle such lessee to claim the reserved royalty, or any part thereof, either in law or equity.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by the Eclipse Oil Company against Henry Garner and others. Decree for defendants, and plaintiff appeals. Affirmed.

Fleming & Fleming and U. N. Arnett, Jr., for appellant. Caldwell & Caldwell and Hall & Hall, for appellees.

DENT, J. The Eclipse Oil Company appeals from a decree of the circuit court of Wetzel county dismissing its bill filed in a certain chancery suit therein pending instituted by it against Henry Garner and oth-

ers to have an accounting of certain oil royalty. This suit is the sequel to the chancery cause of the same plaintiff against the South Penn Oil Company and others, 47 W. Va. 84, 34 S. E. 923, where the facts may be found stated at length. In that case the plaintiff's leases were held void as to the subsequent leases of the defendant. Plaintiff now insists that it is entitled to the one-eighth royalty received by Henry Garner under and by virtue of his lease to the South Penn Oil Company.

The grounds of this claim, as stated in the bill, are: First, that the plaintiff, after Henry Garner had executed his second leases owned by the South Penn Oil Company, paid him \$2,175 on the 10th of November, 1898, and \$2,175 October 31, 1899, being the rentals or commutation money for the years expiring on the 10th day of November, 1898, and the 10th day of November, 1899, which the said Garner received in full satisfaction of such rentals; second, that the said Garner by reason of the execution of the South Penn Oil company leases and putting the latter company in possession, had wrongfully deprived the plaintiff of the benefit of its leases; and, third, that the plaintiff's leases covered this royalty. Examination of the leases shows that the last contention is untenable, for the reason that, in effect, Henry Garner was to have this one-eighth royalty under the provisions thereof. The second ground is res adjudicata by reason of the former decision of this court in that it was held that the plaintiff's leases were void at the time Henry Garner executed the South Penn Oil Company leases, and that he had the legal right to make the latter, and avoid the former. The only question, then, is as to what rights the plaintiff acquired by reason of the payment of the commutation money after its leases had been legally avoided. It did not acquire thereby any right to the one-eighth royalty, for the reason that its leases contain the provision: "The parties of the second part, heirs or assigns, agree to give to the first party  $\frac{1}{8}$  part of all the petroleum obtained from the said premises as produced in a crude state; the said  $\frac{1}{8}$  part of the petroleum to be set apart in the pipe line running said petroleum to the credit and for the benefit of the said party of the first part." This amounts to a clear reservation of the royalty which the defendant Garner is charged with receiving, and deprives the plaintiff of any right to have or demand the same.

The bill shows that the first payment of rental was made on the 10th day of November, 1898, being some days prior to the time which the South Penn Oil Company took possession under its leases, and this sum so paid was for the 12 months already expired. The bill does not allege that the plaintiff during this time was in any manner prevented from taking possession of and boring wells on the land under its leases. Hence the payment of this money was for a past term, which it

had fully enjoyed, in so far as Henry Garner was concerned, and in satisfaction thereof, and can in no manner give it any right to set up a claim to his royalty. The second payment was made after the South Penn Oil Company had taken possession of and developed the land, and was not for the purpose of purchasing the royalty, but for the purpose of enabling it to maintain its suit then pending against the South Penn Oil Company. Both payments were made with open eyes and full knowledge of all the facts, and on the sole theory that plaintiff's legal right to develop the land for oil and gas was superior to that of the South Penn Oil Company, and this it enjoyed to the fullest extent. In short, it bought a lawsuit, and got it. The claim to this royalty is, therefore, an afterthought arising from legal defeat, and has no foundation from the showing of plaintiff's bill, either in equity or at law. Nor has the plaintiff any lien upon or charge against this royalty for the repayment of the rent, or any part thereof. These propositions are so plain that it is labor wasted to argue them. Whether the plaintiff is entitled to recover the rent, having paid it with full knowledge, is for a court of law to determine. Its right to such legal adjudication is reserved by the decree of the circuit court. The bill being entirely based on the contention that the plaintiff is entitled to the royalty, or some part thereof, and such claim being without foundation, the circuit court committed no error in sustaining the demurrer and dismissing the same. Nor did the court err in retaining the cause until the receiver's accounts were settled. The plaintiff should pay all costs of the suit.

The decree is affirmed.

(53 W. Va. 142)

#### CORLEY v. CORLEY et al.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)

#### APPEAL—FINAL JUDGMENT.

1. An order, entered on the verdict of a jury on an issue out of chancery, that the defendant merely recover costs of the plaintiff, is not a final judgment, decree, or order, giving the right to appeal.

(Syllabus by the Court.)

Appeal from Circuit Court, Braxton County; W. G. Bennett, Judge.

Bill by A. W. Corley, executor, against Sarah C. Corley and others. Judgment for plaintiff. Proceedings by Bland & Bland against Louisa W. Kelly to secure attorney's fees. Judgment for Kelly, and Bland & Bland appeal. Dismissed.

W. E. Haymond and Bland & Bland, for appellants. B. P. & V. B. Hall and A. W. Corley, for appellee.

POFFENBARGER, J. A chancery suit in the circuit court of Braxton county for the

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 481.



settlement of the estate of W. L. J. Corley, instituted by A. W. Corley, executor, against Sarah C. Corley, the widow, and others, in 1885, was still pending in 1898, and Louisa W. Kelly (née Corley), not having then received from the executor all that was due her under the will of her father, employed E. S. and C. H. Bland, partners in the practice of the law, doing business as Bland & Bland, to prosecute her claim to final settlement in said suit, which they did, and procured a decree to be entered in her favor on the 22d day of January, 1901, for the sum of \$956.72, subject to a credit of \$200. Immediately afterwards, a controversy arose between Mrs. Kelly and her attorneys about counsel fees, they claiming from her \$350, and she contending that she owed them nothing. She had paid them about \$200, which sum, she insisted, was all she owed them under the contract of service. They admitted the payment of the \$200, but insisted that that sum was due them for services in procuring the transfer of something over \$8,000 from the hands of her guardian in West Virginia to those of her guardian in Pennsylvania, to which state she had removed.

Mrs. Kelly, by a written notice to the executor, forbade payment by him to her attorneys, and they thereupon gave him notice, in writing, that they claimed and would assert an attorney's lien upon the fund in his hands for their fees. Thereupon the executor presented his petition to the judge of the circuit court, showing that J. S. Hyer had caused an attachment against Mrs. Kelly for \$313.05 to be levied upon her estate in his hands; that soon afterwards Bland & Bland had given notice of their claim of an attorney's lien on the fund for fees, amounting to \$350; that later the sheriff of Braxton county had commenced a proceeding against him for the collection out of said fund of taxes due from Mrs. Kelly, amounting to \$103.71; that there was a dispute among the parties as to their rights of priority in respect to said fund, and that Mrs. Kelly was endeavoring to have an execution issued against him for the sum decreed to her; and praying that she be enjoined from suing out an execution or any process for the collection of said sum until the claims asserted against it should be settled, and that the parties interested be compelled to litigate their respective claims before the court. The injunction was awarded, Mrs. Kelly filed her answer, denying liability to Bland & Bland, and they appeared and answered also, setting up their claims. Then on the 31st day of August, 1901, an order was made, directing an issue out of chancery as to the matters in controversy, and on the 30th day of November, 1901, Bland & Bland moved the court to set aside the order directing said issue, which motion was overruled, and a jury was impaneled, and the issue between Bland & Bland and Mrs. Kelly tried. The jury found for the defendant, Mrs. Kelly.

A motion was made to set aside the verdict on the ground that it was contrary to the law and the evidence, and that the court had erred in directing the issue out of chancery, and in overruling a motion to set aside said order, but the court overruled the motion, and entered the following order: "Therefore it is considered by the court that L. W. Kelly recover of E. S. Bland and C. H. Bland, partners in the practice of law, under the firm name of Bland & Bland, her costs in this behalf expended." Thereupon Bland & Bland obtained an appeal.

There is no necessity for inquiry as to whether the proceeding in which this order was made is a pure interpleader suit in equity, where the final disposition of the controversy must be by a decree, either upon, or without, a verdict upon an issue out of chancery, according to the nature of the controversy and the evidence; or the statutory interpleader given by section 1 of chapter 107 of the Code, in which the final decision is by judgment; or a proceeding by mere motion to the court, upon citation, for the adjudication of conflicting claims respecting a fund in court, in which there must be an order, decree, or judgment either giving or disallowing what is claimed. There is no judgment or decree here saying whether Bland & Bland shall or shall not have the amount claimed by them, or any part thereof, nor whether the fund upon which they make their claim has been decreed to anybody else. The order gives judgment against them for costs only, and is silent as to the claim set up in their answer.

There are a few cases that hold that the existence or rendition of a judgment may stand upon mere inference or intentment where there is no positive, affirmative, or certain rendition of judgment, but where enough appears in the order to show that the court intended to render judgment or to support an inference that the court so intended. Thus, in *Kase v. Best*, 15 Pa. 101, 53 Am. Dec. 573, the court held the entry made by a justice of the peace, "Therefore plaintiff for costs," to be a sufficient rendition of judgment, saying, "It was clearly the intention to give final judgment for the defendant, and, that being evident, the magistrate is not to be held to strict form." In *Brown v. Parker*, 38 C. C. A. 261, 97 Fed. 446, a judgment merely against the plaintiff for costs in a blank amount, reciting that it is rendered on a verdict for defendant returned by direction of the court, is sufficiently final and definite to give the right of appeal. All that is said in the opinion in support of this decision is: "We are of the opinion that the practical and probably the legal effect of the judgment is a dismissal of the action. The plaintiff in error can hardly proceed to recover damages for the conversion of the property in suit in the face of this recorded judgment." No precedents are cited for the decision in either of these cases,

and in the opinions the orders held good are admitted to be exceptional, and grossly defective in matter of form. Moreover, the court are compelled in each case to say that they reached the conclusion that judgment was rendered by inference only. The weight of authority, as well as reason, stands against them. A verdict is no judgment. It is a mere report to the court by the jury on the matters submitted to them in the course of trial, and may be set aside by the court for want of sufficient evidence to support it, or for erroneous rulings by the court which vitiate it. It is in no sense final until the court pronounces upon it the sentence of the law, *quod recuperet* (that the plaintiff recover), or *nili capiat* (that the plaintiff take nothing by his bill). "Judgment is the sentence of the law upon the matter contained in the record." 3 Blk. Comm. 395; Steph. Pl. 138. There must be a declaration by the court of the consequences which the law attaches to the facts, in order to determine the subject-matter of the controversy between the parties. Until there is such declaration, there is no judgment. For this reason, an adjudication merely of the costs against one party or the other, upon the verdict, without pronouncing any judgment in reference to the controversy, has been held not to be a judgment. *Hanks v. Thompson*, 5 Tex. 6; *Warren v. Shuman*, 5 Tex. 442; *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782; *Hancock v. Metz*, 7 Tex. 177; *Lisle v. Rhea*, 9 Mo., marg. p. 173, top p. 107. Cost is a mere incident or sequence of a judgment, following it like a shadow.

Nor is it sufficient that the court go so far as to set forth in the order these findings of fact and conclusions of law, clearly showing that it was the intention of the court to render a certain judgment. The judgment must be actually pronounced and entered in the order book. *Fitzgerald v. Evans*, 53 Tex. 461; *Mayfield v. State*, 40 Tex. 289. In the latter case the order said, "It is the opinion of the court that the law is for the state, and the defendant's motion is overruled, to which ruling of the court defendant excepts," and it was held insufficient as being not a "judgment of conviction rendered." In both of these cases the court said that the judgment consists of two parts: "(1) The facts judicially ascertained, together with the manner of ascertaining them, entered of record. (2) The recorded declaration of the court, pronouncing the legal consequences of the facts thus judicially ascertained." To the same effect are *Lumber Co. v. St. Croix County*, 63 Wis. 647, 24 N. W. 417; *Hoev v. Pierron*, 67 Wis. 262, 30 N. W. 692; *Gilpatrick v. Glidden*, 82 Me. 201, 19 Atl. 163, where it is held that a decree becomes final when formally drawn, adopted by the court, and placed on file as the judgment of the court, and that a mere order for a decree, not extended in due form and put in technical language, is not a final decree. "If a record

shows that a jury has been sworn and impaneled, and that they find for the plaintiff for the lot sued for (describing it), and twenty-five dollars for detention, and adds, 'and judgment is rendered against the defendants for the land sued for, together with all costs in this behalf expended, for which execution may issue,' this is not such an entry of judgment as will support an appeal." *Bell v. Otts*, 101 Ala. 186, 13 South. 43, 46 Am. St. Rep. 117. This was pronounced by the court to be in substance a mere memorandum of the clerk, which declares no more than that a judgment was rendered, without setting out what the judgment was, and then says: "This entry is lacking in form and material averments to constitute it a judgment, and to support it as such would be to sanction an uncertainty and looseness in the record and preservation of solemn and important judicial ascertainment, such as would be pernicious."

All that can be said in support of the finality of the order here complained of is that the court, by directing the issue, refusing to set aside the order directing it, overruling the motion to set aside the verdict, and giving judgment for costs against the appellants, indicates that it is satisfied that no error has been committed, and will pronounce a final adjudication in accordance with the verdict, or that a judgment has been rendered, but omitted from the order. That, as has been shown, is not enough. There must be an adjudication that the suit of the appellants be dismissed, that they take nothing by their bill—or whatever the court may determine their pleading to be. Even if the view that a judgment or decree may be established by inference were adopted, no certain inference could be drawn here. From this record it is impossible to tell whether, in entering the order complained of, the court meant merely to award the cost of the trial of the issue and reserve the adjudication of the controversy for disposition by a decree to be entered on the chancery side of the court, or to dismiss the claim of the appellants. On that supposition, the order would not have even the semblance of finality, for if the court, in proceeding to final decree, were of the opinion that the issue had been improperly directed, it would be its duty to set aside the order and disregard the whole proceeding on the issue out of chancery, and enter a decree without regard to the verdict. *Anderson v. Cranmer*, 11 W. Va. 562; *Mahnke v. Neale*, 23 W. Va. 58.

Under our statute, Code, c. 135, § 1, cl. 1, an appeal, writ of error, or supersedeas lies only when there is a final judgment, decree, or order. So it is by the decision of this court also. *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39. Such is the general rule elsewhere. As to what is a final judgment, the general rule accords with the conclusion here reached. "A writ of error or appeal will not lie from the verdict of a jury without an

entry of judgment thereon, nor from the finding of facts or conclusions of law by the court, not followed by judgment. Hence the opinion of the court, no order being entered in accordance therewith, is not reviewable." 2 Cyc. 616. See, also, Elliott, App. Pr. § 83.

The appeal having been improvidently allowed, it must be dismissed.

(53 W. Va. 154)

### TROY WAGON CO. v. HUTTON.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)

#### CONDITIONAL SALE—ACKNOWLEDGMENT OF CONTRACT—RECORD—PURCHASERS FROM VENDEE.

1. It is not necessary that a contract reserving to the seller of chattels title until payment shall be acknowledged, to be recorded under section 3, c. 74, of the Code of 1899.

2. When a contract selling chattels, and reserving title until payment, is left with the clerk of the county court to be recorded, it is deemed that its record is complete, and the fact that it is recorded in the "miscellaneous record book" will not invalidate its recordation.

3. A contract of sale of wagons which reserves title to them until paid for is valid against purchasers from the vendee, even without other notice than that given by its record.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by the Troy Wagon Company against Woodford Hutton. Judgment for defendant, and plaintiff appeals. Reversed.

E. D. Talbott, for appellant. Harding & Harding, for appellee.

BRANNON, J. The Troy Wagon Works Company sold C. W. Flesher 20 wagons. The order for the wagons from Flesher contained the terms of the contract, among them the provisions: "The title to all goods shipped under this or any subsequent order is to remain in the Troy Wagon Works Company (unless at their option it shall be waived), and the goods are to be held at all times subject to their order, until paid for; and if sales are made before payment, the proceeds of all such sales, whether cash, book accounts or notes, are to be held subject to the order of the Troy Wagon Works Company until all obligations arising under this contract are fully paid in money. It is further agreed that notes taken by the Troy Wagon Works Company in settlement are not accepted as payment, but only as evidence of liability." This paper was recorded in the office of the clerk of the county court of Randolph county in the book commonly called the "miscellaneous record." Flesher paid nothing on the wagons, but at once on their arrival at Huttonsville sold them to Woodford Hutton, who paid Flesher for them. Hutton had no knowledge that Flesher owed for the wagons, but, when he bought, the said contract had been admitted to record.

Hutton sold 17 of the wagons, and for the 3 still in his hands the wagon company brought detinue before a justice, which went by appeal to the circuit court of Randolph, and the case was tried on agreed facts by the court, and a judgment for Hutton was rendered, and the wagon company appeals.

It is contended that, as the recorded contract was not acknowledged as a writing to be recorded under chapter 73 of the Code of 1899, its recordation is of no avail. This question is decided otherwise in *Hatfield v. Haubert*, 51 W. Va. 190, 41 S. E. 144. I understand counsel to contend that the registry of the sale contract or order in the "miscellaneous record book" is not good, but it ought to have gone in what we call a "deed book" or "deed of trust book." The Code says that where a sale is made of goods, reserving title until payment, the reservation shall be void as to creditors and purchasers without notice, "unless a notice of such reservation be recorded in the office of the clerk," etc. Code 1899, c. 74, § 3. This contract is a clear notice, and I think that when the seller lodged it in the clerk's office for record he did all the law required of him, and he did not have to see that it was recorded in any particular book. In fact, the said section does not say in what book it shall be recorded. It says the paper shall be "recorded" in the office. When is it recorded? Under a statute saying that the paper should "be lodged with the clerk to be recorded," and "be recorded according to the direction of this act," it was held that when lodged in the office it was to be considered as recorded, whether ever in fact recorded or not. *Beverley v. Ellis*, 1 Rand. 102. The court said that lodgment with the clerk was all that the law demanded of the party, and that the words "and recorded according to the directions of this act" imposed no further duty, and that another construction would make the title depend on the acts or omission of the clerk, over whom the party had no control. *Horsley v. Garth*, 2 Grat. 472, 44 Am. Dec. 393, holds that it is enough to leave the paper with the clerk. It seems to be the general current of authority that, when the document is lodged in the proper office, the recordation exists—is done. 20 Am. & Eng. Ency. L. 565; note to *Deming v. Miles* (Neb.) 37 Am. St. Rep. 469; *Davis v. Whitaker* (N. C.) 19 S. E. 699, 41 Am. St. Rep. 793; *Beebe v. Morrell* (Mich.) 42 N. W. 1119, 15 Am. St. Rep. 288, and note; 2 Devlin on Deeds, § 679. If leaving a paper with the clerk makes the registry complete, then the omission to record, or recording in the wrong book, works no harm to the party claiming under it. The statute does not say in what book a reservation of title to goods sold, or notice of it, shall be recorded, and, when that is the case, "It may be recorded in any book in the office." *Farrabee v. McKerrihan* (Pa.) 33 Atl. 583, 51 Am. St. Rep. 734; 1 Devlin on Deeds, § 630; *Smith v.*

Smith, 13 Ohio St. 532. In fact, as section 10, c. 73, provides a book in which unacknowledged writings may be recorded, we cannot say that recording such a paper in it is improper.

The controlling question in this case is, can the wagon company take the wagons from Hutton? That depends upon the contract—upon the intent of the parties manifested by it. There are two views presenting themselves as to the meaning of the paper. One is that the first clause in the quotation above operates only as between the wagon company and Flesher—that is, the title remains in the company until a wagon is sold, but no longer, and the purchaser from Flesher takes it free from the company's claim; that the sale passes title; that the clause giving the company option to waive the reservation is only while the reservation operates—that is, until sale. This construction says that the design was to prevent creditors of Flesher from subjecting the wagons to his debts, and prevent his giving any lien on them. This view says that the first clause would also prevent any sale by Flesher, if standing alone, but that it does not stand alone, but is qualified by the second clause, because that clause contemplates and allows a sale by Flesher, and manifests that the sale was not that he might keep the wagons—not for that purpose—but, on the contrary, for the very purpose of sale, and that, when sales should be made, the company could not look to the wagons, for the title has passed from it, but must look to the proceeds of such sale and to Flesher. This view gives power of sale to Flesher absolute. The other construction is that the clear, unequivocal reservation of title by the first clause can only be removed by a waiver by the company or payment; that it cannot be cut down by the second clause; that it operates between the company and purchasers from Flesher; that its only purpose is not at all to qualify the first clause, but is consistent with the reservation of title and waiver clause; that its only purpose is to add to the rights of the company the supplemental security of holding notes taken for the wagons to be the property of the company, and to say that, if the company should accept notes of purchasers, that would not release Flesher until their payment. Under this construction Flesher could not sell a wagon unless the company waived its title as to it, or it was paid for, or perhaps by acceptance by the company of a purchaser's note. This view holds that thus an effect is given the second clause—as full effect as its language calls for—and it is consistent with the waiver clause. That waiver clause is potent, and the clause that the goods are at all times to be subject to the company's order until paid for. The court has adopted the second construction. By common law a purchaser can get no better title than the seller has, and we must not take this right away further than the seller has

consented. This contract makes a conditional sale, strictly upon condition that the wagons be paid for, or the company waive its right, which right of waiver it has cautiously retained. It tells purchasers that it has right to waive or not waive. An owner of goods may sell on just such terms as he chooses, and he may impose such condition in a conditional sale as he chooses. *Vermont Marble Co. v. Brow* (Cal.) 41 Pac. 1081, 50 Am. St. Rep. 37. This contract follows up the property in the hands of purchasers. They must look to the record. It may be hard on them, but they must inquire. Ought Hutton not to have wondered whether a large lot of new wagons had been paid for? Should he not have inquired? This contract is a clear reservation, and, whether onerous or not, the company had right to make it. The first construction might practically nullify the careful reservation of the contract, while the one we give executes it.

The point is made that this is an Ohio contract because the wagons were sold and delivered on cars there. It was a valid contract there. It is a good reservation of title here. It is claimed that, being an Ohio contract, it ought to have been docketed in certain public offices there. Why so? The wagons were to come to West Virginia. A bond deed or reservation of title is no less such because not acknowledged or registered. *State v. Proudfoot*, 38 W. Va. 736, 18 S. E. 949. The question is, is it an effective instrument in West Virginia?

Therefore, we reverse the judgment of the circuit court, and render judgment for the plaintiff for the recovery of the wagons. Costs go to plaintiff in three courts.

(53 W. Va. 127)

#### YOUNG v. SEHON et al.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)

#### NONNEGOTIABLE NOTE—PAROL EVIDENCE— CO-PROMISORS.

1. Where a nonnegotiable note bears on its back the signatures of the promisee and another person in such manner as would make them first and second indorsers, respectively, if the note were negotiable, the parties so signing are not deemed to have thereby made a complete and specific contract, analogous to the contract of commercial indorsement, making them liable as guarantors in the order of their signatures; and parol evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note.

2. When such paper does not represent an existing debt, but is made for the purpose of obtaining on it a loan of money for one or all of the parties to it, a person who makes such loan on the faith of it and takes it may, in the absence of an agreement to the contrary, of which he has notice, treat those whose names are on the back of it as co-promisors with him who signed on its face, or as guarantors, at his election.

(Syllabus by the Court.)

Error to Circuit Court, Mason County—  
Warren Miller, Judge.

Action by Sarah F. Young against Columbus Sehon and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John W. English and Rankin Wiley, for plaintiffs in error. C. E. Hogg and J. U. Meyers, for defendant in error.

POFFENBARGER, J. J. N. Camden and J. P. R. B. Smith complain on a writ of error of a judgment rendered against them in the circuit court of Mason county, and in favor of Sarah F. Young, on a nonnegotiable promissory note for \$1,000, payable one year after date, to the order of said Smith, dated December 12, 1893, and signed on the face thereof by C. Sehon and on the back thereof first by J. P. R. B. Smith and then by J. N. Camden. The trial was by the court in lieu of a jury, and the oral evidence consisted of the testimony of said Smith and James L. Knight. The former testified that the note had been mailed to him from Huntington by Sehon, fully made out, with the request that he indorse it, and write a letter to Camden, asking him to indorse it, which was done. Upon the return of the note by Camden, Smith took it, and went to Knight for the purpose of obtaining the money on it for Sehon. Knight testified that he had in his hands, for the purpose of loaning it, \$850, belonging to Mrs. Young, the plaintiff, to which he added \$150 of his own money. took the note, and delivered to Smith his check for \$1,000, payable to Sehon, which was sent to him by Smith; and that afterwards, on the repayment by Mrs. Young of the \$150, he delivered the note to her. The action was assumpsit against Sehon, Smith, and Camden, treating Smith and Camden as original promisors with Sehon for his accommodation, and to enable him to obtain upon the note said loan. Plaintiffs in error plead nonassumpsit, and Sehon interposed a special plea, setting up his discharge in bankruptcy, and judgment was rendered against the plaintiffs in error only.

Against this judgment it is urged by the attorney for Smith that plaintiffs in error, by placing their names on the back of the note, became guarantors, and could not be sued jointly with the principal debtor, the contract of guaranty being collateral, and binding the guarantor only in the event of the failure of the party owing the debt to pay it and the exercise of due diligence on the part of the holder to collect from him. For Camden it is contended that he and Smith became indorsers or guarantors in the order in which their names are signed on the back of the note. In the absence of any parol evidence, the note indicates that it was made by Sehon to Smith, by whom it was assigned to Camden. Was parol evidence admissible to show the relation of the parties to the note? "Whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full

indorsement is made by a third party on the back of a note payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction." Mr. Justice Clifford, in *Rey v. Simpson*, 22 How. 341, 349, 18 L. Ed. 260. In the syllabus of that case it is held that the weight of authority is in harmony with the principle that parol proof of the circumstances under which such indorsement was made is admissible. In 4 Am. & Eng. Enc. Law (2d Ed.) 488, it is said that: "In all the states it would seem, however, that between the immediate parties evidence is admissible to show the actual time of indorsement." There can be no doubt that parol evidence was admitted for that purpose in *Kearnes v. Montgomery*, 4 W. Va. 29; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Thomas v. Lima*, 40 W. Va. 122, 20 S. E. 878; *Goff v. Miller*, 41 W. Va. 683, 24 S. E. 643, 56 Am. St. Rep. 889; *Roanoke Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612; and *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512. The report of the case in *Bank v. Hysell*, 22 W. Va. 142, indicates that no parol evidence was offered in that case. In *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, the parol evidence offered to establish facts fixing upon one of the parties to the note liability as an original promisor was excluded because of the incompetency of the witness to testify against the alleged co-promisor, he being dead, and the transactions to which the witness proposed to testify having been personal between them. Such is the rule in Virginia also. *Hopkins v. Richardson*, 9 Grat. 485; *Welsh v. Ebersole*, 75 Va. 651. This doctrine is so well settled that it is useless to cite authority upon it, but the following may be consulted as leading cases on the subject, all holding that parol evidence is admissible for such purpose: *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813; *Hopkins v. Leek*, 12 Wend. 105; *Essex Co. v. Edmands*, 12 Gray, 273, 71 Am. Dec. 758; *Hall v. Cazenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mees. & W. 694. Moreover, it is well settled by the decisions of this court, as well as by those of the courts generally, that any agreement between the parties to a note bearing irregular indorsements as to the extent of their liability on the note may be shown by parol evidence, and will be enforced as to all who are parties to the agreement. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Miller v. Clendenin*, 42 W. Va.

416, 26 S. E. 512; *Burton v. Hansford*, 10 W. Va. 470, 481, 27 Am. Rep. 571; *Watson v. Hurt*, 6 Grat. 631; *Roanoke v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

Before attempting to ascertain the law applicable to this case, it is proper to state that the facts upon which this judgment is predicated differ somewhat from those of other cases which have been decided by this court, in which the maker and indorsers have all been held liable as co-promisors. In those cases the indorsements were made before the notes were indorsed by the payees. Here the note itself imports, and the evidence shows, that the payee indorsed first. In the absence of parol evidence showing a different agreement or facts from which the law would raise a different obligation, the undertaking on the part of Smith and Camden would be collateral, and not joint with Sehon. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154. In *Burton v. Hansford*, *Miller v. Clendenin*, *Long v. Campbell*, and *Roanoke Co. v. Watkins*, in all of which the indorsers were held to be co-promisors, the third parties indorsed before the payees did so. In most, if not all, of them, the payees became the holders of the notes for value, and did not indorse at all. In each of these cases, the paper itself disclosed the irregularity of the indorsements on the back. Being in the hands of the payee as holder for value, and without his indorsement on the back of it, the theory of successive indorsements or assignments corresponding to the positions of the names on the back of it was negatived by mere inspection of the instrument; and upon a showing by parol evidence that the indorsements were made before delivery the law holds that the indorser is *prima facie* an original promisor or guarantor, as the payee may elect, on the legal presumption that one who indorses, at the time it is made, a note not made payable to him, thereby indicates an intention to bind himself for the payment of it in some form, and that if in such case he has failed to indicate in what form he intends to bind himself it is fair to presume that he intended to be bound in any manner that the payee might elect. The necessity for the admission of parol evidence where the instrument itself shows the irregularity of the indorsements is apparent. Here, however, the positions of the names on the paper indicate that Sehon executed his note to Smith, and that Smith assigned it to Camden, and Mrs. Young comes forward claiming to have acquired it for a valuable consideration. If she had shown that she had given Camden the money on it, without more, his undertaking would have been collateral.

No irregularity of indorsement being disclosed by the paper itself, the question is whether such irregularity may be shown by parol evidence, so as to let in further evidence of that kind to show the intention of the parties. While this is not affirmed in

the case of *Quarrier v. Quarrier*, cited, the opinion of the court intimates in the following language that it may be done: "If these be the facts, Quarrier might be liable for the note as joint promisor or guarantor, according to the time of his signing, or the understanding between the parties." In *Whitehouse v. Hanson*, 42 N. H. 9, Bell, C. J., said: "It is a presumption of law that the parties to a promissory note stand to each other in the relation in which the signatures appear. The signers on the face of the paper are taken to be joint principals, unless some are designated as sureties; and the signers on the back to be indorsers, in the order in which the names are written, if nothing in the terms of the indorsements indicates the contrary. In the case of a bona fide holder of such a note without notice, this presumption is conclusive. But, generally, this presumption is not conclusive as to others, but is merely a *prima facie* presumption, which stands till the contrary is proved." For the assertion that the presumption is conclusive as to a bona fide holder without notice, he cites *Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414, and *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706. Both of these cases hold that the presumption in favor of such holder against agreements and equities among the makers and indorsers, of which the holder had no notice, and which, if enforced, would be prejudicial to him, is conclusive. *Whitehouse v. Hanson* presented the same question and it was disposed of in the same way. Hence there is no ground for an inference that the language quoted means that a holder cannot show by parol evidence the actual nature of the transaction, as to consideration, time, and intent, to the extent of making the parties liable to him in a manner different from that indicated by the mere positions of the names on the paper.

Speaking of the operation upon negotiable instruments of the rule against the admissibility of parol evidence to vary the terms of a written contract, Daniel, Neg. Inst. § 720, says: "The language of the rule implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original or present validity of the indorsement on the ground of fraud. There are three classes of cases in which evidence for this purpose is admissible, and it will be seen that it does not contradict or vary the contract imported by the indorsement, but impeaches it as a valid indorsement to the extent claimed by the indorsee. Thus, firstly, it may be shown that the indorsement was without consideration—as, for instance, that it was for the indorsee's accommodation, or merely to transfer the legal title to the indorsee, he being in fact the owner of the paper; or that it was indorsed for collection, where the form of indorsement does not show that fact, or that it was indorsed merely to perfect an arrangement between the mak-

er and indorsee. And where several successive indorsers agreed to be liable as joint indorsers and co-sureties, an extension of this principle would admit the facts to be shown, as they reveal the extent and nature of the consideration." Section 707 of the same work says: "There is no doubt that, if a note be made payable to the order of the payee, and is indorsed by him, that his liability will be that of an indorser, and not that of a maker. If subsequent to his name there appears the name of another person indorsed upon it, such person cannot be regarded in any other light than as indorser, and no parol evidence will be admissible, as against a bona fide holder without notice, to show that he intended to bind himself in a different character. This view of the law rests upon the fact that there is no ambiguity in the position of his name, and none in his relation to subsequent parties to the instrument. Upon its face the instrument evidences that he intended to bind himself as an indorser, for it purports to have been regularly transferred to him by the payee's indorsement, and by him transferred, by his own indorsement, to the indorsee. And unless he has indicated an intention to become liable as a surety or guarantor by some expression to that effect, he will very clearly be bound as an indorser, and be entitled to require demand and notice as a condition precedent to his determinate liability. The form of the contract must at least *prima facie* determine its construction." Then section 707b says: "If a party not the payee at the inception of the note puts his name on the back of it, and the payee afterward indorse it over such party's name, the latter will then be second indorser, and his liability cannot be varied by parol evidence. And the like result is reached if the payee's name be left blank, and the holder of the note, in negotiating it, fills it up with the name of the party who has signed his name on the back." On the subject of irregular indorsements, such as were found in the cases of *Burton v. Hansford*, *Long v. Campbell*, *Miller v. Clendenin*, and *Roanoke Co. v. Watkins*, the same author says, at sections 709, 710, and 711: "When a note is made payable to the order of the payee, and the name of another appears indorsed in blank upon it, and was indorsed before the note was delivered to or indorsed by the payee, a very different question, and one upon which the authorities are very much at issue, arises. In such cases such person does not appear upon the face of the paper to have held and to have transferred the title, but rather to have placed his name upon its back to add strength and credit to it, and thus render it more easy of circulation; and the inquiry is presented whether he intended to bind himself for its payment as a joint maker or surety, as a guarantor, or only as an indorser, whose liability can only

be fixed by due demand and notice. If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such thing as an 'indorsement,' in its strict and proper commercial sense, of any other than negotiable paper." "When the note is negotiable, the question is by no means capable of such easy and satisfactory solution; but, whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the person who places his name on the back of the note before the payee intended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an absolute promisor to the payee. If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor. And, if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee." "The ground upon which parol proof of intention and agreement in such cases is admitted is that the position of the name upon the paper is one of ambiguity in itself—that it is not a complete contract, as is the case of an indorsement by the payee, which imports a distinct and certain liability, but rather evidence of authority to write over it the contract that was entered into; and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties." "An exception is admitted by Mr. Daniel at section 703, where he says that: "When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint, obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement aliunde different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them." On this proposition he cites *Hogue v. Davis*, 8 Grat. 4; *Bank v. Belrne*, 1 Grat. 265, 42 Am. Dec. 551; *Bank v. Vanmeter*, 4 Rand. 553; *Chalmers v. McCurdo*, 5 Munf. 252, 7 Am. Dec. 684, and numerous other cases

which bear out fully the text. A contrary doctrine is asserted in *Stovall v. Bank*, 78 Va. 194, but the declaration is obiter.

While the rule excluding parol evidence to show liability of indorsers different in extent or character from that indicated by the positions of their names is well supported by decisions of the courts of New York, Illinois, Minnesota, North Carolina, Indiana, Massachusetts, Missouri, Texas, Tennessee, and Rhode Island, there is a vast amount of authority against it. Randolph on Commercial Paper, at section 834, says: "This show of intention seems, however, to conflict with the fact that such signature is generally made for the further assurance of the payee, whereas his position as indorser is naturally after the payee or first holder, and tends to negative all idea of liability to the payee;" and then says the view is "approved as 'the New York rule' by Judge Daniel." At section 833, Rand. Com. P., cites a long list of cases holding that, where the paper discloses no ambiguity on its face, parol evidence of the time of the indorsement and the consideration may be introduced. One of these—*Sturtevant v. Randall*, 53 Me. 149—holds that: "The contract implied, from one's placing his name in blank upon the back of a negotiable promissory note is not a written contract so far complete in itself as to exclude parol evidence to show his connection with such note. As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character." In the opinion, Barrows, J., says: "From a series of decisions in Massachusetts and this state it may be deduced as settled law that when one not the payee of a negotiable promissory note indorses it in blank at its inception, the legal presumption arising from the act is that it was done for the same consideration with the written contract on the face of the note, and the person thus indorsing will be holden as a surety and an original promisor. If the same act is done at some subsequent time, but without a previous indorsement by the payee, there is no presumption as to the consideration, and the person thus indorsing will be held, if there was in fact a consideration for his contract, as a guarantor. If the same blank indorsement is made after an indorsement by the payee, then the person making it is to be regarded as a subsequent indorser; and, in the absence of date or proof, it is presumed that the indorsement was made at the inception. Now, that these presumptions have not been considered, as between all the parties to negotiable paper, to belong to that class of legal presumptions which admit of no opposing evidence, is manifest from the tenor of the reasoning in many of the cases above referred to." Then, after quoting from two Massachusetts cases, he says: "But, aside from numerous dicta of similar import, it is too plain to need elucidation that in such cases parol evidence

must be resorted to, in the absence of anything in writing, to determine what the contract actually was—whether that of an original promisor, guarantor, or indorser to transfer the title—and that this is no infringement of the wholesome rule that parol evidence shall never be received to vary or contradict a written contract."

Another case affirming with equal strength the like doctrine is *Bank v. Marble Co.*, 61 Vt. 106, 17 Atl. 42, decided in 1888. Rowell, J., delivering the opinion of the court, said: "But in this state no distinction has ever been made in this behalf between regular and irregular indorsements in blank of third persons, but they have alike been held *prima facie* to impose the obligation of maker. In most, if not all, of the cases before *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the indorsements were irregular, which brings the cases in line with a great majority of the cases in other jurisdictions. But in *Sylvester v. Downer* the defendant's indorsement was regular; that is, his name was written in blank under the names of the payees. This seems to be so from the case, but we have a copy of the note before us, which shows it to be so. Downer was sued as sole maker of the note, and, although it is true that the evidence tended to show, and the jury found, that he intended to assume an unconditional obligation to pay the note according to its tenor, yet the court adverted to that fact only as putting at rest all pretense that it was not understood that he assumed the obligation his signature imported, and said: On being produced, the note shows the name of the defendant indorsed upon it, and also the names of the payees. This according to the decisions of this court, repeatedly made, imposes upon the defendant the obligation of maker, with this difference: that, his undertaking being in blank, as between him and the parties to it, it is susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing." See, also, *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664, decided in 1892.

*Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, asserts with emphasis the doctrine of the Maine and Vermont courts. Depue, J., said: "The admissibility of parol evidence to vary the legal import of commercial paper is forcibly advocated by Professor Parsons. 2 Parsons on Notes, 520. He maintains that its competency is limited to exceptional cases. Id. 23. The exceptional cases are those in which the evidence tends to establish a defect in the consideration, or the instrument is informal, and therefore no commercial contract is created by the indorsement *per se*. It is upon the principle of this exception that the evidence received by the court in this case was properly admitted. The defendant is not named in the note or as payee. The first indorsement of a note by a person not the payee *per se*



creates no implied or commercial contract whatever, although the party may be subjected to the liability of a second indorser if the payee should afterwards indorse the note, and it should come to the hands of a bona fide holder before maturity. *Crozer v. Chambers*, 20 N. J. Law, 256. As between the parties, a liability can arise only from the facts and circumstances which occurred at the time of the transaction. Whether any contract was made, and what the character of the contract is, must be determined by the intentions of the parties as ascertained by parol evidence of the circumstances under which the indorsement was made. Parol evidence offered for that purpose is not objectionable on account of a tendency to vary a written contract, when no contract arises except upon such evidence." See, also, *Hayden v. Weldon*, 43 N. J. Law, 123, 39 Am. Rep. 551. But *Johnson v. Ramsey*, 43 N. J. Law, 279, 39 Am. Rep. 530, holds that "an accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint, and not a successive, liability." So, in *Foley v. Brewing Co.*, 61 N. J. Law, 423, 39 Atl. 650, a payee who had indorsed a note for the accommodation of the maker before it was delivered to the holder was held to be a commercial indorser, just as the paper indicated.

*Cecil v. Mix*, 6 Ind. 478, opened wide the door for parol evidence, but the Supreme Court of that state long ago adopted the New York rule. *Vore v. Hurst*, 13 Ind. 551, 74 Am. Dec. 268; *Roberts v. Masters*, 40 Ind. 463. So, in Minnesota, it was once held that "parol evidence is admissible to prove in what capacity a party writes his name on the back of a note—whether as indorser, guarantor, or surety—when the controversy is between the original parties, or to determine the mutual liability of the indorser, when there are several." *Pierse v. Irvine*, 1 Minn. 369 (Gil. 272). But in *Coon v. Pruden*, 25 Minn. 105, the court held that: "A member of a firm made a promissory note payable to the order of the firm. Held, that the relation of the firm to the note is that of indorser, and cannot be varied by parol, and that a demand upon the maker is necessary to charge the firm."

Counsel for defendants in error cite certain Ohio cases which they claim sustain their position. Among them is *Douglas v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630, holding, upon evidence of mere local usage, admitted, that accommodation indorsers of a promissory note are co-sureties, among whom contribution may be enforced. This was narrowed and virtually overruled in *Williams v. Bosson*, 11 Ohio, 62, but it affirms the admissibility of parol evidence. Another is *Robinson v. Abell*, 17 Ohio, 36, holding, upon a note executed by John W. Abell to Wm.

Robinson, against Palmer, as a joint maker, that there could be no recovery against Palmer as maker without proof that the indorsement was made at the time of the execution of the note. This asserts the admissibility of parol evidence; but the court virtually certifies in its decision that the irregularity of the indorsement was apparent without the aid of extrinsic evidence, and that would let in parol evidence anywhere. In the syllabus Palmer is described as a stranger to the note. Another is *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 593, 45 N. E. 1094, 35 L. R. A. 786, 60 Am. St. Rep. 719, holding that the indorsement of the maker's name on the back of a promissory note payable to his own order, and its delivery in that form to another for value, are essential parts of the execution of the note, and that the person so making, indorsing, and delivering for value is liable as maker. But the court held that the irregularity of the indorsement was disclosed by the note itself. *Williams, C. J.*, said: "The note, being payable to the order of the maker, was incomplete in its execution until indorsed by him and delivered for value. \* \* \* There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it in order to transfer the title." Another is *Seymour v. Mickey*, 15 Ohio St. 515, in which it was permitted to be shown by parol evidence in a suit upon a note bearing regular indorsements that an indorser signed his name on the back of the note at the time of its execution for the purpose of giving the payees additional security for the payment of the note, and had refused to sign it as a joint maker, whereupon he was held to be liable as an indorser, and entitled to demand and notice. This case does not appear to have ever been expressly overruled, although in *Cummings v. Kent*, 44 Ohio St. 92, 4 N. E. 710, 53 Am. Rep. 793, it has since been held that "evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not liable as such, is inadmissible." The proof offered was that there was a parol agreement that the drawer was not to be liable as such.

Enough has been said to clearly show that, if the case were governed by the rules applicable to negotiable paper, there is respectable authority for deciding the case either way, but the weight of authority would undoubtedly make it impossible to hold the plaintiffs in error liable as joint makers of the note in the present status of the case. But the note is not negotiable, and the inquiry now is whether a different rule applies, and, if so, what that rule is. Section 1 of Daniel on Negotiable Instruments draws a very clear distinction between the two classes of paper, in the third clause of which it is said: "By the common law an instrument under seal imports a consideration by virtue of the

solemn ceremony of its execution, and no other nonnegotiable instrument does. A bill of exchange, however, by the usages of merchants, also *prima facie* imports a consideration; and now by statute promissory notes of a certain kind are placed on the same footing. As between immediate parties, the true state of the case may be shown, and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a bona fide holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosoever hands it may go." In the first clause of said section he shows that a negotiable instrument is a res, a thing of value, title to which may be held and transferred; and that, when it goes into the hands of a bona fide holder without notice of any defect, he may hold it against the world, while in the case of a nonnegotiable instrument the true owner may identify it, and reclaim it from anybody who may hold it as an innocent purchaser from one who has stolen it or otherwise come into possession of it wrongfully.

Edwards on Bills & Notes, at section 326, says: "There is, however, a manifest distinction between those cases in which the party has made a valid and explicit contract (as where a person writes his name on the back of a negotiable note) and that class of cases where the contract cannot be carried into effect as an indorsement, according to mercantile usage (as where a person indorses his name on the back of a note that is not negotiable). In respect to the former, the contract is to be enforced according to its legal effect, under principles that are well established, and presumed to be within the knowledge of the parties; while in respect to the latter courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note." Section 391 of the same book says: "Where a person puts his name, in blank, on the back of a promissory note, he may be held liable as maker or guarantor, when there is an agreement to that effect, and when he cannot be charged as an indorser, as in the case of a nonnegotiable note. But where the payee seeks to charge the indorser of a nonnegotiable note, who indorsed the same before delivery, with the payment thereof, he must allege that the defendant indorsed with intent to become liable as guarantor or maker. This is allowed in order to prevent an entire failure of the contract, on the principle *ut res magis valeat quam pereat*."

2 Parsons on Notes & Bills, 125, says: "In those states where the rule is adopted that a third person indorsing paper in blank be-

fore the delivery of it to the payee is liable as an indorser only it is not applied in case the paper be not negotiable, inasmuch as a legal indorsement can only be made on negotiable paper; but the indorser in such case is held liable as a maker or guarantor."

These authorities clearly show that the rule against the admission of parol evidence to show the consideration, the relation of the parties, and the circumstances attending the execution of the paper, to the end that the true intent may be ascertained and effectuated, has no application in the case of non-negotiable paper. This being true, the rule of liability pronounced by the law must be the same in this case as it is in the cases of irregular indorsements decided by this court, and to which reference has been made. In those cases it has been decided that the holder of the paper may treat the parties thereto either as makers or as guarantors, according to his own election, however their names may stand upon the paper. To this it may be objected that the rule excluding parol evidence when the names upon the paper are signed regularly and in succession rests upon the ground that it operates to vary or contradict the terms of a written contract, and that this paper imports a debt due from Sehon to Smith, transferred by Smith to Camden, and that Mrs. Young stands in the attitude of assignee of Camden, and that, therefore, she must hold Smith and Camden as guarantors of the debt due from Sehon only, and was bound to the exercise of diligence to collect that debt. This contention is not without the semblance of reason, to say the least, but it has just been shown that the indorsements of such note are not regarded as importing a complete contract, and that evidence is admissible to show the intention of the parties. Edwards on Bills & Notes, § 391. In some instances it has been held that the indorser is to be treated as a guarantor, and not as a maker; but the rule applied by this court in the cases in which parol evidence has been admitted entitles the holder of the paper to elect whether he will treat them as makers or guarantors. If there had been an agreement between Sehon on the one side and Smith and Camden on the other that the latter should be guarantors, or that Smith was to be guarantor as to Sehon, and Camden guarantor as to both Smith and Sehon, such agreement would be unavailing as against Mrs. Young, unless she had notice of it. Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; Burton v. Hansford, 10 W. Va. 481, 27 Am. Rep. 571; Watson v. Hurt, 6 Grat. 633. There is no evidence that there was such an agreement, unless the note itself is evidence of it. It cannot be, for it is not commercial paper, and is not regarded in law as imposing liabilities or contracts, according to the order of indorsement. Smith testified in the case, and did not say there was such an agreement. Camden did not come forward to testify. The evidence shows

circumstances from which it is clear that this note was drawn up in the form in which it is for the purpose of procuring money from somebody for the benefit of Sehon, and that the names of Smith and Camden were affixed to it with the intent to give it credit and strength with the person who should accept it and furnish the money upon it. That clearly makes them liable as joint promisors. Defendant in error had the right of election to hold them as original promisors or as guarantors.

For these reasons, the judgment must be affirmed.

(53 W. Va. 65)

### AUGUST v. GILMER.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### EXECUTION—STAY—BOND OF CLAIMANT—SALE —RIGHTS OF PURCHASER.

1. The delivery to the sheriff of a suspending bond, as provided in section 4 of chapter 107 of the Code of 1899, by a claimant of property levied upon under a fieri facias, ipso facto stays the execution; and a sale of the property thereunder before the right of property has been determined as provided in section 5 of said chapter is void.

2. A purchaser at such sale acquires no title to the property, and, after notice, or upon a rule to show cause, may be summarily required to return the property to the custody of the sheriff.

3. Property levied upon under a fieri facias is in the custody of the law, and the court has power, by attachment, punishment for contempt, and the writ of restitution, to maintain its jurisdiction against its own officers, parties, and other persons.

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County;  
J. M. McWhorter, Judge.

Action by J. A. August, Sr., against Henry Gilmer. Judgment for plaintiff, and defendant brings error. Affirmed.

Preston & Wallace, for plaintiff in error.  
John W. Harris and Gilmer & Gilmer, for defendant in error.

POFFENBARGER, J. On a judgment in the circuit court of Greenbrier county, C. M. Harwood sued out an execution against J. A. August, Jr., returnable to July rules, 1901, which was levied by the sheriff on a horse. J. A. August, Sr., set up a claim of title to the horse, and thereupon the sheriff demanded from the plaintiff an indemnifying bond, which was given; and then, on the 25th day of June, 1901, said claimant executed and delivered to the sheriff a suspending bond. Two days later, June 27, 1901, the sheriff sold and delivered the horse to Henry Gilmer for \$150. On the 2d day of July, 1901, the circuit court of the county being in session, the claimant caused a notice to be served upon Gilmer to the effect that he (August, Sr.) would move the said court on the 8d day of July, 1901, to set aside and annul the said purchase, and have the horse

returned to the custody of the sheriff. To this notice Gilmer appeared specially, resisted the docketing of the motion and notice, and moved to quash the notice and the return, which motions being overruled, he took his bill of exceptions. Afterwards, on the 5th day of July, 1901, August, Sr., filed his petition, setting up the proceeding on the execution, and praying that Harwood and Gilmer be required to come in and litigate their claims with the petitioner. On the same day the court declared the sale void, set it aside, ordered Gilmer to forthwith release the horse, and directed the sheriff to take it into his custody.

Gilmer complains of said judgment, urging that the claimant's remedy was an action of detinue for the recovery of the horse, or a suit against the sheriff, and that the proceeding amounts to a taking of his property without due process of law. As the order made shows that the court acted only upon the notice, the execution and the return thereof, the indemnifying bond, and suspending bond, it is true that the judgment does not stand upon formal pleadings between the parties to the notice; but whether the order made in the proceeding, requiring the sheriff to retake the horse from Gilmer, the purchaser, amounts to depriving Gilmer of his property without due process of law, depends upon the construction which the courts have put upon that clause of the Constitution which prohibits it. This necessitates an inquiry concerning, first, the construction of said constitutional guaranty; and, second, the jurisdiction of courts and their modes of procedure.

The constitutional guaranty referred to was not intended to either establish or perpetuate any particular form of action or mode of procedure. All that it requires is that the substantial rights of notice and hearing before judgment be preserved. 10 Am. & Eng. Ency. Law (2d Ed.) 301. In Railroad Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467, Mr. Justice White said: "The fourteenth amendment to the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided. \* \* \* It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law, within the constitutional meaning of those words." The same construction has been given the phrase "due process of law" in a state constitution. "Due process of law," as the term is used in the state and federal Constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for pub-

lie use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained." *Railroad Co. v. State*, 47 Neb. 549, 66 N. W. 624. These adjudications are in response to the claim that the established practice in courts of common law and equity, or usual modes of procedure, must be adhered to and followed. No case has been found in which it has been decided, or even claimed, that there is lack of due process of law when such modes are pursued. Such a contention would certainly be without reason. If the proceeding complained of here has warrant in the common law, the objection to it must fail. If it shall be found that there is an inherent power in courts to retain within their control property over which they have acquired jurisdiction, and also the power to reclaim, in a summary manner, property which has been illegally withdrawn from the jurisdiction of the court, there is no violation of the constitutional guaranty.

"When property is lawfully taken by virtue of legal process, it is in the custody of the law." *Bouv. Law Dic. tit. "Custodia Legis."* In *Taylor v. Carryl*, 20 How. 583, 594, 15 L. Ed. 1028, Mr. Justice Campbell, speaking of the English courts, said: "Those courts take efficient measures to maintain their control over property within their custody, and support their officers in defending it with firmness and constancy. The court of chancery does not allow the possession of its receiver, sequestrator, committee, or custode, to be disturbed by a party, whether claiming by title paramount, or under the right which they were appointed to protect, as their possession is the possession of the court. Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. The courts of law uphold the right of their officers to maintain actions to recover property withdrawn from them, and for disturbance to them in the exercise of the duties of their office." In *Hagan v. Lucas*, 10 Pet. 411, 9 L. Ed. 470, Mr. Justice McClain, speaking for the court, said: "Property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction." To the same effect are *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Buck v. Colbath*, 8 Wall. 334, 18 L. Ed. 257. "It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other

court, and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." Mr. Justice Grier in *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841.

These principles have direct application to this case, although their enunciation by the courts arose from causes presenting facts and conditions somewhat different from those of the present case. They put it beyond question that property levied upon by execution is in custodia legis—in the custody of the law—through and by the court, holding by the hand of its executive officer, acting under the process of the court. The possession of the court is good against all individuals and all other courts and their officers, and the court must necessarily have the power to vindicate and uphold its right of possession. Otherwise its jurisdiction would fail, and it would be powerless to perform its functions under the law. In the first place, the forcible and wrongful dispossession of the officer in whose custody the property is does not deprive the court of its jurisdiction. It may go on and render a binding judgment or decree. *Freeman v. Howe*, 24 How. 450, 457, 16 L. Ed. 749. As stated in the quotation from *Freeman v. Howe*, cited, "where a court has jurisdiction, it has a right to decide every question which occurs in the cause." It is upon this principle that a person who acquires an interest in property involved in litigation pendente lite, and from a party to the suit, takes it subject to the rights of the other parties to such suit, as finally adjudicated, and is concluded by the judgment or decree, whether he becomes a party to the action or suit, and has his day in court, or not. 21 Am. & Eng. Enc. Law (2d Ed.) 395; *Bart. Ch. Pr.* 167; *Stout v. Manufacturing Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *Parker v. Clarkson*, 39 W. Va. 184, 19 S. E. 431; *Lynch v. Andrews*, 25 W. Va. 751. "A purchaser of the land from the brother pendente lite need not be brought in as a party to the suit. The law imputes notice to such purchaser, for public policy requires that this real property, specifically sued for, shall abide the result of the suit; and such purchaser is as conclusively bound by the decree as if he had been a party from the beginning." *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. "Pendente lite purchasers are bound by the decrees entered affecting the property so purchased by them, although they may not be parties to the suit." *Lynch v. Andrews*, cited. And this applies to personal property, especially when it is in the custody of the court by attachment, receivership, or other sequestration. 21 Am. & Eng. Enc. Law (2d Ed.) 627.

But in attachment, punishment for contempt, and the power of restitution, the courts have more ample, summary, and heretofore methods of maintaining their jurisdiction, compelling respect thereto, and enforcing the

due administration of justice. These measures are held to be absolutely necessary for the furtherance and execution of justice. They have been long practiced, and are well established as a part of the law of the land. They are used by the courts against two classes of persons—ministers of the court, its officers and jurors, and all other persons who are guilty of contempts of the writs of the court, contempts in the face of the court, contemptuous words or writings concerning the court, contempts of the rules and awards of the court, and abuses of the process of the court. Particular persons included in this last class are "inferior judges, counsellors, gaolers, and any person whatsoever, guilty of the acts named." Hawk. C. P. 206, 223. In such cases the court may, if necessary, imprison the parties offending, and that without indictment or information, and yet the guaranty of a trial by jury is not violated. *State v. Fredlock* (decided at the fall special term, 1902) 43 S. E. 153; *Mason v. Bridge Co.*, 16 W. Va. 864; *State v. Frew*, 24 W. Va. 416. 49 Am. Rep. 267; *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407. Bacon's Abr. vol. 1, p. 462, says such imprisonment is no violation of the guaranty in Magna Charta that none shall be imprisoned "*sine iudicio parium, vel per legem terræ*," and puts it upon the grounds of the necessity of such power, and its inherency in every court of general jurisdiction.

It is impossible for a court to fully perform its functions if it has no power to direct and control its executive officer—power to compel him to do what he is commanded to do, and power to compel him to refrain from doing, under mere color of authority, what he is forbidden to do or what he has no authority to do. Hence he is under the control of the court, through its power of attachment and punishment for contempt for not executing its writs effectually and for making false returns. Hawk. C. P. 207, 208. In *Tidd's Pr.*, vol. 1, p. 435, it is said that these powers may be exercised by any of the English courts of general jurisdiction, against "inferior judges and officers, for acting unjustly, oppressively, or irregularly in the execution of their duty, or for disobeying the King's writs issuing out of the superior courts, by proceeding in a cause after it has been put a stop to, or removed by a writ of prohibition, certiorari, habeas corpus, supersedeas, or error," etc.; and, "fifthly, against sheriffs, or other persons having the execution of writs, for not returning them, or bringing into court the body of the defendant, etc., on being served with a rule for that purpose"; and "against gaolers, etc., on the Lord's act, for extortion or oppression," and against other persons "for contempts committed out of court, for a rescue, or contemptuous words spoken of the court or its process." Among the contempts mentioned by Blackstone are "those committed by sheriffs, bailiffs, gaolers, and other officers of the court; by abusing the process of the

law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty." 4 Blk. Com. 284. "Sheriffs and other officers are liable to an attachment for an oppressive or illegal practice in the execution of a writ; as using needless force, violence, or terror, treating persons under an arrest basely and inhumanly, extorting money from them, etc., or making an arrest without due authority." Bacon, Abr. 463, tit. "Attachment." The use of these extraordinary methods is discretionary with the courts, and they are not usually employed, except in cases of palpable corruption or willful negligence or obstinacy. *Id.* 463; 2 Hawk. C. P. 208, 209. But this argues nothing against the power and authority of the court to employ them wherever, in the discretion of the court, their use is proper. Here it may be added that Blackstone says, "For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory," and that the power referred to results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. 4 Blk. Com. 286.

Inquiry may be made here as to the reason for the citation of all these authorities, showing that courts have the inherent power to punish for contempts, inasmuch as nobody is here appealing from a judgment in such case. The reply is that these measures and the authority to so punish are grounded upon, and flow out of, the necessary jurisdiction and control of the court over property which forms the subject of its action and is within its jurisdiction, and prove, by their very existence and their varied functions, that such plenary power to vindicate, uphold, and defend their jurisdiction and compel respect to their authority is lodged in the courts. Of course, mere punishment of offenders would not always effectuate the purposes of jurisdiction, although it is often resorted to to compel the faithless officer to perform his duty. Courts have the further power to right the wrongs perpetrated by the abuse of process, as well as those resulting from their own erroneous decision and actions. For this purpose the writ of restitution, as old as the law itself, has been used. See *Simpson v. Juxon*, Cro. Jac. 699, where it is held that, if judgment be reversed on error, a writ of restitution shall be awarded. "When the thing levied upon under an execution has been sold, the price for which it is sold is to be restored." Bouv. Law Dic. tit. "Restitution"; *Flemings v. Riddick's Ex'r*, 5 Grat. 272, 50 Am. Dec. 119; *Keck v. Allender*, 42 W. Va. 425, 28 S. E. 437; *Little v. Bunce*, 7 N. H. 485, 28 Am. Dec. 363; *Crocker v. Clement's Adm'r*, 23 Ala. 296. In *Duncan v. Kirkpatrick*, 13 Serg. & R. 292, Gibson, J., said, "In this respect, the judgment, when entered in form, is not only that the judgment of the court below be reversed, but that 'it is considered that the defend-

ant be restored to all things which he has lost on occasion of the judgment aforesaid'; and the writ of restitution which is issued in pursuance of it, and in which the sheriff is commanded to levy the money of the chattels of the plaintiff, or to arrest his person, is strictly an execution." This presents the theory and the ancient practice of restitution, but it seems that the writ itself, in modern practice, is rarely issued. Restoration is enforced by the use of other writs, but restitution, the object of the ancient writ, is thereby equally effectuated. "When the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there the party shall have restitution without a scire facias, because it appears on the record that the money is paid, and there is a certainty of what was lost; otherwise where it was levied, but not paid, for then there must be a scire facias, suggesting the matter of fact, viz., the sum levied, etc. If the judgment be set aside after execution for irregularity, there needs no scire facias for restitution; but, if it be not made, an attachment shall be granted upon the rule for a contempt." 2 Tidd's Pr. 1073. An illustration of the use of the writ of restitution, which shows clearly its application here, is found in the old cases in which there were judgments of outlawry, where it was held that, after the reversal of the outlawry, the proceedings were regarded as having wrought no change in the title to the property taken on execution, and the defendant was always restored to the possession of the property itself, and not compelled to take the money realized from it. See 5 Coke, 183, note "c," where it is said: "In the case of an outlawry, the instant it is reversed it becomes mere waste paper, and the rights of all the parties are restored to the same situation as if no outlawry had taken place. *St. John's College v. Murcot*, 7 T. R. 264; and vide *Dr. Drury's Case*, 8 Co. 143. And a termor upon the reversal of his outlawry shall be restored to his term, although it has been sold to the King." The sale in such case was made by the sheriff under a writ called "*capias utlagatum*," and is distinguished from a sale made on an execution, upon the ground that the sheriff, in the case of a *capias utlagatum*, is not bound to sell the property levied upon by him, but only to keep it for the King's use, whereas on an execution he is bound to sell, and has the power to pass the title, and by sale does pass it. It was upon the theory that the title had not passed that restitution of the goods themselves was made in outlawry cases, while restitution of the money only was made in the case of valid sales on execution. In *Charter v. Peter*, 2 Cro. Eliz. 597, it was held that where property had been levied upon, but not sold, when a supersedeas was awarded, and afterwards a venditioni exponas was awarded, the defendant was not entitled to be restored to the property, for the reason that execution upon

the judgment had been commenced, and was to be treated as fully completed, upon the theory that execution is an entire thing, and cannot be superseded after it has commenced. At first blush, this might be taken to be in conflict with the view that where the sheriff is not compelled to sell, and yet does sell, he passes no title. But it is to be noticed that the court held that the supersedeas had not the legal effect of staying the execution, because it was an entire thing, and was to be treated as if it had been completed, although in fact it had not. In *Lessee of Bisbee v. Hall*, 3 Ohio, 464, an execution was stayed by injunction after a levy on chattels, and the court decided that the sheriff was bound to restore the chattels to the owner. The difference between the two cases is very manifest.

In applying these principles, it is necessary, first, to ascertain the relation of the parties to one another and to the court, and the status of the property. It is almost needless to say that the property was in the custody of the court. It had been levied upon under an execution issuing from the court that made the order of restitution. So far as this record discloses, there was a valid judgment, a valid execution thereon, and a valid levy of the same. A suspending bond had been delivered to the officer by a claimant of the property, and section 4 of chapter 107 of the Code of 1899 says that "when such bond is so delivered the sale of the property shall be suspended." From the reading of that section, it is manifest that the mere delivery of such bond operates a suspension of the sale. While it says that the suspension shall be at the instance of the claimant, he is not required by said section to do more than deliver the bond. Such bond effectually stays the execution in the sheriff's hands, and he is powerless to sell. A sale thereafter is not only insufficient to pass title, but if willfully made, or if made collusively, for the purpose of favoring the execution creditor, it amounts to an abuse by the sheriff of the process of the court, and would subject him to punishment for contempt. *McWilliams v. King et al.*, 32 N. J. Law, 21; *Hopkins v. Sears*, 14 Vt. 494, 39 Am. Dec. 236; *O'Donnell v. Mullin*, 27 Pa. 199, 67 Am. Dec. 458. As he had no power to pass the title by his sale, of course the creditor obtained none. As the invalidity of the sale was shown by the papers in the cause, including the execution in the hands of the sheriff, it required no extraneous evidence to establish the fact that the purchaser had acquired no title, and was in no better situation than any other purchaser pendente lite. The only procedure necessary, therefore, was a rule against him to show cause why he should not be required to restore the horse to the custody of the sheriff. In lieu of a rule, a notice was served upon him, which brought him before the court and performed substantially all the functions of a rule, and

then the order of restitution was made, and at the same time the sheriff was commanded to take and bring back into the custody of the court the property which he had illegally passed out of his hands. The functions of the court in respect to the property had not ended, for it was the duty of the court, on the application of the claimant, who had given the suspending bond, to cause the execution creditor and the claimant himself to appear before the court, to the end that their respective claims might be litigated and their rights decided in the court. Section 5, c. 107, Code 1899. The action of the sheriff and Gilmer had taken out of the possession of the court the subject-matter of its jurisdiction, and without a show of right of authority. Certainly the court ought to have as much power to vindicate its possession as a private individual has. The right of reclamation of property, without process and by mere recaption, by the owner from whom it has been illegally taken, is as old as the law itself. He need not stop to invoke the aid of the court, but may follow up the property and take it himself, whenever that can be done without committing a breach of the peace. Chitty, Gen. Pr. 130; 3 Blk. Com. 304. "The true owner of goods wrongfully taken may retake them if he can, even from a third party, using (it is said) whatever force is reasonably necessary." Bouv. Law. Dic. tit. "Recaption."

This order, it must be remembered, is not an adjudication between parties, but only one in favor of the court against all the parties. The restoration is not to the defendant or to the claimant, but to the custody of the law, to the end that final adjudication of the rights of the parties may hereafter be made. By this order nobody has been deprived of his property. Nothing is affected except rights relating to the horse, and the alleged purchaser acquired none in him, as conclusively appeared by the papers in the case when the order was made. Whatever recourse he may have for his money is upon the sheriff and the plaintiff, who made the illegal sale. By this order the court simply maintains its jurisdiction and vindicates the majesty of the law.

The judgment will be affirmed.

(53 W. Va. 106)

### GROVER v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### ASSUMPSIT—DECLARATION—SUFFICIENCY.

1. A declaration in assumpsit, based on a claim of plaintiff against a railroad company for personal injuries, which plaintiff claims was compromised by defendant agreeing to give plaintiff employment at a stipulated per diem as track walker as long as defendant kept a track walker on the section designated, and from which service he was wrongfully discharged, which fails to allege a complete accord and satisfaction, is bad on demurrer.

2. A declaration in assumpsit, based on mutual promises, which fails to allege the promises made by plaintiff, and that defendant, "in consideration of such promises," undertook and promised to do the things alleged, is demurrable.

(Syllabus by the Court.)

Error to Circuit Court, Mason County; F. A. Guthrie, Judge.

Action by J. P. Grover against Ohio River Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Rankin Wiley, H. P. Camden, and J. W. Vandervort, for plaintiff in error. W. R. Gunn, Charles E. Hogg, and Sommerville & Sommerville, for defendant in error.

McWHORTER, P. This was an action of assumpsit, instituted by J. P. Grover against the Ohio River Railroad Company in the circuit court of Mason county, averring a contract made with the defendant under a compromise and agreement that plaintiff should have the business of track walking on section No. 29 on the line of said railroad as long as the defendant company kept a track walker on said section No. 29, at the price and compensation of \$1 per day, which service was from the — day of November, 1893, and continued until the — day of —, 1897, when plaintiff was discharged from such service, and was refused further employment by the defendant as such track walker, although the defendant still continued to keep a track walker on such section; that said compromise and agreement was made with plaintiff as a compensation for personal injuries received by him as the result of the wrongful acts and negligence of the said defendant, acting by and through its agents and employés. On the 9th of February, 1899, defendant appeared, and demurred to the declaration, and each count thereof, which demurrer was overruled, and the defendant pleaded non assumpsit. At the February term, 1900, a jury was impaneled, the case tried, and verdict rendered in favor of the plaintiff for \$679.75 damages. Defendant moved to set aside the verdict and award a new trial, of which motion the court took time to consider. On the 21st of May, 1900, the motion to set aside the verdict because the same was contrary to the law and the evidence, and because of the court's refusal to give certain instructions to the jury asked for by the defendant, and because of the court's rulings on the introduction of certain matters of evidence, being argued and considered, it was overruled, to which rulings the defendant excepted, and judgment was rendered upon said verdict. The defendant took three bills of exceptions, numbered respectively, 1, 2, and 3, and made a part of the record. Defendant obtained a writ of error from one of the judges of this court, assigning six separate errors.

First. The court erred in overruling the

defendant's demurrer to plaintiff's declaration, and to each count thereof. There are two counts in the declaration. The first count alleges: "That he intended to bring an action for damages against the said defendant for the injury so received by him as aforesaid, and would have brought such action but for the reason that the said defendant, by way of compromise and adjustment with this plaintiff, as a compensation for the injury received by him as aforesaid, offered and proposed to donate to this plaintiff half time until he was able to resume his work, and further offered that as soon as the plaintiff was able to go to work the said defendant would give to this plaintiff the light business and employment of track walking on section No. 29, as long as the defendant kept a track walker on said section No. 29. This plaintiff says that by way of compromise, and in order to avoid litigation, he accepted the proposition aforesaid and offer aforesaid, made to this plaintiff as aforesaid; and, after the said plaintiff had sufficiently recovered from his injuries, he entered upon the business and work of a track walker on said section No. 29, and that on the — day of —, 1898, he began his work of track walking under the contract, compromise, and agreement that he should have the business of track walking on said section No. 29 as long as the said defendant should keep a track walker on said section No. 29. This plaintiff says that in pursuance of said contract he was employed by said defendant as such track walker on section No. 29 from the — day of —, 1898, until the — day of —, 1897, at the price and compensation of one dollar per day. And plaintiff says that on the — day of —, 1897, the said defendant discharged this plaintiff as track walker on said section No. 29, and has refused ever since that day to give this plaintiff the business and work of track walking on said section No. 29, and still refuses to give this plaintiff any further work of track walking on said section No. 29, although this plaintiff says that said defendant still retains a track walker and keeps such track walker on section No. 29, who is a person other than this plaintiff, and has kept and employed a track walker on said section No. 29 ever since the discharge of this plaintiff; and this plaintiff says that ever since his discharge from his employment of track walking aforesaid he has been at all times ready and willing to perform his part of the said contract of track walking on section No. 29, and is still ready and willing so to do. So this plaintiff avers that he lost his position and situation as track walker on said section No. 29, and the defendant refused to restore this plaintiff to said employment of track walking on said section No. 29." This is a declaration upon an alleged oral contract, of which there was no memorandum or writing. It does not allege there was any dispute

between the plaintiff and defendant in relation to any liability for his personal injuries, or that he was making any claim against the defendant on that account, and that in consideration of the claim of plaintiff against the defendant for damages for personal injuries, and that plaintiff would not bring this action for such damages, the defendant promised to give plaintiff the employment as alleged. It is only alleged that plaintiff intended to bring an action for damages against the defendant for the injuries so received by him, but does not allege that the defendant knew of his said intention, nor that the defendant, in consideration of avoiding litigation with plaintiff, or for any other reason, compromised or adjusted his alleged claim or intended action by agreeing to donate him half time until he should be able to work, and to give him a place on section 29 as track walker.

The second count contains practically the same allegations as the first count, except plaintiff alleges that the defendant had notice of plaintiff's purpose and intention to bring a suit to recover damages for his injury, without stating when the defendant has notice—whether before or after the compromise is not shown; but it does not allege that the defendant, in order to settle the intended suit and avoid litigation, made the proposition, nor that plaintiff accepted the proposition offered in full satisfaction of his said claim for damages, and released the said defendant from liability therefor in pursuance of such compromise and adjustment. The declaration fails to allege any consideration for the promises alleged to be made by the defendant. It is nowhere alleged that, in consideration of alleged promises made or things done or to be done by plaintiff the defendant promised and undertook as in the declaration it is alleged. 1 Chit. Pl. (16th Ed.) 305. The declaration is not sufficient either as on mutual promise or as on an accord and satisfaction, and the demurrer to the declaration and to each count should have been sustained.

The only other assignment of error deemed necessary to notice is that in refusing to give defendant's instruction No. 6: "The court instructs the jury that the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize." In 2 Sutherland on Damages, p. 1565 (side page 474) § 693, it is said: "The opportunity to be employed by another will not, however, be presumed, but must be affirmatively shown by the defendant. While the rule here is the same as in other cases, that compensation is limited to the actual injury, and this is deemed to be only the difference between the wages stipulated to be paid by the defendant and the amount the plaintiff, by diligence, can obtain for like service elsewhere, yet the burden is on the defendant to show the latter amount; otherwise the damages



will be measured by the salary or wages agreed to be paid." And cases are there cited. The court had given on the motion of defendant, which was proper, the following instruction: "The court instructs the jury that if a person is hired for service for a given term, and is wrongfully dismissed, the law imposes upon him the duty to seek other employment, and to the extent that he obtains it and earns wages, or might have done so, his damages are reduced." The court did not err in refusing instruction No. 6.

The judgment complained of is reversed, the verdict of the jury set aside, and the case remanded, with leave to plaintiff to amend his declarations if he be so advised, and a new trial awarded.

(53 W. Va. 476)

ARBENZ v. EXLEY, WATKINS & CO.

(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

LEASE OF LAND—DESTRUCTION OF BUILDING—LIABILITY FOR RENT—TENANT FROM YEAR TO YEAR—DUTY OF LANDLORD TO REPAIR.

1. A tenant of land, not merely of a room or apartment, must pay rent for his term, though a building on it, included in the lease, without fault on his part is totally destroyed by fire, unless the lease otherwise provide.

2. One who enters into possession under a written lease without seal for a term greater than five years is a tenant at will, but if he pays periodical rent the tenancy is by law one from year to year, and he must pay rent accordingly. The lease does not vest an estate for the term, but it is admissible evidence to prescribe the rent, and the rights of the parties, and all things save duration of the tenancy. The tenant can only end the tenancy by notice to quit, and must pay rent as a tenant from year to year, and cannot discharge himself from rent by abandoning the premises.

3. Unless a lease provide for repairs by a landlord, he is not bound to either repair or rebuild in case of accidental destruction. He is bound only so far as his covenant goes. His covenant to repair is independent, and does not release from rent, and is to be enforced by recouping damages in an action for rent or by a separate action for damages.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; H. C. Hervey, Judge.

Action by John Arbenz against Exley, Watkins & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

Henry M. Russell, for plaintiffs in error.  
Hubbard & Hubbard and John Arbenz, Jr., for defendant in error.

BRANNON, J. John Arbenz, Sr., made a written lease, but not under seal, to Exley, Watkins & Co., leasing for a term of five years and three months a brick building, including vacant parts of certain lots, in the city of Wheeling, the term commencing January 1, 1896, and ending March 31, 1902, for

the annual rent of \$700, commencing April 1, 1896, payable in monthly installments. The lessees took possession the first week of January, and occupied the premises, paying rent monthly. On September 15, 1898, a fire totally destroyed said building. The lessees paid rent for that September and also for October, but with the rent for October sent a letter, October 31, 1898, to Arbenz, informing him that they thereby vacated the premises, and surrendered them to him. In November, 1898, Arbenz sued out a distress warrant against said lessees for rent from November 1, 1898, to October 31, 1899, and, the same having been levied, a forthcoming bond was given, and in the proceeding upon it in the circuit court of Ohio county a verdict was rendered for the plaintiff for \$502.54, after deducting for failure to repair an engine, and judgment given thereon, and the defendants took a writ of error. The defendants filed pleas denying grounds of attachment, and denying all liability for the rent claimed.

Counsel for defendants contends that the destruction of the building by fire discharged the tenants from further obligation to pay rent. He does not base this position on common law, as it requires the tenant to pay rent notwithstanding it is wholly destroyed by accidental fire, flood, or the like, unless there be stipulation otherwise. 18 Am. & Eng. Ency. L. (2d Ed.) 306; 2 Rob. Prac. 52; Scott's Ex'x v. Scott, 18 Grat. 165; 2 Miner, Inst. 762. Where the lease carries no interest in the land, but is a room or apartment merely, total destruction of the thing leased discharges the tenant from future rent. 18 Am. & Eng. Ency. 308; 2 Tayl. Landlord & Ten. § 520. Counsel rests the position that the fire absolved the tenants from rent upon Code 1899, c. 72, § 22, that "no covenant or promise by a lessee that he will leave the premises in good repair shall have the effect, if the buildings are destroyed by fire or otherwise, without fault or negligence on his part, of binding him to erect such buildings again, or to pay for the same or any part thereof, unless there be other words showing it to be the intent of the parties that he should be so bound." This statute was made to change the common-law rule that bound the tenant, in case of destruction by fire, to rebuild, if the lease bound him to leave the premises in good repair. Ross v. Overton, 3 Call, 306, 2 Am. Dec. 552; Maggort v. Hansbarger, 8 Leigh, 532; Thompson v. Pendell, 12 Leigh, 591. It does not change the common law as to rent. The revisors of the Code of 1849 proposed that section so as to release the tenant from rent proportionally when destruction deprived him of the use of the tenement, but the Legislature struck out the clause as to rent. 2 Rob. Pr. 54. Counsel says that the words, "or to pay for the same or any part thereof," in the section, can refer to nothing but rent. They plainly in terms

¶ 1. See Landlord and Tenant, vol. 22, Cent. Dig. § 177.

refer to "buildings," not rent. It does not deal with rent.

The lease in the present case is for a term beyond five years, and, being not a deed, it falls under section 1, c. 71, Code 1899, providing that "No estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed, unless by deed or will." It is argued that the lease is void by the statute, and the basis of no demand for rent. The court gave an instruction, which controls the case, to the effect, for present purpose, that the jury should find for the plaintiff \$700 rent for the one-year claim. If that instruction is right, others in the case are immaterial, as is conceded on both sides, because, that being right, others, if erroneous, would not affect the result. The defendants took possession by reason of the lease, and paid rent. They were then tenants. The lease did not pass to them the term which it purported to pass, it is true. It passed no distinct term. The statute makes the lease ineffectual to pass the term of over five years, or any term; but it does not say it is void, or void for all purposes. It simply does not pass an estate. But when, under its color, the lessees became tenants, a tenancy was established. What kind of tenancy? The decided weight of authority is that when a lease is made not complying with the statute of frauds, and possession is taken, there arises, by operation of law, a tenancy from year to year. "This implied tenancy from year to year will arise in case where occupation is had under parol demise for years, void because exceeding the period allowed by the statute of frauds." Taylor, Landl. & Ten. § 56. "An entry under a lease for a term at the annual rent, void for any cause, and a payment of rent under it, creates a tenancy from year to year upon the terms of the lease except as to its duration." Wood, Stat. Frauds, § 22, p. 56. The lease is admissible evidence not to pass a term, not to give title for the term it names, but to show some kind of a tenancy exists, and to show its terms and conditions. So says Wood, *ubi supra*. See 1 Washb. Real Prop. § 823; *Huntington v. Parkhurst*, 24 Am. St. Rep. 146, 87 Mich. 38, 49 N. W. 597; *Schuyler v. Leggett*, 2 Cow. 660; *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 Am. St. Rep. 761. In *Reeder v. Sayre*, 70 N. Y. 180, 28 Am. Rep. 567, the court says such a void lease may be repudiated as soon as made by either party, because it does not of its own force bind them, but possession and payment of rent make it a tenancy from year to year, and that then, though the lease is void as to term and interest in the land, yet it regulates the relation of the parties in other respects, and may be resorted to to determine their rights in all things consistent with, and not inapplicable to, a tenancy from year to year. But our own court in *Allen v. Bartlett*, 20 W. Va. 46, said: "Although

a parol lease for more than one year is invalid under the statute of frauds, yet if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease and so continues as long as he remains in possession without any new or other agreement."

In *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237, we said that though a contract for service more than one year was void, yet after service there could be action for compensation, and the contract could be used to furnish measures of recovery. Just so in this case, it fixes the rent. Many cases hold this view. *Nash v. Berkmeir*, 83 Ind. 539; *Larkin v. Avery*, 23 Conn. 315; *Garrett v. Clark*, 5 Or. 464; and others. Counsel for defendants relies upon *Unglish v. Marvin*, 128 N. Y. 380, 28 N. E. 634, holding apparently different views. In reference to this case I may safely say that, if to be construed as holding counter to the position above stated, it is counter to numerous New York cases. Apparently it does hold hostile doctrine, but the judge delivering the opinion does not think so, because he says the relation of the landlord and tenant did not arise under the particular agreement in that case, and also because he expressly states the law to be that an occupancy under a void parol lease for more than a year does create a tenancy from year to year, and cites as proving this cases cited above. He distinctly says that these cases settled the above stated doctrine, and does not hint any dissatisfaction with them. He based the ruling on the peculiar contract in the case. All I need say of that case is that it admits the above law. We are referred to *Jordan v. Furnace Co.*, 126 N. O. 143, 35 S. E. 247, 78 Am. St. Rep. 644. It was an action to recover damages for refusal to execute a lease pursuant to an oral contract to lease premises for five years. That was an action direct upon the void contract, which alone could give existence to the contract. There being no contract, there was no right of action. The case is not in point. The case of *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642, seems to hold against the doctrine stated; but it admits that the current of English and American authority does hold that entry and payment of rent under a void lease creates a tenancy from year to year. I just now met with a later case, *Steele v. Anheuser Ass'n*, 57 Minn. 18, 58 N. W. 685, holding that a lease void under the statute of frauds "will nevertheless regulate the terms as to rent, if the tenant goes into possession and occupies the premises." The *Johnson Case* seems to me no more than that the void lease cannot fix duration of the term. I think 1 McAdam, Landl. & Ten., 66, lays down sound law thus: "Where a lease is void by reason of the provisions of the statute, that does not render the contract an illegal or

unlawful one, if the parties choose to perform it. If the lease is verbal, and the term is longer than one year, it is void in the limited sense that neither party can compel the other to perform it. The landlord need not, in such case, give the tenant possession of the premises, if he chooses not to do so; and no action will lie by the tenant against the landlord in consequence thereof. Nor need the tenant take possession in such case. No action will lie against him, if he does not. The parties may, however, go on and perform the agreement, though they could not be compelled to do so. And if the tenant goes into possession of the demised premises, and occupies them, he will be bound to perform the agreement, by paying the rent agreed for such time as he may remain in possession in the same manner as though the lease had been reduced to writing. And if, by reason of the manner of paying rent, as by the year, a yearly tenancy is implied by law, the tenant may make himself liable for the year's rent. During the time which the tenant occupies the premises, or in case a yearly tenancy is implied by law, the tenant will be bound to perform the terms of the agreement." "A tenant in possession under a parol lease for two years void by the statute of frauds is a tenant at will, or from year to year." *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462.

Thus far I have written on the theory, conveyed by the words of authority, that a lease not conforming to the statute not only brings into being a tenancy, but one from year to year; but my mind has raised again the question, is it a tenancy at will, or one from year to year? If at will, the recovery in this case is wrong, because it is one for a year on the theory of a tenancy from year to year, which requires a notice to terminate the tenancy for three months terminating on the terminal day of the current year, which was not given in this case; whereas, if a tenancy at will, no notice is required, and the letter of defendants surrendering the premises would, I think, be sufficient. An examination upon this question has brought me to the conclusion that mere entry into possession under such a lease creates what technically is a tenancy at will, but payment of rent periodically makes the tenancy a periodical one, not one merely at will; and, further, the authorities say that the law implies a tenancy from year to year, or quarter to quarter, or month to month, as the case is. In England and many of our states are statutes to the effect that one entering under a lease void under the statute of frauds is a tenant at will, and even under these statutes it is held that occupancy and payment of rent do away with the feature of tenancy at will, and make it a periodical tenancy. 18 Am. & Eng. Ency. L. 194. "The mere fact that a person goes into possession under a lease void because for a longer term than a year does not create a yearly tenancy.

If he remains in possession with the consent of the landlord for more than one year under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year; and the terms of the lease void as to duration of term would control in respect to the rent." *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. Rep. 609, quoted and approved in *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608. Such a tenancy under a void lease is at first a tenancy at will, but by remaining in possession for several years paying rent the tenancy becomes one from year to year. "The tenant cannot at any time during the year, at pleasure, surrender the premises against the will of the landlord, and excuse himself from accruing rent," nor can he defend an action for the rent by showing that he abandoned the premises, as he is liable whether he in fact occupies the premises or not; and the parol agreement which is acted on by the parties "until the estate becomes a tenancy from year to year will govern their rights as to the amount of rent and the time of payment." *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79. In Vermont the statute declared that one holding under a void lease should be a tenant at will; but the continuance of possession and payment of rent "expands into a holding from year to year," said the court. Here the tenants held far into the third year, paying rent every month, and many cases make them tenant from year to year. Such a tenancy, though at first one at will, "for purposes of notice to quit, and some other purposes, has been by judicial constructions converted into a tenancy from year to year." *Cody v. Quarterman*, 12 Ga. 386; *Wallace v. Scoggins*, 17 Am. St. Rep. 752, note; *Kerr v. Clark*, 19 Mo. 182; *Larkin v. Avery*, 28 Conn. 316.

It is suggested that this is a tenancy from month to month, and then the letter from the tenants surrendering would close the lease at once or a month thereafter; but the lease covenants for rent of "\$700 per annum for each and every year commencing from and after the 1st day of April, 1896, payable in equal monthly installments." This is a yearly rent, payable monthly, and does not make it a monthly tenancy, in face of another clause making the term begin January 1st. *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Irving v. Thomas*, 18 Me. 418; 18 Am. & Eng. Ency. L. (2d Ed.) 196.

It is hardly necessary to extend this opinion beyond this point in view of instruction 5; but it may be expected that this opinion should refer to that provision in the lease that the lessor "agrees to put and keep the roof of said building in good order." I do not understand that failure of ArbENZ to repair the roof before the fire gave cause of abandonment and released lessees from ----

because failure to repair does not warrant abandonment, unless the property is therefrom untenable, which is not claimed, and remaining in possession after breach is a waiver of right to abandon. The lessees kept on in possession and paying rent. 18 Am. & Eng. Ency. L. 231; Gear, Landl. & Ten. § 107. This theory would show instruction 5 to be wrong. But why speak of this when there was no abandonment, or claim or show of it, before the fire, for want of repair of the roof? I do not see that the question of abandonment is material. But the claim under this clause was that after the fire it released from rent, as the defendants asked, but were refused, instruction 9—"that the failure of the plaintiff to restore the roof of the building after the fire freed the defendants from any further obligation to continue to occupy the building or pay rent for the same." This is a claim that Arbens was bound to rebuild, as there can be no roof without a house. The law does not require a lessor to rebuild a house destroyed by fire without a covenant to do so in terms or a general covenant to repair. 18 Am. & Eng. Ency. L. 226 (2d Ed.); Kline v. McLain, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776. This lease contained no general covenant to repair or rebuild, but only the limited one to keep the roof in order. As neither the written lease nor the law required Arbens to rebuild, of course, this clause as to repair of the roof had no application after the fire. The case of Thompson v. Pendell, 12 Leigh, 608, is cited to support the argument that the covenant as to the roof is as strong to relieve the tenant from rent as the covenant in that case. There a mill was leased, and destroyed by fire during the term, and the lease said that the lessee should make repairs, "except heavy repairs, such as if the dam or forebay should be injured by high water, or the main shaft or wheel should give away so as to require a new one," in which case the lessor was to repair the same, and the lessor "is not to lose the rent if he should go on to do the work here according to contract." It was held that this did not bind the lessor to rebuild, but, as he refused to do so, the tenant was discharged from rent, because it was to be inferred that, as the lease released the tenant from the rent for refusal of the landlord to make heavy repairs, for a stronger reason it ought to release him for a total failure to rebuild. The reason of decision there was that the lease itself was held to mean and provide for a release of rent for failure to rebuild, but in our case there is no hint of release of rent for any cause. But this roof covenant is an independent one. The lease does not express or imply that repair is a condition precedent to obligation to pay rent; that repair must be made before payment of rent. The covenant could not apply after the fire. For its breach, if there had been any shown, the

defendants could sue for damages in a separate action, or recoup from the rent. "The landlord's covenant to repair and the tenant's to pay rent are independent covenants, and at common law a breach of the former is no defense to an action on the latter. And this still remains the law, both in England and the United States." 1 Taylor, Landl. & Ten. § 332; 18 Am. & Eng. Ency. L. 230. But there can be no question that the tenant may, in a suit for rent, recoup damage for failure of a lessor's covenant to repair. Cheuvront v. Bee, 44 W. Va. 103, 28 S. E. 751; 18 Am. & Eng. Ency. L. 230. There was no notice of recoupment for this cause, and one would not have availed. There was no error in refusing defendants' instruction. There was no evidence to prove a breach of the covenant, and really this discussion of it is useless, except as it raises a question of law. It follows that there was no error in plaintiff's instruction 8 that failure to repair roof was no release of the obligation to pay rent. It adds to the strength of the plaintiff's case that the defendants continued on the premises from the 15th September to 31st October.

Judgment affirmed.

(33 W. Va. 32)

**HANNAH v. CHARLESTON NAT. BANK**  
et al.

(Supreme Court of Appeals of West Virginia.  
April 4, 1908.)

**SUPREME COURT—JURISDICTION—AFFIDAVIT  
TO SHOW—FINAL JUDGMENT.**

1. When the form of procedure in the trial court does not require that the record or evidence show the value of the property in controversy, and it does not appear therein, affidavits may be filed in the Supreme Court to show a value giving jurisdiction.

2. In a trial of right of property originating in a justice's court under section 152, c. 50, Code 1899, on appeal to the circuit court the verdict finds the property to be the property of the claimant, and the court overrules a motion to set aside the verdict, and gives judgment for costs, but renders no judgment touching possession of the property. No writ of error lies for want of a final judgment.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County:  
J. H. Couch, Special Judge.

Action by Kate P. Hannah against the Charleston National Bank and others. Judgment for plaintiff, and defendant Silverman brings error. Dismissed.

A. M. Prichard and S. S. Greene, for plaintiff in error. Flournoy, Price & Smith and A. B. Littlepage, for defendant in error.

**BRANNON, J.** An execution issued by a justice of Kanawha county in favor of the Charleston National Bank against Pfeifer and Silverman was levied on some chattels. Kate P. Hannah filed her petition before the

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 257.

justice, as provided in Code 1899, c. 50, § 152, claiming the chattels as hers, and denying their liability to such levy, and, the parties in interest having been summoned to try the right of the property, a trial before the justice took place, and resulted in favor of the said claimant. The case was then taken to the circuit court, and a trial was there had before a jury, resulting in a verdict finding the chattels to be the property of Kate P. Hannah. The court overruled a motion to set aside the verdict, and gave judgment for costs in favor of Kate P. Hannah. Silverman sued out a writ of error.

This case involves the question whether we must dismiss the writ of error, without considering its merits, as improperly granted, because the record does not show that the value of the property exceeds \$100, or must read an affidavit filed in this court showing that fact, and go on to consider the merits. It seems to me that this is not a question of fixed law, but one of practice in this court, so that we can adopt such rule as we deem proper. Our cases say that, where the case is one in nature merely pecuniary, the record must affirmatively show that the matter is of greater amount or value than \$100. *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. 19; *Aspinall v. Barrickman*, 29 W. Va. 508, 2 S. E. 795. But we can hardly say that simply from the statement that the value must appear "from the record" an affidavit is inadmissible. That was not the question in those cases. It must appear by the record as made below, if there is nothing else. A matter to be regarded in this case is that the trial in the court below did not call for proof of value. It was not relevant to the case. Value not having been shown below, no relief by writ of error can be had, though property worth thousands of dollars is involved, unless affidavits be allowed in this court. In *Dryden v. Swinburn*, 15 W. Va. 250, Judge Green expressed the opinion, which I think correct, that, where the form of action does not require the record to disclose the value of the matter in controversy, it may be shown by affidavit in this court; citing cases in the national Supreme Court. Judge English seems to have thought an affidavit proper at the close of his opinion in the *McCoy* Case, above. It is clear from many cases that the United States Supreme Court has allowed affidavits or other means of sustaining the jurisdiction. *U. S. v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, so held. In *Richmond v. Milwaukee*, 21 How. 391, 16 L. Ed. 72, Chief Justice Taney said (what is applicable in our case) that in cases in which the value does not, according to the usual forms of proceeding, appear in pleadings or evidence in the record, affidavits have been received to show that the value is large enough to give jurisdiction. This is approved in *Red River Cattle Co. v. Needham*, 137 U. S. 632, 11 Sup. Ct. 208, 34 L. Ed. 799. It was held that,

where the case is not for money, but the nature of the suit requires value to be stated in pleadings, affidavits cannot be filed on appeal; nor will they be allowed where there has been evidence of value below, and the evidence certified; but where the appeal is taken without question as to value, and it is not disclosed by the record, affidavits may be received to establish the jurisdictional amount. 1 Ency. Pl. & Pr. 716. I would not open a wide door to affidavits, because, if one side files, the other must be allowed counter affidavits, and complication might ensue. I would not admit them where the record does or ought to show value, but only in cases where it is not relevant below. I think the passage in 2 Cyc. 558, is good law: "Necessarily, it would seem, in cases in which the pleadings or record must show the jurisdictional fact, the amount or value cannot be shown by affidavits in the appellate court." In this case the proceeding was not under section 151, c. 50, Code 1899, but under section 152. If it had been under section 151, the justice or jury had to ascertain the value of the property, in order to give judgment on the bond given by the claimant to take the property into possession; but, the case being under section 152, there being no bond, there is no need of finding value. Hence the affidavit is admissible to sustain jurisdiction.

The second point made against the writ of error is that there is no judgment on which the writ can rest. The jury in the circuit court found that the property was the property of Kate P. Hannah, and the court overruled a motion to set the verdict aside, but gave no other judgment than for costs. Our Code 1899, c. 135, § 1, cl. 1, allows a writ of error only on a final judgment. So does law everywhere. "A writ of error or appeal will not lie from the verdict of a jury without an entry of judgment thereon, nor from the finding of facts or conclusions of law by the court not followed by judgment. Hence the opinion of the court, no order being entered in accordance therewith, is not reviewable." 2 Cyc. 616. The suggestion may be made that by refusing to set the verdict aside and awarding costs the court manifested intent to finally end the case; but that is not enough. "No order is final in such sense as to constitute final judgment unless it disposes of the main case so far as there is power in the court to decide upon the questions presented by the issue, no matter how clearly and decisively the order may indicate what the ultimate judgment may be. Until ultimate judgment, the case is not finally disposed of, inasmuch as the court may change its rulings, award a venire de novo, or grant a new trial." *Elliott, Appel. Pro.* § 83. "Final judgment must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties have been adjudicated."

Scott v. Burton, 55 Am. Dec. 782, 6 Tex. 322. But an authority binding us is *Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39, dismissing a writ of error as premature because taken on a verdict without any judgment. Judge English's holding in that case is incorrectly criticized, and language of Judge Green in *Tompkins' Ex'r v. Stephens*, 10 W. Va. 167, is used as the weapon. "Whatever may be the practice in other states, it is well settled in this state that the court of appeals may review the action of a circuit court in either granting or refusing a new trial." Judge Green was not talking about a writ of error based on a mere verdict. He was answering the claim that even after judgment there could be no review of facts on a writ of error, which is the case in some states. He surely did not mean that a writ of error will lie upon a verdict, or upon refusal of a new trial, in advance of judgment. It does lie for setting aside a verdict before judgment by force only of our statute, but not for refusal of new trial until judgment. A verdict finds only facts. It is a report to the court on the facts. It is only the court that can speak the law on those facts. I do not say that a judgment must necessarily have the *ideo consideratum est*, or any particular form or words; but there must be some announcement of the court's direction touching the thing litigated to carry into execution the verdict. It cannot be said that this is a statute proceeding, and that takes it out of the general law. It stands in lieu of detinue. Surely, there would have to be a judgment in that action. It is a short, simple process to recover the property from the possession of the officer. Turning to the statute, we find in section 152 that a judgment is required in even the justice's court, as it requires the justice to "dismiss the claim, or order the officer to deliver the property to the claimant." This is virtually the detinue judgment. Can we say that the circuit court is relieved from judgment? Where is there any judgment compelling the officer to give possession of the property? Ought he not have the court's authority? Will it be said that the judgment for costs will sustain the writ of error? Costs are a mere attendant of the main judgment, the shadow following the substance. "A judgment merely for costs without a final disposition of the cause, is not a final judgment." 2 Cyc. 593; 2 Ency. Pl. & Pr. 133; 1 Hyde's Dig. 194.

Section 153 says: "Any party considering himself aggrieved by the decision of the justice, or verdict of a jury, under either of the two preceding sections may appeal therefrom to the circuit court in like manner as from a judgment." From this it is argued that, as this section allows appeal from a verdict only, the present writ of error is not

open to the objection above found. The first question is whether the section really means to allow an appeal from a verdict without judgment. I do not think that such is its meaning. All courts deny to a verdict the legal effect of a judgment, and unless it is very plain that the Legislature so intended we ought not construe a statute to contravene established procedure, and every verdict is subject to a new trial by order of the court. If the contention is true, the party has choice of a new trial or appeal. If he can appeal instantly, he can deprive the justice of the right, if he had done injustice by error in the trial, of granting a new trial. The statement that he may appeal from "the decision of the justice or verdict of a jury \* \* \* in like manner as from a judgment" only means that in this special statutory trial of the right of property there shall be appeal just as in ordinary cases of actions, under section 163. That is the significance of the word "judgment" in section 153.

Again, the letter of section 152 does not give a jury trial. If that is its true construction, then a judgment is all the more necessary, as a verdict would be a nullity; but I think the intent was to give a jury trial in a proceeding under either section 151 or section 152, as they both provide for a trial of the same kind of controversy; and it is very unlikely that it was intended to give a jury where a bond is given, and deny it where none is given. There is no reason for such a discrimination. A thing is often within the spirit though not in the letter of a statute. We must view the three sections through the same glasses. Sections 151 and 152 both say that the justice shall give judgment. Hence we cannot think that section 153 intended to give appeal without judgment, and thus conflict with the preceding sections. By complying with those sections in requiring judgment, we obey them, and do not violate section 153, for still the party gets his appeal. In fact, section 153 has for its only mission the grant of an appeal, not to dispense with judgment. If it had further object, it was to give an appeal notwithstanding there had been a jury trial. So much for the question whether there can be an appeal to the circuit court under section 153 on a mere verdict. But this is not the real question. This question is whether a writ of error from the circuit court to this court lies on a mere verdict. A circuit court is a court of record, proceeding according to the common law. Chapter 50 governs procedure in justices' courts, but not in circuit courts. Certainly section 153 has no application. To say that a writ of error lies from a verdict in a circuit court, we must fly in the face of all precedent authority. Therefore we dismiss the writ of error as improvidently granted.

(52 W. Va. 396)

**HAST et al. v. PIEDMONT & C. R. CO.**(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)**HIGHWAYS—DEDICATION—BY RAILROAD CORPORATION—EVIDENCE—ACCEPTANCE.**

1. The owner may dedicate his land to the public for use as a highway by acts and declarations, without deed or other writing; but such acts and declarations must be deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to permanently abandon his property and devote it to public use.

2. A dedication by a railroad corporation, to bind the corporation beyond revocation, must be made by the directors, or recognized by them in some way, or be expressly ratified by them, or by such public use for such time and under such circumstances as to justify the inference of such ratification. The mere act of officers and agents making such dedication without authority from the directors will not make a valid dedication, unless by such express or implied ratification.

3. Where a railroad company occupies a street which is a public highway in an unincorporated village, and acquires a lot with intent to open through it a way in place of the street, but does nothing more to evince a dedication than to tear down the fence around the lot and allow its use by the public for a way, this does not constitute an irrevocable dedication.

4. A corporation may dedicate some of its land to public use for a highway, if it do not materially interfere with the accomplishment of the purposes of its incorporation.

5. To render a dedication of land for a highway valid to create a highway as to a county, so as to charge it with maintenance and repair, there must be an acceptance of the dedication by the proper public authority.

6. If a landowner dedicate a highway over his land for public use by a valid dedication binding on him, and it is accepted by the public by general use of the way, it becomes a highway, as between the dedicant and public, beyond his revocation of the dedication, though the dedication is not accepted by the county court; but this does not charge the county with maintenance or repair of the highway.

7. Oral evidence of a general manager of a railroad company that the company purchased a lot of land for the purpose of dedicating it to public use as a street, and tore down the fences around it, and threw it open to public use, does not prove such dedication of it as to render the dedication irrevocable.

8. In an action by the owner of a village lot against a railroad company for damage to the lot resulting from the taking of a street near the lot by the company for its track, the company gave oral evidence to show, in defense or mitigation of damages, that the company had dedicated a street or way over a lot owned by it in lieu of the street taken for its track, and thus took the position that such dedication had been made. This did not constitute an estoppel against the company afterwards, in other suits, denying a dedication, so as to defeat or mitigate a recovery of damages.

9. In such action, an attorney of the railroad company, in adducing evidence to prove such dedication, and making such defense of dedication, does not bind the company, against its denial in another suit of such dedication.

(Syllabus by the Court.)

Error to Circuit Court, Mineral County.  
R. W. Dalley, Judge.

Action by Viola G. Hast and another against the Piedmont & Cumberland Railroad Com-

pany. Judgment for plaintiffs. Defendant brings error. Affirmed.

F. M. Reynolds, for plaintiff in error. C. W. Dalley, for defendants in error.

**BRANNON, J.** The owner of land in Mineral county, across the river from the city of Cumberland, laid out a village by platting his land into lots and streets. The village is called "Ridgely," but is not incorporated. In the village are two streets, which we will call "A" and "B." Viola G. Hast and Henrietta Hast own a house and lot on A street, near the corner of A and B streets. The Piedmont & Cumberland Railroad Company made an embankment for its tracks, taking part of B street, and also part of A street, and laid its tracks on the embankment; and the said Hasts sued the company for damages resulting to their property from the embankment, by rendering access to it less easy, and from inconvenience and detriment from the operation of the railroad, and recovered a judgment in the circuit court of Mineral county for \$300 damages, from which judgment the railway company has taken this writ of error.

On the trial the company sought to defend itself upon the theory that when it so occupied those streets it acquired a lot in the village, and tore down the fences inclosing it, and threw a part of it open to the public use, in lieu of the parts of the streets which it had occupied, and thus exchanged part of that lot for the parts of the streets which it thus occupied, and thus dedicated a part of the lot to public use for a public way, giving access from A to B street. The company gave evidence to prove by its general manager that, about the time of laying the tracks in the streets, it had purchased a lot for a street or way for the public in the room and stead of the streets so occupied, and that the company, in execution of that purpose, took down the fence from around the said lot, and threw it open to the public to use in lieu of the streets, though no street was actually constructed upon it, and that the public had so used it ever since, in the same condition in which it was when it was so thrown open. It was otherwise proven that the public had so used the way over said lot. The company asks the court to instruct the jury that if they found from the evidence that the company acquired the lot with intent to dedicate it to the public use for such way, and did throw it open in execution of such intent, and that the public had since used it as a way, then such action amounted to a dedication of the ground as a public way, which could not be revoked by the company, and that the company could not thereafter close up the said way. The defendant thereby sought to show that the plaintiffs, having thus a way from street to street by reason of such dedication, either suffered no damage, or that such damage would be mitigated by the presence of the way under such dedication.

This presents to us the question whether

¶ 1. See Dedication, vol. 15, Cent. Dig. § 12.

there was a dedication binding upon the company, beyond its power of revocation. Is this substituted way a public highway? Can the company hereafter disavow the dedication, and close up this substituted way? A way may be a highway for some purposes, and not for others. It is very certain that under our statute (Code, c. 43, § 31) declaring that every road, street, or alley used and occupied as a public road, street, or alley shall be deemed to be a public one, mere user by the public, however long continued, will not make it a highway, as regards the county or municipality; that is, to charge such county or municipality with the burden of maintenance, or of liability for injuries arising from nonrepair or defects. To make it a highway for those purposes, our decisions are distinct that there must be shown action by the county court establishing or in some way recognizing the road as a highway, or it must be shown that it has been worked by a public surveyor of roads. An individual may lay out a way upon his land for public use, and do all in his power to dedicate it to the public use, and it may be accepted by the public by using it as such; but it does not thereby become a public highway, so as to charge the county with the burdens above stated. It is true, we find much law to show that by common law a dedication may be made by an owner of property, which, if accepted by the public by long user, makes the way a public highway for all purposes—even to charge the public with its maintenance and with liability for its defects. *Elliott on Roads & Streets*, § 154; 2 Dill. Munic. Corp. § 642. But in this state our decisions do not allow the public use of a way to operate as an acceptance of a dedication so as to bind the county. *Sampson v. Goochland Justices*, 5 Grat. 241; *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Dicken v. Salt Co.*, 41 W. Va. 511, 23 S. E. 532; *Kelly's Case*, 8 Grat. 632. If an owner of land lays it out into streets, lots, and alleys, and sells lots with reference to such streets and alleys, by plat or otherwise, it is a dedication of such streets and alleys irrevocable by him, and makes them public as to all lot owners, and consequently as to the general public. He is estopped to deny them that character. *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831; *Skeen v. Lynch*, 1 Rob. 186; 9 Am. & Eng. Ency. L. (2d Ed.) 34. To make a dedication valid, there must be a dedication and an acceptance; there must be two parties—the dedicant and an acceptor. 9 Am. & Eng. Ency. L. (2d Ed.) 43; *Elliott on Roads & S.* § 150; *Angell on Highways*, § 157.

In the present case the county court or surveyor in no wise accepted the dedication, and the question comes up, not whether the way is a public way as regards the county, but whether it is a highway as regards the plaintiffs and the general public. In other

words, has the railroad company bound itself against a recantation of its dedication? Can it close this dedicated way against the plaintiffs and the general public? Under this head, the first question is, was there a real act of dedication? It is not to be denied that, as between the public and the dedicant, there may, under circumstances, be created a highway binding on the dedicant in favor of the public. This seems to be the case not only where people have expended money on the faith of such dedication, but also where there is no such expenditure; but the act of dedication must be shown by acts and declarations deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to permanently abandon his property to the public use. *Pierpoint v. Harrisville*, 9 W. Va. 215; 9 Am. & Eng. Ency. L. (2d Ed.) 38. Now, the mere opening of this lot to the public use is not adequate to evince an irrevocable purpose to dedicate, for we may attribute that use to a mere license, rather than an intent to dedicate. It is so common for railroad companies to let their lots lie open, that we attribute it to license—mere permissive use—not to an intent to dedicate. Nor does the fact that the company purchased this lot with an intent to dedicate it bind the company, as it might change its notion. There is not such an unequivocal act as speaks unalterably an intention to dedicate. No writing is necessary to make a valid declaration of dedication. 9 Am. & Eng. Ency. L. (2d Ed.) 34; *Pierpoint v. Harrisville*, 9 W. Va. 215. There is no act to tie the company to this dedication. Who made this dedication? I interpret the evidence to mean that the general manager of the company threw open this street, or some agent of the company when constructing the road. There is no action by the directors, and the president or general manager would have no power, unless authorized by the directors, to dedicate this lot away. 1 *Elliott on Railroads*, § 283. "A general business and financial agent, though he is also the president, has no authority to sell or mortgage the property of the corporation." 1 *Rorer, Railroads*, 667. "A general agent of a corporation has no power to convey the real estate of the corporation. To effect such an object, a specific authority is indispensable." *Stow v. Wyse*, 18 Am. Dec. 99. Some of the authorities hold that, in order to bind the dedicant, other persons must have expended money or acquired rights on the faith of the dedication; and, in the absence of some such circumstances it seems difficult to see how a dedicant can be bound irrevocably, he receiving no consideration, perhaps, and other parties not having made any expenditure on the faith of the dedication. I should have stated a few lines back that we cannot say that an act of dedication binds the company when there is not a shadow of evidence competent to bind it, that is, action of its directors, the only com-



petent and authorized agents of the corporation. Nothing has been shown to bar the company in future from repudiating its dedication. If time enough had elapsed to bar the company by reason of the adverse, continuous, open user by the public, then this way would be a highway valid against the company in favor of the public. Then the public right would rest on the statute of limitations, not on dedication and acceptance. 9 Am. & Eng. Ency. L. (2d Ed.) 67. But it is not shown that the period required to thus give title has expired. Thus I see no error in the refusal to give defendant's instructions.

Another point of error in that after a witness had given his opinion that the plaintiffs' property had been damaged one-half, and stated that that opinion was based considerably upon the fact that the railroad company might close up the lot which had been opened, counsel for the defendant asked the witness the question, "If the company cannot close up its lot, and assuming that it will be left open for use, what would you say would be the decrease in value then?" and the court refused to allow the witness to answer the question. This question is based on the assumption that there was a valid, binding dedication, when none was shown; it assumed, also, that the company would not and could not close the way, when nothing was shown to debar it, adequate to debar it from so doing; and therefore the court did not err in refusing to allow the question to be answered.

The point is made by a second brief filed by counsel for the plaintiffs that a corporation cannot make a valid dedication, for the reason that it can perform only certain functions, is incorporated to do only certain things, and cannot do other things not contemplated by its charter; in other words, that such an act would be ultra vires. Some English cases are cited to this effect, but, in the immense conflicting and confusing cases, we can find authority for almost any proposition. It is very well settled by modern authority that corporations may dedicate land to the public use. Elliott on Roads & S. (2d Ed.) § 146; Elliott on Railroads, § 425. So it do not interfere with the purposes for which it was incorporated, a private corporation may make a dedication. 9 Am. & Eng. Ency. L. (2d Ed.) 33.

The point is made that two of the plaintiffs' instructions assume that the plaintiffs were entitled to damages, by the language that "the jury, in estimating the amount of damages, may take into consideration," etc. I do not think this language assumes the right of recovery. Surely the jury would understand that the question of damages depended on evidence, and that it was with the jury to pass on such evidence, and that the court did not intend to express an opinion upon that point. We must not so lightly assume that a jury does not understand its

functions, and will so easily be misled in the performance of its duty. Besides, I think the language is very common in instructions telling the jury how to estimate damages, and is not inapt or improper. And still further, if these instructions, taken alone, were objectionable on that account, the objection would be obviated by the fact that another instruction for the plaintiffs reads, "The court instructs the jury that if they believe from the evidence that the property of the plaintiffs has been permanently injured and its value depreciated by the laying and constructing of the embankment and railroad track, and that the defendant constructed and laid, or had constructed and laid by its agents, the said embankment and track, then the plaintiffs are entitled to recover damages;" thus plainly telling the jury that they could only find damages on proof of the facts supposed in the instructions.

Plaintiffs' instruction No. 3, as to the mode of assessment of damages, is supported by principles contained in *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604; *Blair v. City of Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837; *Guinn v. Railroad Co.*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

I should have noticed in its proper place the position taken by defendant's counsel that what it did in occupying the streets, and in their place dedicating a passage over its lot, was an exchange justified by section 48, c. 54, Code 1899, providing that a corporation may take and hold "under any grant or ordinance made by a municipal corporation any interest or right such municipal corporation may have in any street, alley or public ground, and may in exchange therefor, in whole or in part, dedicate or otherwise secure to public use another street, alley or parcel of ground out of real estate owned by such railroad corporation." Now, it is apparent that there is no justification under this section, because there is no warrant for a railroad company to take a street and make such exchange, unless a statute allows it, and this statute does not allow it, because it, in terms, applies to incorporated municipal corporations, and contemplates a treaty of exchange between the two corporations, evidenced by proper memorials of the consent of the municipality, if not of the actual dedication, also. Moreover, under that section, what the company did was not of such a character as to constitute such a dedication in such exchange, even if the statute applied. Under that statute, there must be an organized town, in order to become a party to the exchange. It should be affirmatively shown that the exchange was declared by the directors of the company. It does not appear that the company did any acts or made any declarations expressive of such dedication at the time, and constituting a valid dedication. There was no express dedication—at best, only an implied dedication; and the mere

tearing down the fences on the lot, and the passage of people over it, are not enough. There was no consent of the county court. Therefore we affirm the judgment.

#### On Rehearing.

Upon rehearing, it is argued that the above opinion does not correctly interpret the evidence of the general manager. That evidence reads: "C. L. Bretz, general manager of the West Virginia Central & Pittsburgh Railway Company, operating the railroad of the defendant company ever since its construction, in 1886 or 1887, being introduced as a witness on behalf of the defendant, testified that, about the time of the laying of the tracks in the streets aforesaid, the defendant company purchased said lot No. 55 for a street or way for the public across it, in the room and stead of the streets occupied by the company's tracks, and that the defendant, in pursuance of that purpose, took down the fence from around said lot, and threw it open to the public, to be used in lieu of said streets, though no street or roadway was actually constructed or thrown up, and that the public had so used it ever since in the condition so thrown open, and other witnesses, both on behalf of the plaintiffs and defendant, testified that since the construction of said tracks in the street aforesaid the public had used said lot No. 55 as said streets had been used before that time. It is admitted that the defendant introduced no writing purporting to be a formal dedication of said lot No. 55 to the use of the public." It is said that this evidence does not warrant the inference that the acts claimed as effecting a dedication were done only by the general manager or some agent. As no action of the company was shown or suggested, I still think the interpretation given this evidence is a fair one. But let us take this evidence for all it is worth on the line argued by counsel, which is that the witness said that "the defendant company" purchased the lot for a street, and that "the defendant," in pursuance of the purpose to make a street upon it, took down the fences. Counsel argues that this language imports, not the acts of a mere agent, but the action of the very company itself, and that, though this is not the primary evidence to show dedication, it was not objected to, and no objection can be made to it in the Court of Appeals. *B. & O. R. Co. v. Skeels*, 3 W. Va. 556. Our question is not one of the admissibility of this oral evidence. The evidence not having been objected to, its admissibility for want of the better evidence is not before us, but its effect is. It is sought to use it for two purposes—one to prove the fact of dedication; the other how, in what manner, by what act, it was made, or rather, that it was made in an all-sufficient mode to bind the company. It must answer for these purposes, else it is not adequate to establish dedication; for it is, beyond question, not sufficient to say, in a

general way, that dedication was made, but it must be shown to have been made by some acts that are "deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property for that specific public use." *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. 148. Does the evidence of the manager meet this demand? He does not state the fact of dedication, but say that he meant that. Then, when we ask how, he does not say that there was any deed, any written declaration in any form by resolution or declaration by the company, nor that there was any open, deliberate declaration of dedication—nothing to irrevocably bind the corporation. How did the corporation dedicate? He says it purchased a lot for a street for public use. A purchase only is not enough. This is a mere intent, and this purchase is of doubtful import to manifest even such intent, because the company occupied part of the lot with its track. We may more readily attribute the purpose of the purchase as one for its own use. What else did it do? Threw down the fence and left the lot open. It would do that for its own convenience. Do these acts show an unequivocal, deliberate, final intent to abandon ownership, so that in future the company would be clearly barred from otherwise using the lot to its own purposes? Are the plaintiffs to be in peril of the company's so doing in future, and be compelled to rely on such frail evidence of dedication? To hold the plaintiffs to a dedication, we must be able to say that they are full-handed with evidence of facts incontrovertibly showing in all the future that there was such conclusive dedication, and this we cannot say. Taking this oral evidence for all that it is worth, it is not enough to prove this. By so holding, would we leave them safe? We are called upon to say now, in this present suit, that a future suit involving the dedication cannot but be decided against the company in favor of the plaintiffs. To do this, we should have very clear evidence of acts of the company from which it cannot in future escape, and this evidence does not furnish them. Is there a deed—a resolution of the directors making or ratifying a dedication? We do not know. The court "certifies that the defendant introduced no writing purporting to be a formal dedication of said lot No. 55 to the use of the public." If in truth there was any writing, the company should produce it, and that oral evidence does not tell its contents. "Generally, parol evidence, though not excepted to when offered or afterwards, is not competent to prove the contents or effect of a deed." *Warren v. Syme*, 7 W. Va. 474 (syl. point 11). The evidence relied upon to fix dedication, disregarding its secondary character, is too short. It does not prove acts of dedication, settling it beyond question. To cite an instance of the danger of relying upon it, take the case of *Williams v. New York & N. H. R. Co.*, 39 Conn. 509.

A railroad company had a passenger station, and later bought an adjoining piece, making a large space in front of the station, which piece was connected with a public street at one end, and the city made a street to its other end; and the public constantly and freely used the ground, not merely to go to the station, but from the one street to the other. A party, thinking the space was a public highway, bought land adjoining, and built buildings fronting on it, and, in connection with the company, laid a stone walk along the front, of great benefit to his premises. Years afterwards the company undertook to remove the walk, for more room for carriages in front of its station; and upon an injunction it was held that the company had not dedicated the land as a highway, and that it was not estopped to deny a dedication. So, in this case, does the mere purchase of the lot involved in this case when the company needed and used a portion of it for its track, and left it open, which it would prefer to do for its own purposes as long as it chose, without doing a bit of work to make a street, stop the company from reclaiming it to meet future want? We hold that it does not. In fact, is it not more plausible to say that, if the manager did not merely mean that he or some other agent made the dedication, he was giving his own mere opinion that what the company had done constituted a dedication? If so, he may be mistaken. As we are asked to say in advance that for all future suits there was a final dedication, we must demand evidence beyond all controversy; otherwise we imperil the plaintiffs. Mere user for a short time is the strongest element shown, but that is frail reliance, especially as there is no municipal acceptance. "Mere use of a road by the public, for however long a time, will not make a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license revocable at pleasure." *Dicken v. Salt Co.*, 41 W. Va. 511, 23 S. E. 582; *Harris Case*, 20 Grat. 833.

But it is argued that, even if this oral evidence does not show dedication, the fact that on the trial the railroad company took the position that it had dedicated was an admission of that dedication, and constituted ever after an estoppel against its denying such dedication; and this on the principle that, when a party once takes a position in a suit, he cannot afterwards change and take an inconsistent position; that the company could not say on the trial that it had dedicated a way over the lot, and in future deny it. It is very material to see whether the position so taken would be an estoppel absolutely forbidding the company from afterwards contesting dedication, or only an admission going in evidence, to have only such weight as a jury might thereafter give it; for, if it be not an estoppel, we cannot bind the plaintiffs by it, as they must be left free

from danger of revocation of the dedication. I do not regard it such estoppel, though as evidence it might be strong in another contest. *Wilson v. Phoenix*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. In *Beatty v. Randall*, 5 Allen, 441, it was held that a party in an action of tort for conversion of personal property was not estopped by the fact that, in a bill in equity by himself and wife, they asserted a joint property in himself and wife. "The pleadings of a party to one suit may be used in evidence against him in another, not as an estoppel, but as proof open to rebuttal and explanation. But in order to bring such admission home to him, the pleadings must either be signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138. On one trial between the same parties, counsel admitted incorporation of his client, and it was held that it did not estop a denial of incorporation on a second trial, but that that it was evidence as an admission. *Perry v. Simpson Co.*, 40 Conn. 313. A party in an answer made a statement, and it was held that parties claiming under her were not estopped to contest the statement, but it had only the effect of an admission as evidence. *Tabb's Curator v. Cabell*, 17 Grat. 160. See *Penn's Ex'r v. Penn*, 88 Va. 361, 13 S. E. 707; 11 Am. & Eng. Ency. L. 446, 449. We have cited two cases in the Supreme Court of the United States to sustain the contention that the position of the defendant is an estoppel: *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578, and *Michels v. Olmstead*, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671. In the former, D. had a proceeding for discharge as a bankrupt, and W. had notes against him, and got judgment on them in a California court on publication. When D. moved for a discharge, W. opposed it, and D. said that as W. had got judgment by leave of the bankrupt court, which would still stand good, he could not resist a discharge; and the court so held, and granted a discharge. In a subsequent suit in New York by W. against D. to enforce an estoppel, to prevent D. from asserting in any suit that might be brought on that it was void, the Supreme Court held that D. could not say that the judgment was void for want of jurisdiction. This was going far; but, when thought of, it is the ordinary case of estoppel by conduct—where one party takes a position, and succeeds in it, and gets the benefit of it, to another's harm, he is estopped to recant it. In the second case, a party, sued at law upon a written contract, offered evidence to show that it was not intended to be binding, which, on motion of the plaintiff, was rejected, as incompetent to destroy a writing. Afterwards, on a bill to enjoin the prosecution of the action at law, the plaintiff in the action was held estopped from saying that the evidence was admissible in the law action.

Here, too, the party got the benefit of the position which he assumed. Where a party takes a position, and gains its fruit, and thus detriments another, he cannot go back on it.

There is another objection to holding that the plaintiffs can securely rely upon the defense made by the company as their protection in future against its denial of a dedication. There was no plea of such dedication—nothing of record to signally and explicitly manifest that the company admitted, as a binding fact, the fact of dedication. It simply gave some evidence to show it, and asked instructions upon the theory of dedication. The estoppel is inferential—not so plainly manifested as if in an answer or plea. "Certainty is essential to all estoppels." Bigelow on Estop. 578. The door is left too plainly open to the company hereafter to dispute dedication. But even if there had been a pleading explicitly stating the fact of dedication filed by an attorney, I do not think it would be an estoppel, further than for that particular suit. "They [admissions in pleadings] are admissible, also, against him in another suit in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instruction." 1 Am. & Eng. Ency. L. (2d Ed.) 720.

Another consideration detracting from the argument that the position of dedication taken by the company works an estoppel is that it was taken by an attorney. The company was a corporation not physically present, but was represented by an attorney. No resolution of the directory empowering him to admit a past dedication, or then make a new one at the trial, appears. An attorney is a special agent, of limited authority. He may make admissions in matters relating to the progress of the particular trial or case, but do they bind clients elsewhere and for other purposes? Can an attorney, in defending a suit, by taking a position or pleading, admit a dedication, to take away, not merely for the purposes of that suit, but for other suits, the land of a corporation? "Pleadings of a party in one suit may be used in evidence in another, not as an estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts." 1 Whar. Ev. § 838. "Statements in pleadings, signed by an attorney only, not sworn to by the client, are not competent evidence against the latter in another suit, when the statements are made without his knowledge or consent." Note 1 in 1 Am. & Eng. Ency. L. (2d Ed.) 720. It seems to me that there is a difference between an attorney of a corporate and a natural person. Acts of the attorney outside the scope of his authority are not binding on his client. Even in the case of a natural person, the power of an attorney is only to do those acts necessary or incidental to the prosecution and management of the suit, which affects the remedy only, and not the cause of action. Weeks on Attorneys,

382. Hence he cannot waive the essential rights of his client without his consent. He cannot enter a retraxit, commute or compromise his demand, receive pay in anything but money, and the like. Crotty v. Eagle's Adm'r, 35 W. Va. 143, 13 S. E. 59; Wiley v. Mahood, 10 W. Va. 206. As nobody but the directory can pass right to the corporate realty, it seems to me there ought to be shown express authority. I cannot see that the attorney in this case can admit away the right of the company to its land, so as to deprive it forever of that land. I cannot see that his acts would go beyond that suit as a conclusive estoppel—not even as an admission.

We see no reason why we should not repeat our affirmance of the judgment.

(52 W. Va. 375)

#### BRIGHTWELL v. BARE et al.

(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)

##### APPEAL—WHEN LIES—PARTY ENTITLED.

1. Where the final decree is regarded as merely pecuniary, and the matter in controversy, exclusive of costs, is not of greater value or amount than \$100, an appeal therefrom will not lie.

2. To entitle a party to obtain and prosecute an appeal or writ of error in this court, he must not only be a party to the controversy, but the record must show affirmatively that he himself has been prejudiced by the order, judgment, or decree from which the appeal or writ of error is taken.

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County; J. M. McWhorter, Judge.

Bill by W. J. Brightwell against W. W. Bare and others. Decree for plaintiff, and defendants appeal. Dismissed.

W. G. Hudgins, for appellants. Miller & Read and J. J. Swope, for appellee.

MILLER, J. Mary L. Bare, a married woman, the wife of W. W. Bare, owned as her sole and separate estate a house and lot in the town of Alderson, W. Va. She, with her husband, executed to appellee, Brightwell, a joint obligation for a sum of money, for the payment of which she bound the said property. Brightwell commenced his suit in equity in the circuit court of Monroe county, and filed his bill against said Mary L. Bare, her husband and others, to charge said estate with said indebtedness and some other small demands in favor of the other defendants. On the 14th day of September, 1892, a decree was entered in the cause in favor of the defendants Bare jointly for \$57.18, with interest and costs, and in favor of the other defendants for small amounts. The decree also provided for the renting of the property in case said recoveries were not paid within the time prescribed, but the decree was not executed. Plaintiff's decree, except \$24.45, was paid to him. In March, 1893, said Mary L. Bare died intestate, leav

ing surviving her W. W. Bare, her husband, Stella Bare, who intermarried with Oscar Brust, and Nellie Bare, an infant, her only children and heirs at law. On the 3d day of October, 1894, W. W. Bare, by his deed of that date, conveyed his curtesy in said real estate to J. Orr Nickell. In 1894 Joseph N. Alderson commenced his suit in equity in the said circuit against said W. W. Bare and others to subject said property to the payment of a debt alleged to be due him from W. W. Bare. Certain decrees were made and entered in said last-named suit, including a decree to rent the property to satisfy Alderson's demand. Both suits were removed to the circuit court of Summers county, and consolidated, or further heard together, as appears from the imperfect and confused record presented. The property was rented, under the decree in Alderson's suit, to G. W. Graves, for a term of years. In 1898 Brightwell filed his amended bill in his said suit, and made parties defendant thereto said W. W. Bare, C. E. Lynch, as administrator of Mary L. Bare, deceased, G. W. Graves, James Mann, alleged to be a creditor of Mary L. Bare and W. W. Bare, Stella Brust, and Nellie Bare. Summons was issued on this amended bill, and served on all of the defendants thereto. W. H. Boude was appointed guardian ad litem for Nellie Bare, and filed her answer to said amended bill, to which answer plaintiff replied generally. None of the other defendants made any appearance in said cause. There was a reference to a commissioner, who made a report. On the 18th day of September, 1899, the cause was again heard by the court upon the papers formerly read and proceedings had therein, upon the answer of Nellie Bare, by her guardian ad litem, and general replication thereto, and upon the commissioner's report, whereupon the court pronounced therein personal decrees as follows: That plaintiff, Brightwell, recover from W. W. Bare and C. E. Lynch, administrator of Mary L. Bare, out of any money in the administrator's hands unadministered, \$24.45, with costs, less \$27.20, already paid thereon; that James Mann recover from W. W. Bare and C. E. Lynch, administrator, out of the funds in his hands unadministered, \$167.13, and that said G. W. Graves recover \$180 out of the proceeds of the sale of said property, which sum he agreed to take for the possession of the property for the period for which he had rented it. All of said sums were to bear interest from the 2d day of May, 1899, and they were each declared to be liens on said property in the order and priority as above stated. The decree further provides that, unless said sums should be paid by said C. E. Lynch, administrator of said Mary L. Bare, deceased, W. W. Bare, or the heirs at law of said Mary L. Bare, deceased, or some other person for them, within 15 days from the rising of the court, then James H. Miller and J. J. Swope, who were ap-

pointed special commissioners for the purpose, should sell said house and lot, after having given the required notice. Sale of the property upon the terms prescribed was afterwards made by the special commissioners above named to Frank N. Mann, who was not a party to either of said suits, for \$300, who complied with the terms of sale; and on the 14th day of May, 1901, said sale was, by the court, confirmed without exception; and said James H. Miller, special commissioner, was directed to convey said property to the purchaser, and to collect and disburse the purchase money therefor, according to the requirements of former decrees. On the 18th day of May, 1901, E. Chase Bare, as administrator of J. Orr Nickell and said Stella Brust, presented to the court their several and respective petitions, and asked leave to file the same in said cause, to the filing of which the plaintiff, Brightwell, objected. The said objection was, by the court, sustained, and said petitions rejected. From this last decree rejecting the petitions the said E. Chase Bare, administrator as aforesaid, and Stella Brust, obtained from a judge of this court an appeal.

The petition of Stella Brust, alleges, in substance, that she is the daughter of W. W. Bare and Mary L. Bare, against whom the bill in chancery was filed by said W. J. Brightwell in the lifetime of said Mary L. Bare, she having since died, leaving petitioner and another daughter, Nellie, an infant, her only children and heirs at law; that at the time of her death said Mary L. Bare owned the house and lot in Alderson, mentioned in the said bill and proceedings thereon; that since the death of said Mary L. Bare, an amended bill had been filed by plaintiff, making petitioner and her sister parties to the suit, and praying a sale of said property; that on the 16th day of May, 1899, a decree was entered, which is a personal judgment in favor of the plaintiff against C. E. Lynch, the administrator of Mary L. Bare, for \$24.45 and costs, including an attorney's fee of \$15, and declaring said judgment a lien on the land of said Mary L. Bare; that in the same decree there is a personal judgment against C. E. Lynch, as administrator of Mary L. Bare, in favor of James Mann, for \$167.13, another in favor of J. N. Alderson for \$31.12, and another in favor of George W. Graves for \$180; that on the 18th day of September, 1899, another decree was entered in substance the same as that entered on the 16th day of May, 1899; that both decrees declared the aforesaid judgments to be liens upon the real estate of Mary L. Bare, and provided that, unless they were paid by her personal representative, her land should be sold, and appointed J. H. Miller and J. J. Swope special commissioners to make sale thereof in pursuance of said decree; that said commissioners did undertake to sell the said real estate at public auction to W. W. Bare, but at the last term of the court a decree

was entered setting aside that sale and directing another; and that petitioner is advised that the court had no jurisdiction to enter the personal decree as aforesaid. Petitioner then prays that the said decrees may be reversed for the reasons set forth in her petition, and for general relief.

The petition of said E. Chase Bare, administrator of J. Orr Nickell, alleges that his intestate was, in his lifetime, a creditor of W. W. Bare, and to secure him the said W. W. Bare, on the 3d day of October, 1894, made a deed, by which he conveyed to said J. Orr Nickell all his interest in the real estate of his deceased wife, being a life estate as tenant by the curtesy in a certain house and lot in the town of Alderson of which said Mary L. Bare was seised and possessed at the time of her death; that, while the said deed is an absolute deed of the life estate of the said W. W. Bare, it was in fact only intended as a mortgage to secure the said J. Orr Nickell an amount due, and any further advancements which it was expected and agreed would be made by the said J. Orr Nickell to the said W. W. Bare, and was so treated by the said J. Orr Nickell, who did not reduce the said property into possession, but always claimed his right to so do when it should become necessary; that since his qualification as administrator of the said J. Orr Nickell he has learned that the said life estate is advertised for sale by virtue of a decree entered in the cause pending in which W. J. Brightwell is plaintiff and the said W. W. Bare and others are defendants, which was commenced in the lifetime of said M. L. Bare; that the said J. Orr Nickell was never made a party to the said suit, and had no actual notice of it at the execution of the said conveyance, and that there were no judgments, decrees, or lis pendens docketed in the clerk's office of the county court of Monroe, wherein the said property is located, and that the said J. Orr Nickell was a purchaser for value of the said life estate, without notice, actual or constructive, of the said proceedings, which are in no way binding upon him or his estate; that the proceedings, orders, and decrees entered in the said suit are inoperative, and of no binding force upon him in his lifetime or upon his estate. Petitioner prays that the said deed may be treated as a mortgage for the benefit of the estate of the said J. Orr Nickell, and that all orders and decrees entered in the suit may be declared inoperative, and of no binding force upon him or his estate, and that the said life estate of the said W. W. Bare may be subjected to the payment of the indebtedness of the said W. W. Bare to the said J. Orr Nickell in preference to the debts set up or attempted to be set up and enforced against the said W. W. Bare in the said proceedings. Petitioner also alleges that the said J. Orr Nickell has died since the last term of this court, and that petitioner has but recently qualified upon his estate. He is

therefore unable to file with his petition a statement of the said indebtedness, but he is sure that the amount due from the said W. W. Bare to his intestate is more than the value of the said life estate. He prays, therefore, that, before any further orders or decrees affecting the said life estate are made, he may have an opportunity to have a settlement with the said W. W. Bare of the accounts which have been running between him and the said J. Orr Nickell for a long time, and that he may have a decree for the said life estate in conformity with this petition. He also asks such other and general relief as the court may see fit to grant.

It is contended by appellee that the appeal was improvidently awarded, and should be dismissed. Neither of said petitions makes any person a party thereto, and neither of them prays any process thereon. No party to either of said suits, except the appellant, appeared to said petitions, or to either of them. The said petitions are defective and insufficient. *Shinn v. Board of Education*, 39 W. Va. 499, 20 S. E. 604; *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561. Said J. Orr Nickell was not a party to either of said causes, and, so far as the record shows, no mention of him or of his alleged interest in the subject-matter of the suits was made in any of the pleadings therein. "It is well settled that, to entitle a party to obtain and prosecute a writ of error or appeal in this court, he must not only be a party to the controversy, but the record must affirmatively show that he has been prejudiced by the order, judgment, or decree from which the writ of error or appeal is taken." *Miller v. Rose*, 21 W. Va. 291, and cases cited; *Williamson v. Hays*, 25 W. Va. 609-613. In *Reed v. Nixon*, 36 W. Va. 685, 15 S. E. 417, the court says: "At all events, it is a well-established principle that an appellant must show by the record not only that there is error in the judgment of the circuit court, but that he himself has been thereby injured." In *Stout v. Philippi M. & M. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843, it is held: "One not a formal party cannot appeal, though affected as a pendente lite purchaser." The decree in favor of appellee, Brightwell, is for \$24.45 and costs, and, being simply a pecuniary decree for less in amount than \$100, exclusive of costs, the appeal as to him should not have been allowed to either of the appellants. *McClagherty v. Morgan*, 36 W. Va. 191, 14 S. E. 992; *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011. Neither the estate of said J. Orr Nickell nor his personal representative is bound by any of the decrees in said chancery cause. Therefore, admitting to be true the allegations of the petition of said administrator, his remedy, if any, is by original bill.

The said several decrees complained of are decrees on a bill taken for confessed as to

said Stella Brust. She was not entitled to her appeal until she had made her motion, after reasonable notice to the opposite party, his agent or attorney in fact or at law in the court below, or to the judge thereof, to have said decrees reversed, and said motion had been overruled in whole or in part. Code 1899, c. 134, § 6. She made no such motion. Her petition cannot be treated as such notice as to any of the parties except Brightwell, because the same was not served upon nor appeared to by any opposite party other than Brightwell.

The circuit court did not err in rejecting said petitions. For the reasons stated, the appeal was improvidently allowed, and must be dismissed.

(53 W. Va. 79)

### STEVENS v. FRIEDMAN.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### PLEADING—TRIAL BY JURY.

1. It is a settled rule of the common law, strictly adhered to by this court, that before a trial can be had by a jury, in a common-law suit, on issue joined, the defendant must put in or file his plea, and the record must show this fact, and the character of the plea on which the issue is joined.

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County; F. A. Guthrie, Judge.

Action by Cora E. Stevens against Jacob Friedman. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Nash and Linn & Byrne, for plaintiff in error. J. C. Thomas and J. W. Kennedy, for defendant in error.

DENT, J. Jacob Friedman, defendant, complains of a judgment against him in favor of Cora Stevens, plaintiff, rendered by the circuit court of Kanawha county on the verdict of a jury, for the sum of \$500, in an action of trespass. The case is, in short, this: The plaintiff went to the defendant's store, and, by pretending she wanted to take it, got possession of a hat which she did not want, and on which she had previously paid 50 cents, for the purpose of compelling the defendant to repay her the 50 cents. He, thinking she was going to carry away the hat without paying for it, rushed at her and seized the hat, taking it from her, and pushing her towards the door. She, claiming that she was greatly wounded in her feelings and hurt in her side, brought this suit, which resulted in the judgment aforementioned.

The first error assigned is that no pleas were entered, or issue joined thereon. The record fails to show that the defendant pleaded in any manner to the declaration, but contains this order, to wit: "This day came the defendant, by his attorneys, and thereupon the defendant demurred to the declaration, which demurrer the plaintiff joined,

which demurrer, being argued by counsel and considered by the court, is overruled, and issue is thereon joined." If the defendant put in a plea, the record fails to show it, and the character of the verdict found by the jury would appear to indicate that no plea was before them, but that they were simply executing a writ of inquiry on confession of guilt of the grievous charges alleged in the declaration. Even in such case it would be hard to say, if it were necessary, that such verdict was justified by the evidence, but in such case the record should show that it was a judgment by *nil dicit* or default. On the contrary, it tends to show some kind of appearance, and the jury was sworn to try the issue joined. What is left to mere matter of conjecture. This case is clearly governed by the case of *Ruffner v. Hill*, 21 W. Va. 152. Judge Green, in that case, on page 159, fully answers the argument here made in favor of the contention of the plaintiff in words as follows, to wit: "It is said the only issue which could be made up is the one actually tried, and it would be too technical to reverse because the formality of entering the plea of not guilty was omitted. But these cases abundantly show that the court has not reversed judgments entered upon such verdicts because there was any doubt as to the real issue which the jury tried, nor because the defendant might have made up some other issue if he had pleaded. The reason for these decisions is entirely different from what this argument presumes. The real ground on which these decisions rest is that by the common law the court has no right to make up the issue and impanel a jury to try it, but the parties, by their pleadings, must first come to an issue, and then it is tried by a jury. When, therefore, the record shows that the parties, by their pleadings, have not come to an issue, but nevertheless the record shows that the issue was tried, this issue must either have been illegally made by the court, or, by a blunder, it must have been assumed to have been made by the parties, when in fact it was not. In some of the cases we have cited, the record showed distinctly what was the exact issue tried by the jury, and also that the verdict was distinctly responsive to such issue, and that it was the only issue the parties in the particular case could have made, had they by the pleadings made any issue. Yet the judgments were reversed because no issue, so far as the record showed, had been formed. It has thus been held as absolutely necessary in every case that an issue shall be made up by the pleadings before a jury can be impaneled to try the case." According to this holding, the record must show that the defendant put in a plea, either in writing or by word of mouth, and what such plea was, before issue thereon can be made up and joined. This was not done in this case. If the defendant put in any plea, the record does not show it, and the presump-

tion is that there was none, and the jury took none into consideration. All of which appears to have been matter of inadvertence, bearing heavily on the defendant. In the light of this holding, it becomes unnecessary to consider the other assignments of error, as the circuit court on rehearing may correct all such errors, if any.

The judgment is reversed, the verdict of the jury set aside, and the case is remanded, with leave to the defendant to file such plea as he may be advised is necessary, and, on issue being joined thereon, that a trial thereof may be had as the parties may elect.

(52 W. Va. 614)

**ECHOLS v. TRACEWELL et al.**

(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

**APPEAL—REVERSAL—DECREE ON BILL AND ANSWER.**

1. A decree reversed for the reason that the circuit court, in its final determination, inadvertently overlooked the fact that the answer, when filed, had been replied to generally. *Armstrong v. Town of Grafton*, 23 W. Va. 50.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County;  
L. N. Tavenner, Judge.

Bill by Sallie P. Echols against W. S. Tracewell and others. Decree for defendants, and plaintiff appeals. Reversed.

Merrick & Smith, for appellant. V. B. Archer and Wm. Beard, for appellees.

DENT, J. Sallie P. Echols appeals from a decree of the circuit court of Wood county dismissing her bill filed against W. S. Tracewell, seeking to cancel a tax deed executed to him by the clerk of the county court of said county, and for other relief. The plaintiff alleges in her bill, in substance, that she is the owner in fee of a certain lot of land, situated near the Little Kanawha river, opposite the city of Parkersburg, in said county, which was conveyed to her on the 30th day of October, 1899, by J. N. Robinson, and that the defendant had obtained from B. F. Stewart, clerk of the county court of said county, a tax deed for such lot of land, bearing date the 19th day of February, 1901; reciting therein a sale by O. A. Wade, sheriff of such county, in the month of February, 1900, for \$1.45 taxes delinquent, and charged thereon in the name of J. N. Robinson, in the year 1897. Plaintiff further alleges that no such assessment of taxes was made, no such delinquency occurred, and no such sale was ever made, but that such tax deed is wholly illegal, null, and void. The defendant files his answer, in which he admits that there was no assessment, delinquency, or sale in the name of J. N. Robinson, but, by way of avoidance of plaintiff's charges, alleges that, by mistake of the clerk, such lot of land was placed on the tax books in the year 1897 in the name of J. R. instead

of J. N. Robinson, and was returned delinquent, and the sale was made in the name of J. R. Robinson, and that in making the deed the name was corrected. He files with his answer a copy of the land book, showing a tract or lot of land assessed in the name of J. R. Robinson for the year 1897, described as a "lot Spencer Est., Con. by B. F. Stewart, C. W. C. C." To this answer the plaintiff replied generally. No proof was taken by the defendant. The circuit court, in deciding the case, as shown by its final decree, overlooked the fact that a general replication had been entered on the 27th day of November, 1901, and proceeded on the 23d of August, 1902, to decide the case on bill and answer, without regard to the general replication. The case, as made out by bill and answer, is entirely different from that appearing on bill and answer with general replication thereto. On bill and answer the new matter set up by defendant in avoidance of plaintiff's claim is taken as true, and no proof thereof is required. But on bill and answer with general replication, such new matter must be sustained by proof or wholly disregarded on the hearing. This case, as it now stands, is controlled by the case of *Armstrong v. Town of Grafton*, 23 W. Va. 50, wherein it is held: "If by inadvertence the circuit court decides a cause upon the bill and answer, when the record shows that the answer had been replied to generally, and the case made by the bill, answer, and general replication, this court will reverse the decree so entered on the bill and answer. It will, however, enter no decree in the cause made by the bill, answer, and general replication, as such cause has never been before the circuit court for consideration, and has never been acted upon by it. This court will simply remand the case to the circuit court, to be proceeded with as if no decree had been entered in the case."

The decree is reversed, with costs to the appellant, and the cause is remanded.

(53 W. Va. 572)

**HUTTON v. HOLT, Judge, et al.**

(Supreme Court of Appeals of West Virginia.  
Dec. 20, 1902.)

**MANDAMUS TO JUDGE.**

1. Unless the petitioner shows a clear legal right to have the thing done of which he complains, mandamus will be denied.

2. The syllabus in the case of *Phares v. Holt or Marsteller v. Ward* (decided at this term) 43 S. E. 178, approved.

(Syllabus by the Court.)

Application by Alfred Hutton for writ of mandamus to John Homer Holt, judge, and others. Writ denied.

W. B. Maxwell, for petitioner. C. W. Dalley, for respondents.

DENT, P. Alfred Hutton asks the court for a writ of mandamus to compel Hon.



John H. Holt, judge of the circuit court of Randolph county, to enter up a judgment in petitioner's favor against Elihu Hutton in a certain action at law in such court pending, wherein petitioner was plaintiff and Elihu Hutton defendant. Petitioner brought suit against the defendant on the 22d day of August, 1901. Summons was served and office judgment entered at rules, and the case was placed on the trial docket for the October term, 1901. Petitioner filed with his declaration an affidavit as to the amount he was entitled to recover. No action was taken at that term, nor at the succeeding January term, but at the May term the petitioner moved the court to enter up judgment. The defendant resisted the motion, asked that the office judgment be set aside, and he be permitted to plead. The court overruled petitioner's motion, set aside the office judgment, and permitted the defendant to file a plea. The petitioner then applied for this writ, claiming that the court was acting without authority in setting aside the office judgment, as it had become final. This is the same question presented in the case of Phares v. Holt, Judge, or Marstiller v. Ward (decided at this term) 43 S. E. 178. The law is fully settled in that case, and it is useless to repeat it here.

The affidavit filed by the petition to obtain judgment is fatally defective, in that it fails to conform with the statute in alleging that the debt is not only due, but is unpaid. The court was not bound, therefore, to enter up judgment until a proper affidavit was filed, nor is the petitioner entitled to a mandamus to compel him to do so. A clear legal right to have the thing done must be shown before a mandamus will be awarded to compel the doing thereof.

For this reason the mandamus is refused, and the petition dismissed.

(52 W. Va. 537)

### ERWIN v. HEDRICK.

(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

#### DEED—UNDUE INFLUENCE—SETTING ASIDE.

1. To set aside a deed for undue influence, it must be shown to the satisfaction of the court that the grantor, at the time of the execution of the deed, had no free will, but stood in vinculis; or it must appear that the undue influence was such as to destroy free agency, and substitute the will of another for that of the person nominally acting. *Delaplain v. Grubb*, 30 S. E. 201, 44 W. Va. 612, 67 Am. St. Rep. 788. *Held*, in this case there is no such proof.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Bill by Rebecca R. Erwin against W. A. Hedrick. Decree for defendant, and plaintiff appeals. Reversed.

J. W. Arbuckle, for appellant. Preston & Wallace and Simms, Enslow & Alderson, for appellee.

MILLER, J. In the above-entitled cause the circuit court of Greenbrier county entered two decrees—one on the 8th day of December, 1900, and the other on the 6th day of May, 1901. From said decrees the plaintiff was allowed an appeal to this court. The general object of the suit is to have canceled and set aside a deed executed by the plaintiff, Rebecca R. Hedrick, now Erwin, to the defendant, William A. Hedrick, bearing date on the 15th day of August, 1894; and also an agreement of said Hedrick with said Erwin, bearing the same date; the deed and agreement, as claimed by appellant, constituting but one contract.

The bill alleges that the plaintiff was an unmarried woman, inexperienced in business, and was induced, by misrepresentations and undue influence of defendant, to execute said deed—which, at the time, she did not understand—and to accept the said agreement; that the contract is unjust and inequitable; that the consideration for the contract is inadequate and voluntary; and that the plaintiff intended to make a will, or a paper having the force and effect of a will, instead of the said deed; and prays that the deed and agreement may be canceled and set aside. The defendant answered, denying all of the material allegations of the bill; and upon general replication being filed a mass of testimony was taken and put into the record. Upon final hearing the circuit court, by its first-mentioned decree, refused to cancel said deed and agreement, but did decree the specific performance by said Hedrick of said agreement with a certain interlineation therein, hereinafter referred to; and in its said second decree adjudged that the defendant was and is entitled to the possession of the old mansion house and its appurtenances on the farm in controversy.

The material facts in the record may be summarized as follows: The maiden name of the plaintiff was Hedrick. Her father, Abram Hedrick, who died on the 2d day of March, 1894, by deed, in which his wife, Sarah Hedrick, did not join, several years before his death conveyed to the plaintiff, then about 33 years of age, and unmarried, a tract of land situate in Greenbrier county, containing 195½ acres, with considerable personal property; that plaintiff, soon after her father's death, took possession of the land and other property; that said Sarah Hedrick had dower in the land, and lived thereon with plaintiff, until her death in April, 1896; that D. C. Hedrick, a brother of plaintiff, was a tenant of plaintiff on said land; and Fred Hedrick, another brother, was next her tenant until 1891, but afterwards he left the land, and in 1890 went West. In 1893 the defendant, W. A. Hedrick, a cousin of plaintiff, then about 24 years old, leased the farm from plaintiff until 1895. Previous to that time defendant had attended a business college at Staunton, Va., and had graduated therefrom, and afterwards, and before renting the land, had done some work for Fred Hedrick on the

land and on a sawmill. By the terms of the lease plaintiff was to furnish everything, board defendant and his hands, and was to receive as rent one-half of the crops raised, and was also to give defendant one-half of the increase of the live stock. During this tenancy defendant had some business positions offered to him, which he had been considering, and had taken some steps toward the acceptance of one of them at the expiration of his lease; but plaintiff, to induce defendant to stay on the land, offered to give him the farm in consideration that he would pay certain sums of money for her and remain. Plaintiff also wrote a will, purporting to give the farm to defendant, and handed it to defendant for examination and consideration. Afterwards, on the 15th day of August, 1894, defendant went to Lewisburg, and consulted John A. Preston, Esq., an attorney at law, concerning this matter, and was advised by Preston that, inasmuch as he proposed to build upon the land, and otherwise improve the same, if the offer of plaintiff should be accepted by him, it would be better for him to have a deed and an agreement containing the contract of the parties. Thereupon the said deed and agreement were prepared by Preston, as appeared to him proper in such case, and as they now appear in the record, except the signatures of the parties thereto and of the officer who certified the acknowledgments thereof, and the interlineation in the agreement hereinafter discussed. The said deed, agreement, and will were then taken back by defendant, and delivered to the plaintiff, who read the deed and agreement as prepared, and stated that she liked their form better than the paper which she had written. Plaintiff kept the deed and agreement in her possession until the 26th day of October following. On that day, plaintiff having previously arranged the time, the defendant went with her, at her request, to Levi Claypool, a notary public, and then and there plaintiff signed and acknowledged the said deed as prepared, and delivered it to defendant in the presence of the two witnesses who attested the same by subscribing their names to the "Memo." annexed thereto, at her request. The agreement was at the same time signed and acknowledged by the defendant, and delivered to the plaintiff. Whether the agreement was interlined before its execution or after it was executed and delivered to the plaintiff is a controverted question in this suit. It further appears that plaintiff stated at the time of the execution of the deed that she had not been persuaded or influenced to do the act, but that she had acted of her own free will and accord; at other times, that she knew what she had done; that she was satisfied therewith; that she did not intend that any of her property should go to her relatives, and that she meant that her property should remain just as the deed provided; and on other occasions she declared that she understood the effect of a recorded deed, but not of an un-

recorded deed. It seems that this deed was not to be recorded until after the death of plaintiff's mother. Plaintiff says it was not to be recorded until after her death. For the reason that the deed was not to be recorded until some future time, Preston advised defendant that witnesses to the execution and delivery of the deed might save the parties trouble about the matter thereafter. In not wanting the deed put to record by defendant the plaintiff seemed to be influenced by a desire to avoid annoyance and criticism from her mother and other relatives, who had busied themselves about the transaction, and were dissatisfied therewith. Defendant, after obtaining the deed, which was not recorded until June 21, 1899, worked upon and improved the land as his own, without objection from plaintiff; and was assisted by her to some extent in the erection and completion of some buildings thereon, which cost \$800 or \$900. In the meantime the defendant was married, and, with his wife, continued to live on the farm.

On the 30th day of August, 1899, plaintiff was married to Robert F. Erwin, and afterwards, in 1900, with her husband, went to the state of Missouri to reside. Shortly before her marriage, and doubtless in contemplation of the same, she commenced this suit. The deed and agreement, with the interlineation therein, are in substance and effect as follows: "This deed, made and entered into this 15th day of August, 1894, between Rebecca R. Hedrick of the first part and William A. Hedrick of the second part, both of Greenbrier county, West Virginia, witnesseth: That the said party of the first part, for and in consideration of said party of the second part providing said party of the first part with a good and comfortable support and home on the tract of land hereinafter mentioned and described and in the house where said party of the first part now resides, with all the attention necessary to make the said party of the first part comfortable for and during the lifetime of the said party of the first part, and in further consideration of the said party of the second part paying to William A. Hedrick the sum of five hundred dollars, to Mary A. Fry, wife of Jacob Fry, the sum of \$380.00, and to Daniel C. Hedrick one hundred and seventy-five dollars, said sums to be paid as aforesaid to be paid as soon after the death of said party of the first part as said party of the second part can make them conveniently, said sums so to be paid as aforesaid not to draw interest until the death of said party of the first part, has given, granted, bargained, and sold and by these presents does sell and convey, with general warranty of title, unto the said party of the second part, his heirs and assigns forever, that certain tract or parcel of land situate, lying, and being in Fort Spring District, Greenbrier county, West Virginia, on Greenbrier river, joining the lands of John Lewis, Harvey Coffman, and Price Coggman, being the same tract of land

deeded to said party of the first part by her father, Abram Hedrick, now deceased, and being the same tract of land upon which she now resides, containing 195 $\frac{1}{4}$  acres, more or less; to have and to hold the land hereby conveyed unto said party of the second part, his heirs and assigns, forever. It is expressly understood that a lien is hereby retained on the land hereby conveyed for the support and maintenance aforesaid of the said party of the first part during her life, and also for the payment after the death of said party of the first of the aforesaid mentioned sums of money, to wit, the sum of five hundred dollars to said William A. Hedrick, three hundred and eighty dollars to said Mary A. Fry, and one hundred and seventy-five dollars to Daniel C. Hedrick; and also in consideration of the undertakings above mentioned by the said party of the second part the said party of the first part does hereby sell and convey to said party of the second part all of her personal property, consisting of horses, cattle, sheep, hogs, farming implements, household furniture, kitchen furniture, etc. In witness whereof the said party of the first part has hereunto set her hand and seal this the day first above written. Rebecca R. Hedrick. [Seal.]” This deed is duly acknowledged by said Hedrick before Levi Claypool, notary public, on the 26th day of October, 1894, and has subjoined thereto the following: “Memo: Rebecca R. Hedrick this 26th day of October, 1894, delivered this deed to William A. Hedrick in our presence as witness our hands. Levi Claypool, O. C. Claypool.” And it appears to have been recorded on the 21st day of June, 1899. “This agreement, made and entered into on this 15th day of August, 1894, between William A. Hedrick of the first part, and Rebecca R. Hedrick of the second part, witnesseth: That the said party of the first part, in consideration of the conveyance to him of the farm of 195 $\frac{1}{4}$  acres and all her personal property by said party of the second part by deed dated this day, does hereby undertake and agree to support in a good and comfortable manner and furnish a home in the house upon said tract of land of the said party of the second part during her life, with all the attention necessary to make said party of the second part comfortable, and further to pay, as soon as he conveniently can after the death of the said party of the second part, to William A. Hedrick the sum of five hundred dollars, to Mary A. Fry, wife of Jacob Fry, the sum of three hundred and eighty dollars, and to Daniel C. Hedrick the sum of one hundred and seventy-five dollars; all of which is set out in said deed of said party of second part to said party of the first part hereto, said farm and personal property having been turned over to me together with the aforesaid deed (it being understood that the said R. R. Hedrick is to have control of same during her life, and is to receive one-half of the income for the support mentioned in deed, and to pay taxes and other farm expenses) upon the execution and

delivery hereof, as witness my hand and seal. W. A. Hedrick. [Seal.]” This agreement is also duly acknowledged before said Claypool, notary public, on the 26th day of October, 1894.

There is much more of the depositions relating to various matters not pertinent to the real points in controversy. From the whole record I conclude that both plaintiff and defendant were capable of knowing and did know what they were doing when they executed the deed and agreement; that the grantor had the legal capacity at the time to make the deed; that the facts and circumstances of the case, as presented, do not prove that plaintiff was induced to execute and deliver the deed by reason of misrepresentations, undue influence, or fraud of the defendant; and that the principal motive which actuated the plaintiff to execute and deliver the deed was to secure her support and maintenance and provide for the payment of her debts and the several sums required by her to be paid by the defendant as specified in the deed, as it does not appear that she had any prospect of marriage at that time. The value of the farm at the date of the deed was about \$2,400. By accepting the deed, the defendant became liable for something over \$1,400, made up of the indebtedness of the plaintiff and of sums required by her to be paid by the defendant. This sum includes \$300 for which he afterwards became surety for the plaintiff. The land was then incumbered by the dower of said Sarah Hedrick therein, besides “the good and comfortable support and home” for the plaintiff in the house on the land during her life, to be furnished by defendant, and for which a lien was reserved on the land in the face of the deed. The facts do not justify the contention of the plaintiff that the consideration for the contract was and is inadequate and voluntary. There is nothing in the record to sustain the allegation that the plaintiff, at the time she executed and delivered the deed, intended to make a will, or that she believed the paper so executed and delivered by her to be a will.

In *Delaplain et al. v. Grubb et al.*, 44 W. Va. 623, 30 S. E. 205, 67 Am. St. Rep. 788. the court says: “If all that is suggested against List’s acts were fully true, it would not amount to undue influence in the eye of the law, for it must be of such a nature as to overcome the free agency. *Forney v. Ferrell*, 4 W. Va. 729. Both as to deeds and wills the underlying idea is that the influence must be such as to destroy free agency, and substitute the will of another for the person nominally acting. 27 Am. & Eng. Enc. Law, 453. The highest court in the land has put the principle so strongly as to say that, to set aside a deed or will for undue influence, it must be shown that the party had no free will, but stood in vinculis. It must amount to force or coercion, destroying free agency. *Conley v. Nailor*, 118 U. S.

127, 135, 6 Sup. Ct. 1001, 30 L. Ed. 112." It seems useless to say that the case before us does not approximate the rule thus established.

As to the second charge in the bill, 2 Pomeroy, § 920, says: "The rule is well settled that, where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation." Again, in the same section: "The doctrine, however, is now settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not a ground for refusing the remedy of specific performance. In order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud. In short, inadequacy as a negative defense and as an affirmative ground for cancellation is governed by one and the same rule." Considering the respective ages and environments of the parties, they were fully capable of understanding, and did understand, the value of the land, and the consideration to be paid therefor. The contract, so far as the record discloses, was unaccompanied by any inequitable incident caused by defendant. The case presented does not come within the rule here stated, but, in addition to this, the consideration to be paid for the land appears to have been its full value.

It is useless to discuss the third proposition in the bill. Suffice it to say that the deed was executed and acknowledged by the plaintiff, who was at the time fully capable of making such instrument; that it was delivered by the plaintiff to the defendant uninfluenced by misrepresentation, undue influence, or fraud on the part of the defendant; and was and is valid for the purposes therein stated. It is conceded that the original draft of the agreement as prepared by Preston did not contain the words: "It being understood that the said R. R. Hedrick is to have control of same [meaning the farm] during her lifetime, and is to receive one-half of the income for the support mentioned in the deed to pay taxes and other farm expenses." There is conflict in the evidence as to when and by whom this interlineation was made. Plaintiff testifies that defendant told her that he had made the interlineation, and that she recognized it as his handwriting. The defendant, however, avers in his answer, and also testifies, that he did not write the interlineation; proves by a number of witnesses that it is not in his handwriting; swears that it was put into the agreement after he had signed, acknowl-

edged, and delivered the same to plaintiff; that he had never seen the interlineation until after this suit was instituted; that the agreement had been in the plaintiff's possession from the time of its delivery to her, and that some of her relatives had had access thereto. Bearing in mind that plaintiff, after the execution of said deed and agreement, had changed her plans for the future; that she contemplated marriage, and did marry, and removed to Missouri to reside; that she is presumed to have known that under the deed she could not require the defendant to provide her with "the good and comfortable support and home on the tract of land and in the house where she then resided" if she should leave the same and live in Missouri—it cannot be fairly inferred that the interlineation in said contract was conceived and interpolated therein by the defendant in order that the plaintiff might, notwithstanding the terms of the deed, still have control of the land during her life, and receive one-half of the income thereof for the support mentioned in the deed. *Isner v. Kelley*, 51 W. Va. 82, 41 S. E. 158. It is not probable that defendant made the interlineation in question. The conclusion is that the interlineation in the agreement was not a part of the contract at the time of the execution, acknowledgment, or delivery thereof by defendant to plaintiff; that the interlineation was made in the agreement without the knowledge or consent of the defendant, and without his acquiescence therein; and that, therefore, the circuit court erred in holding "that the minds of the plaintiff and defendant met as to the terms mentioned in the interlineation in said contract; and that the plaintiff was to have control of said land during her lifetime, and to receive one-half of the income of said tract of land conveyed by said deed for the support mentioned in said deed and to pay taxes and other farm expenses; and that said W. A. Hedrick is sole tenant of said tract of land during plaintiff's life."

The said decree, made and entered on the 8th day of December, 1900, must, therefore, be modified in so far as it determines and adjudges said interlineation to be a part of said contract, and said interlineation in said contract is expunged, and held for naught. The part of said decree adjudicating that said W. A. Hedrick is sole tenant of said tract of land during the plaintiff's life must also be stricken out and disregarded; and said contract is restored to its original language and terms, independent of and without regard to said interlineation, or any part thereof; and, the right of the appellant to the occupancy of the house in which she resided on the said farm at the date of the execution and delivery of said deed not being sufficiently reserved in the said decree made on the 6th day of May, 1901, the said last-mentioned decree must also be modified so as to reserve to said Rebecca R. Erwin, née Hedrick, the right to the occupancy of said house,

if she elects to occupy the same. The said two decrees are therefore reversed, with costs to the appellee, and the cause is remanded to the circuit court to be therein further proceeded with, according to the principles herein announced, and according to the rules governing courts of equity.

(52 W. Va. 647)

**MOUNDSVILLE, B. & W. RY. CO. v. WILSON et al.**

(Supreme Court of Appeals of West Virginia.  
Nov. 22, 1902.)

**ACTION ON BOND—ALLEGATION OF NONPAYMENT—NOTICE—EVIDENCE.**

1. The words in a declaration on a penal bond that the defendants "the same to pay hath hitherto wholly neglected and refused, and still do neglect and refuse," held to be a sufficient allegation of nonpayment of the penalty, on general demurrer.

2. Where the opportunity to know certain facts is as equally open to the defendants as to the plaintiff, it is not necessary to allege or prove notice thereof.

3. The failure to prove facts immaterial to the prima facie case made out by the plaintiff will not invalidate, or be considered sufficient grounds for the reversal of, a judgment founded on the evidence of the plaintiff alone.

(Syllabus by the Court.)

Error from Circuit Court, Marshall County; Thayer Melvin, Judge.

Action by the Moundsville, Benwood & Wheeling Railway Company against Benjamin Wilson and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. B. McClure, for plaintiffs in error. Hooten & Hooten, for defendant in error.

DENT, P. J. W. Burchinal and others obtained a writ of error to a judgment of the circuit court of Marshall county rendered on the 20th day of July, 1901, in favor of the Moundsville, Benwood & Wheeling Railway Company for the sum of \$3,065.55, and assign the following errors: First, the overruling of the demurrer to the declaration; second, the rejection of the plea of ultra vires; and, third, that the judgment is not sustained by the evidence.

The declaration is founded on a bond executed by the defendants, with the following condition, to wit:

"The condition of the above obligation is such that whereas the above-bound principal obligors and M. F. Cox, the stockholders of the Moundsville, Benwood & Wheeling Railway Company, did, on the twenty-first day of August, 1897, enter into a written agreement, under seal, with the above-named obligees, the purpose of which was to provide for a reorganization of the said railway company (which is now in the hands of a receiver under an order of the United States Circuit Court) and for the payment of its debts by means chiefly to be furnished by the said obligees; and whereas it is, among other things, provided by the said agreement that the parties

of the first part therein (corresponding with the principal obligors herein) shall well and truly pay off and discharge all the debts and liabilities now existing against the said company in excess of one hundred and fifteen thousand dollars, which last-mentioned amount is to be settled in part by the use of one hundred thousand dollars, cash, which the second parties in said agreement are to furnish, and in part by the assumption or payment by the contemplated reorganized company of a floating indebtedness of fifteen thousand dollars, and that the said first parties will give bond, with security, to assure the payment of such excess: Now, therefore, if the obligors herein, or any person for them, shall well and truly pay off and discharge all of the liabilities now existing against the said Moundsville, Benwood & Wheeling Railway Company which shall not be satisfied by the use of said one hundred thousand dollars, cash, and the assumption by said contemplated reorganized company of fifteen thousand dollars thereof, then shall the above obligation be void, otherwise it shall be and remain in full force and effect."

The bond was payable to J. A. Miller and others, who assigned the same to the plaintiff, for whose benefit and protection it was taken; its object being to indemnify the plaintiff against the outstanding indebtedness of the old company in excess of \$115,000. Such indebtedness must have presumptively, at least, been known to the defendants, and also the fact that the \$115,000 had been furnished. Hence averment of notice of these things was wholly unnecessary in the declaration. The defendants' means of knowing them were fully as great as those of the plaintiff, for the money could not have been furnished and the debts paid without their knowledge, as the business of the company was still under their control or that of their receiver until the contract for reorganization had been consummated. As soon as this was accomplished they became liable for the excess of indebtedness intended to be secured by the bond. The suit itself is notice and demand for the payment thereof. 14 En. Plead. & Pract. 1067.

It is claimed the declaration is bad for failure to aver nonpayment of the penalty to the obligees before assignment. It is necessary to aver nonpayment of the penalty. *Riggs & Co. v. Parson et al.*, 29 W. Va. 522, 2 S. E. 81; *State v. Phares*, 24 W. Va. 657; *Braxton's Adm'r v. Lipscomb*, 2 Múnf. 282. Still this averment need be only in the most general terms. *Cobbs v. Fountaine*, 3 Rand. 484. The averment in this case is in these words: "Yet the said defendants, although often requested, have not, nor has either of them, as yet paid the said plaintiff the said sum of twenty thousand dollars, or part thereof, but the same to pay hath hitherto wholly neglected, and refused, and still do neglect and refuse." This is undoubtedly broad enough to cover the obligees and assignors of the bond, although it might have easily been made more specific without the pleader becoming prolix.

It is true, the assignors of the bond have suffered no damages directly, yet, as the bond was taken for the protection of the company in which they were pecuniarily interested, the whole damage contemplated by the giving of the bond has been suffered either by themselves or their assignee, and, if not paid by the obligors, must be lost by the stockholders of the plaintiff—a loss which the bond was executed to prevent. Nor is the plea of *ultra vires* broad enough to cover, if at all applicable to, this case. The assignment was a mere nominal matter to enable the plaintiff to sue in its own name without controversy. Otherwise it would have had the right to sue in the names of the obligees for its use and benefit, as it was the real beneficiary of the bond. The assignment was but intended to simplify the legal proceedings for the enforcement of the bond. This bond was taken to protect the stockholders of the reorganized company, and hence the company, from the payment or loss of the indebtedness of the old company in excess of \$115,000. The real consideration for the assignment was that the plaintiff must pay this excess of indebtedness, and therefore, having it to pay, it was entitled to recover it from those who had obligated themselves to pay it for the relief of the reorganized company and its stockholders. This was strictly the business of the company, and in no wise in violation of its charter or the purposes for which it was created.

The various objections as to the sufficiency of the evidence are so finespun and technical that it is hardly worth while to notice them, except as matter of respect to the able and learned counsel presenting them. It is insisted that there is no proof of notice. As heretofore shown, under the circumstances of this case no notice was necessary, except in so far as the suit furnishes notice and demand that defendants comply with their agreement and bond. The evidence of Alfred Paull, as manager of the reorganized company, fairly shows that the obligees fully complied with their contract, and undoubtedly presents a fair *prima facie* case against the obligors. The defendants introduced no evidence.

The judgment is affirmed.

#### On Rehearing.

On petition for rehearing, defendants' counsel insist that some one or all of the many legal quibbles raised by them are sufficient to reverse the judgment in this case, and, without using their own capabilities for settling these questions of easy solution, impose upon this court the labor of doing so, in seeming disregard of the recommendation contained in section 2, rule 5 (23 W. Va. 823), of the rules of this court.

The first point relied on is that the declaration fails to allege the nonpayment of the penalty of the bond by Charles W. Vance in his lifetime, or by his administrator since his death. Neither the deceased, nor his administrator, is made a party to this action. In

the case of *Reynolds v. Hurst*, 18 W. Va. 648, it was settled that it was only necessary to allege nonpayment of the penalty by the defendants in a suit on a joint and several bond, thereby expressly overruling the case of *Vandiver v. Hyre's Adm'r*, 5 W. Va. 414, in which the contrary had been held. Not only is this good practice for the reasons there given, but for the further reason that the allegation of nonpayment by the defendants is usually broad enough to cover any payment that they may be entitled to the benefit of by whoever made, for that which is done for a person is the same as though done by himself. The declaration, by use of the following language, shows that the action is against the defendants alone, to wit: "Whereby, by force of the condition aforesaid of the said writing obligatory, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of twenty thousand dollars above demanded." As is said by Judge Patton in the case of *Reynolds v. Hurst*, 18 W. Va. 656: "I understand the authorities to be that, where one is sued on a joint obligation, the averment of promise and nonpayment on the part of the one sued is sufficient, without noticing the other, and that defendant can neither by demurrer nor on the trial prevent a recovery. His only remedy is by plea in abatement. More especially is this true where the obligation is joint and several. In suing on it in its several character, its legal effect makes it only the bond of the one sued, and as to that suit the bond must be treated as if no other person had executed it." If another, not party to the suit, has paid, this can be taken advantage of by plea and by demurrer.

The second point is that the surety, Doyle, was not notified before suit that the plaintiff had been reorganized, and had paid the \$115,000 of indebtedness. There is nothing in this case that would require any such special notice. He assumed by his bond to pay all the indebtedness of the company in excess of the \$115,000. This indebtedness was then in existence, and, it must be presumed, was known to him; and there is no provision in the bond or otherwise that requires the plaintiff to give notice of the payment of the \$115,000 prior to bringing suit for such excess. The suit itself is all the notice and demand that the law requires. Counsel confound this case with one in which notice must be given before the liability becomes fixed—in short, to a case in which notice must be given, or no liability exists, such as the protest of negotiable instruments. Failure to give notice in such cases destroys liability. But in this case notice has nothing to do with liability. It was paid when the bond was executed on condition that the plaintiff paid or assumed payment of the \$115,000. The fact of the payment or assumption of payment satisfies the condition, and no notice thereof is required other than that which the

suit given. Notice not being required to fix liability, it is not necessary to allege or prove the same.

The next point is that the plaintiff can only recover what its assignors might demand, being merely nominal damages. It is plain that the assignors, the obligors, were not acting for themselves individually, but wholly in behalf of the plaintiff, and that the bond was taken wholly for its benefit; that is, to secure the payment of its indebtedness in excess of \$115,000. This the obligors agreed to pay, but, failing to do this, the plaintiff had it to pay. It was therefore equitably entitled to recover the same from such obligors, and this it might legally do under section 2, c. 71, Code. The bond, however, was nominally payable to the obligees, and they to make the legal and the equitable rights correspond executed an assignment thereof to plaintiff. While the obligation seemingly is to pay the indebtedness in excess of the sum of \$115,000, as no creditor, debt, or payee is specified, it was plainly the intention of the parties to the agreement that, whenever the amount was ascertained that the obligors were bound to pay, the same should be paid directly to the reorganized company, as it would have to assume and pay such indebtedness to those entitled thereto; it being an indemnity that the reorganized company should not be required to pay more than \$115,000 of the then existing indebtedness of the old company, and that such excess of indebtedness should be made good to it. Hence the true payee contemplated in both the bond and the agreement was the company when reorganized, to wit, the plaintiff, and not the various creditors of the company, or the nominal obligees named in the bond. The agreement and bond both show that they were both made solely for the benefit of the reorganized company, in this: that they were intended to relieve such company of the indebtedness for which it otherwise would be bound, in excess of the \$115,000. It was the company that was to be finally relieved from this excess, not the obligors in the bond, and, if not so relieved, the company alone would have it to pay. The obligees took the bond payable to themselves because the company had not yet been reorganized. When reorganized, as a matter of course, it was entitled to be substantiated in the place of the obligees under the bond; otherwise the bond would be worthless for the purpose for which taken. The agreement and bond were, in effect, nothing more than a promise to pay to the company, when reorganized, the excess indebtedness of the old company, to relieve it from the payment thereof. To emphasize this meaning and purpose of the bond, the obligees named transferred and assigned the bond to the company when reorganized; thus making it, both in law and equity, to be the true payee of the bond. So that the plaintiff had not only the right to recover nominal damages,

but also the specific damages suffered by it and set forth in its declaration, by reason of the failure of the obligors to comply with their agreement. This proposition is too plain for argument. The alleged plea of ultra vires relates merely to the assignment, and, as heretofore shown, the assignment, having been made simply to strengthen the legal title and make it correspond with the equitable title, was a mere nominal matter, not affecting the plaintiff's real right of recovery. Hence the plea is not broad enough to present an issue in the case, and the court did right to reject it.

The next point is that Alfred Paul was not a competent witness to prove that he was the manager of the plaintiff, although placed on the witness stand for this purpose by the plaintiff. Defendants' counsel has the faculty of applying plain legal propositions to a wrong state of facts. It has been held by this court that "neither the declarations of a man nor his acts can be given in evidence to prove that he is the agent of another." *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555; *G. & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799. It has also been held that an agent is a competent witness to prove his agency. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222. And this to establish his agency as against the principal. But it has never been held that the principal could not put its agent on the witness stand, and by him establish such agency. The principal alone can deny the agent's authority, and, when he authorizes his agent to speak for him as a witness, he is bound by his declaration. "Both the principal and agent are competent witnesses to the existence or nonexistence of the relation, the admissions of the former being also competent evidence." 1 Am. & Eng. Enc. Law (2d Ed.) 969. Mr. Paul was competent to prove that he was the general manager of the company after its reorganization, that it was reorganized, and that, to his knowledge, the whole indebtedness of the old company amounted to \$119,670.62, all of which was paid or assumed by the company as reorganized; and it also appears that, after allowing all just credits under the agreement and the bond, there was still due the company the sum of \$2,628.70, with interest from October 1, 1898, of the excess of indebtedness which the defendants had promised, but failed, to pay. This certainly made a clear prima facie case against the defendants, and, if they had any just defense thereto, they should have presented it.

The only issue in this case is made up on a plea of covenants performed, not specifying acts of performance. Such a plea has been held insufficient. *Norfolk, etc., Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737; *Hogg's Pleadings & Forms*, 309, 310; *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312. Such a plea admits the plaintiff's case so far as properly pleaded, and is an affirmative allegation of

the performance thereof. It admits liability, but claims satisfaction or payment. Hence it did not put in issue the reorganization of the company, nor the making of the bond or agreement, nor the obligation of the defendants to pay the excess indebtedness demanded, but amounts to nothing more than a general averment that the defendants have paid such excess indebtedness. The burden of sustaining such plea, if good, is on the defendants. *Wheeling v. Black et al.*, 25 W. Va. 266; *Riddle v. Core*, 21 W. Va. 530; *Douglass v. Central Land Co.*, 12 W. Va. 502; *Pate v. Spotts*, 6 Munt. 394.

Counsel present no error calling for a reversal of this case, and the judgment must stand.

(53 W. Va. 39)

### PARSONS v. MAXWELL.

(Supreme Court of Appeals of West Virginia. March 23, 1903.)

#### ATTORNEY—FRAUDULENT COLLECTION OF JUDGMENT—LIABILITY TO JUDGMENT DEBTOR.

1. Where an attorney has for collection a claim which is in judgment on forthcoming bond, and the same is paid to him in full by the principal judgment debtor, and the attorney afterwards causes execution to be issued on said judgment, and to be levied on the property of one of the sureties in said forthcoming bond, the property sold, and money again collected by said attorney, such attorney is liable in an action by such surety to recover back the money so collected on said judgment the second time; and it is no defense to such action to plead that he was acting therein as attorney for the judgment creditor.

(Syllabus by the Court.)

Error to Circuit Court, Tucker County; John Homer Holt, Judge.

Action by L. W. Parsons, administrator, against W. B. Maxwell. Judgment for plaintiff. Defendant brings error. Reversed.

J. P. Scott, for plaintiff in error. C. O. Strieby, for defendant in error.

McWHORTER, J. James H. Lambert executed a forthcoming bond, together with J. B. Lambert, C. C. Lambert, and Ward Parsons as his sureties, on a judgment in favor of D. E. Offutt. Judgment was taken on said bond in the circuit court of Tucker county, and execution issued thereon from the clerk's office for \$573.26, with interest from the 14th of May, 1890, till paid, and \$13.30 costs. The land or farm of James H. Lambert in Tucker county was decreed to be sold to pay his debts, which amounted to something over \$3,000. He sold or exchanged his Tucker county land to and with N. V. Bennett, A. J. Bennett, and Frank Bennett for a place in Pendleton county, and got about \$3,300 "to boot," with which sum his debts were paid, the said judgment due from James H. Lambert to D. E. Offutt being paid to W. B. Maxwell, attorney for said Offutt. After said James H. Lambert had left Tucker county and gone to his place in

Pendleton county, on the 15th of January, 1892, the said W. B. Maxwell caused to be issued from the circuit clerk's office of Tucker county an execution in favor of D. E. Offutt against said James H. Lambert and his said securities on the forthcoming bond for \$142.64, with interest from the 29th day of December, 1891, and costs, which was paid by the surety Ward Parsons by the sale of his property under said execution on the 4th day of February, 1892. On the 20th day of April, 1897, Ward Parsons brought his action before a justice against W. B. Maxwell to recover back the money which he had paid on the said debt of Lambert, claiming: "February 4, 1892, to amount paid on Offutt judgment, \$152.88; to Int. on same, \$45.86—\$198.74." The justice rendered judgment in favor of the plaintiff, from which said Maxwell appealed to the circuit court of Tucker county, William M. Cayton being surety on his appeal bond, which was dated April 29, 1897. At the March term, 1898, plaintiff, Ward Parsons, having died, the case was revived in the name of L. W. Parsons, his administrator. At the November term, 1899, the defendant filed his plea in writing of the statute of limitations within five years, to which plea the plaintiff tendered his special replication that he ought not to be barred or precluded from his said action because the said James Lambert, the principal debtor in the cause of action on which Ward Parsons was surety, had on the — day of —, 1892, paid all the debts for which the said Ward Parsons was surety for him to W. B. Maxwell, who was the attorney for D. E. Offutt, and the First National Bank of Piedmont, and that the said J. H. Lambert afterwards moved out of Tucker county into the county of Pendleton, and the said Maxwell, attorney, after having received pay in full of all the said debts, fraudulently and deceitfully caused an execution to issue from the clerk's office of the circuit court of Tucker county against Ward Parsons et al., which was levied on the property of the said Ward Parsons, and enough of said property was sold to satisfy said execution, and the said Ward Parsons did not know of the fraud and deceit practiced by the said W. B. Maxwell upon him until the said James H. Lambert had presented the receipt signed by the said Maxwell, showing the payment of all said debts for which Ward Parsons was surety, which was about the — day of —, 1893, to the filing of which the defendant objected upon the ground that the same was not sufficient in law, and demurred thereto, which objection and demurrer was overruled and the replication filed; and the defendant rejoined generally to said replication, and by leave of the court made special rejoinder, and said that it was not true that the defendant was the attorney of either the said James H. Lambert or Ward Parsons; that, on the contrary, said defendant was the agent and attorney of one D. E. Offutt, and the defend-



ant did not fraudulently and deceitfully cause execution to issue, but, on the contrary, the execution was caused to be issued at the instance of said Offutt, and the money received and collected thereon by said defendant was collected and received for said Offutt by said defendant as his agent and attorney, and was accounted for and paid to said Offutt by the defendant, and the defendant was not chargeable therewith; but, if the said plaintiff had a right to recover, he should recover the same against said Offutt, and not against the said defendant. To which special rejoinder plaintiff made special surrejoinder in writing that, by reason of anything in said defendant's special rejoinder alleged, plaintiff ought not to be barred from having and maintaining his said action, because he said that the said defendant did fraudulently and deceitfully cause execution to issue from the circuit clerk's office of Tucker county in the name of D. E. Offutt against Ward Parsons et al., and by virtue of the said execution collected the said money in said suit demanded from Ward Parsons, after having collected the said money from the said James H. Lambert, thus fraudulently and deceitfully collecting the said money twice, once from James H. Lambert, and second from Ward Parsons; the said money was in the hands of said defendant, and he was liable therefor in this action, and not D. E. Offutt, who only received the money due him, if that; and this the plaintiff was ready to verify. A jury was impaneled, and, after hearing the evidence introduced by plaintiff, defendant moved to exclude said evidence, which motion was overruled by the court. The defendant then demurred to the plaintiff's evidence, in which demurrer the plaintiff joined, and the jury returned a verdict for plaintiff, assessing his damages at \$237.87, subject to the decision of the court on the demurrer. The court overruled the demurrer to the evidence, and entered judgment against the said Maxwell and William M. Cayton, surety on his appeal bond, for the said sum of \$237.87, with interest thereon at the rate of 10 per cent. per annum from April 26, 1897, the time the appeal was taken, until paid, and the costs. The defendant filed his bill of exceptions to the rulings of the court, which certified all the evidence and the demurrer thereto, and procured from this court a writ of error.

The first two assignments of error go principally to the amount of the verdict and judgment rendered. The first assignment is that: "The verdict of the jury wa's for too large an amount. The plaintiff, by his account filed in this case, claimed \$152.88, with interest from February 4, 1892, which at the date of said verdict would not have amounted to more than the sum of \$229.82," being an excess of \$8.05. The second assignment is that the court erred in entering judgment for \$237.87, the verdict of the jury, with 10 per cent. damages thereon from the 26th day

of April, 1897, the date of the judgment before the justice. It seems that interest was included up to the date of the verdict in the circuit court, and judgment entered for that amount, with damages from the date of the judgment before the justice, at the rate of 10 per cent., as provided by section 172, c. 50, Code 1899, so that it would appear that there was error in the judgment to the extent of the interest on the aggregate from the date of the judgment of the justice, April 26, 1897, to the 25th day of June, 1900, the date of the judgment rendered by the circuit court, and 10 per cent. per annum on said interest for said period, the date of the judgment of the justice, to the rendering of the judgment by the circuit court, making in all something less than \$40 error in the judgment, which is not sufficient in itself to give jurisdiction to the Appellate Court.

The third assignment is that the court erred in overruling defendant's demurrer to the special replication of the plaintiff to petitioner's plea of the statute of limitations. It is alleged in the said special replication that on the — day of —, 1892, James Lambert, the principal debtor in the said cause of which Ward Parsons was surety, had paid all the debts for which said Parsons was surety for him to the defendant, W. B. Maxwell, who was attorney for D. E. Offutt and the First National Bank of Piedmont; that said Lambert, after the payment of said debts, removed from the county of Tucker into the county of Pendleton, and that the said defendant, Maxwell, attorney of said Offutt, after having received payment in full of all said debts, fraudulently and deceitfully caused an execution to issue from the clerk's office of the circuit court of Tucker county against Ward Parsons et al., which was levied on the property of said Ward Parsons, and enough of said property sold thereunder to satisfy said execution; and that the said Ward Parsons did not know of the fraud and deceit practiced by said Maxwell upon him until said James H. Lambert presented the receipt signed by said Maxwell, showing the payment of all debts for which Ward Parsons was surety, which was about the — day of —, 1893. This replication to the special plea of the statute of limitations seems to be intended, and it is claimed in the brief of defendant in error, to meet the provisions of section 18, c. 104, Code 1899; it is claimed to be correct in form and to embody the law laid down in said section. That section provides the statute shall not run when the person against whom the right is "shall, by departing without the state or by absconding or concealing himself or by any other indirect ways or means, obstruct the prosecution of such right." In the case at bar it was the plaintiff who left, not the state, but the county, while the defendant remained, and not only did no act to conceal the right plaintiff had against him, but the right accrued by reason of an act of defend-

ant in suing out an execution wrongfully from the clerk's office of his county, and causing same to be levied on the property of plaintiff, and having it sold thereunder by the officer of the law. It is not shown that he did anything or attempted in any way to conceal his action, or did anything in an indirect way or used any means to obstruct proceedings against him, and the special replication does not allege any of the things which would bring the wrongful acts of defendant within the purview of said section 18. In *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795, Syl., point 7, it is held: "Where a cause of action arises out of a fraud, the statute of limitations runs from its perpetration. This does not apply to fraudulent transfers"; and Syl. point 8: "Under section 18, c. 104, Code 1899, it requires some positive—that is, affirmative—act by the defendant to operate under the clause, 'or by any other indirect ways or means obstruct the prosecution of such right.' Mere silence will not do, but there must be some act designed to conceal the existence of liability, and operate in some way upon the plaintiff, and prevent or delay suit for it." The court erred in overruling the demurrer to said special replication.

The fourth assignment is that the court erred in overruling the demurrer to the evidence. It is insisted by counsel for plaintiff in error that he should not be held chargeable because the execution was caused to be issued at the instance of his client, D. E. Offutt; yet it is admitted by plaintiff in error that the money was received and collected on said execution by him, and it is not denied by him that he had before collected the debt in full from the principal debtor, Lambert, and, if he had paid the money over to his client after receiving it from Lambert, then the relation of attorney and client between Maxwell and Offutt as to that claim ceased, and he had no right to have the execution issued either at the instance of his former client, Offutt, or by himself. Payment to Maxwell as his attorney was payment to Offutt. Under the evidence, but for the plea of the statute of limitations, the judgment of the circuit court would have to be affirmed. *Mechem on Agency*, § 564; 1 Am. & E. E. L. 1131; *Story on Agency*, §§ 300, 301; *U. S. v. Pinover* (D. C.) 8 Fed. 309. Section 12, c. 104, Code 1899, provides: "Every personal action for which no limitation is therein prescribed shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative." To avoid the effect of this statute the plaintiff must bring himself within the rule laid down in *Vanblibber v. Beirne*, 6 W. Va. 168 (Syl. point 5): "If it appear by the proper pleadings, supported by proof, that the facts on which the cause of action is founded were exclusively in the knowledge of the defend-

ant, that he fraudulently concealed those facts, and that by such ways and means he defeated and obstructed the plaintiff from bringing his action within the time limited, the statute of limitations is answered." This he utterly failed to do. There is no evidence tending to show that the facts on which the cause of action is founded were exclusively within the knowledge of the defendant, or that he fraudulently concealed these facts, or that anything was done by defendant to defeat or obstruct plaintiff in bringing his action. The issuance of the execution, the levy and sale of the property, and payment of the money were all a matter of public record. It is clearly shown by the evidence introduced by the plaintiff that the money was paid February 4, 1892, by Ward Parsons, from the sale of his property under the execution sued out on the 15th day of January, 1892, at which date—February 4, 1892—the right accrued to Ward Parsons to have his action to recover back the money so wrongfully collected from him. It is not only proved by the executions and returns thereof introduced by the plaintiff that he paid the money February 4, 1892, but the account upon which he bases his action is for amount paid on Offutt judgment, February 4, 1892, \$152.88, with interest thereon from same date. This action was begun April 20, 1897—more than five years after the cause of action arose. The demurrer to the evidence should have been sustained.

For the reasons given herein, the judgment of the circuit court is reversed, and this court proceeding to render such judgment as the circuit court should have rendered, the demurrer to the evidence is sustained, with judgment for defendant, the plaintiff in error.

(53 W. Va. 165)

#### BAKER'S EX'RS v. BAKER et al.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)

#### WILLS—CONSTRUCTION—NATURE OF ESTATE—PRECATORY WORDS—TRUSTS.

1. Under the following provisions in a will: "21.—I will that the balance of my lands not willed shall be sold and the money given to my wife for charitable purposes. I will that the balance of my bonds not willed shall be collected and the money given to my wife for charitable purposes"—held, the wife takes the money bequeathed absolutely.

2. The words "for charitable purposes" are mere precatory words containing no command or instructions, but leaving the whole matter in the discretion of the legatee.

3. A gift to enable a legatee to confer bounty on others is not a trust, but a beneficial legacy to him.

4. Where the will clearly shows that the use of the property indicated is merely the motive which leads the testator to make the gift, and, if the beneficiary is not limited in his discretion as to the use which he is to make of it, the gift does not impose a trust.

(Syllabus by the Court.)

Appeal from Circuit Court, Grant County;  
R. W. Dailey, Judge.

Bill by Aaron Baker's executors against Mary E. Baker, executrix, and others. Decree for plaintiffs, and defendant Mary E. Baker appeals. Reversed.

F. M. Reynolds, for appellant. J. N. McMullen and Benjamin Dailey, for appellees.

McWHORTER, P. Aaron Baker, of Grant county, executed his last will and testament, in which he provides: "1st.—I will to my beloved wife, Mary E. Baker, my home farm and my 100 acre tract of land lying west of Obed Babb's residence to hold during her lifetime. 2nd.—I will to her, Mary E. Baker, all the stock that is on my farm including all furniture in my house, and all tools and machinery there is on the place at my death. 3rd.—I will to my wife, Mary E. Baker, my Bank stock and three thousand dollars of my bonds, her choice." Having no children, he proceeds to provide certain sums for his brothers and sisters and half-brothers and half-sisters and nephews and nieces, the eighth clause of which is as follows: "8th.—I will to Bernie V., Daughter of my half brother, Benjamin F. Baker, dec'd, Five Hundred Dollars"—and makes disposition of the home place at the death of his wife. He then provides, in clause 21, as follows: "21.—I will that the balance of my lands not willed shall be sold and the money given to my wife for charitable purposes. I will that the balance of my bonds not willed shall be collected and the money given to my wife for charitable purposes"—and appoints his said wife and G. W. McCauley his executors, and directs that they shall not be required to give bond. The will is dated the 7th day of January, 1898. Afterwards, on the 9th day of April, 1898, he made the following codicil: "1st.—I revoke the legacy given in said will to Bernie V., daughter of my half brother Benjamin F. Baker, dec'd, she being now dead and I devise and bequeath the five hundred dollars that I had given to her, to be given to my wife, Mollie E. Baker, for charitable purposes."

The executors filed their bill in the circuit court of Grant county, praying that the court would construe item 21 and the said codicil, and determine whether said item 21 and said codicil, or either of them, was valid, and that, in the event the court should determine that said provision of item 21 and the said codicil were void for uncertainty or some other cause, it would direct the plaintiffs to whom the money coming into their hands under said provision should be paid, and for general and special relief. The defendant Mary E. Baker filed her separate answer, denying that said item and codicil were void on account of being indefinite and uncertain, or for any other reason; averring that testator willed to his next of kin of his estate all that he intended they should have, and made respondent his residuary legatee under the terms and provisions of said item

21 and the codicil, and thereby gave this respondent the residue of his estate mentioned in said item 21 and codicil as her absolute property, to do with as she wished or desired; claiming that the expression contained in said item and codicil, that said residuary legacies were given to her "for charitable purposes," did not create any trust for charitable purposes or for any other purpose, but was a mere expression of the motive of the testator for making respondent his residuary legatee, and that she as such residuary legatee was entitled in her own right to said testator's estate given to her by said item 21 and by the codicil; praying that the same might be paid to her by the executors of said will, and that respondent was advised that the amount of said residuary legacies coming to her under said item and codicil amounted to, perhaps, \$10,000 or \$12,000, or more; insisting that the next of kin of said Aaron Baker were not entitled to said residue of his estate, not by the law of descents or otherwise, but that respondent was entitled to the same as his widow, and that said testator was not under any obligations to the said next of kin of him claiming the residue of said estate under said item 21 and the codicil, and that what was given them was purely a gratuity on testator's part, and not because of any obligation resting on her late husband to do so; and praying to be dismissed with her reasonable costs.

On the 4th of December, 1901, the cause was heard on the bill and exhibits filed, process duly executed on all the home defendants, order of publication as to the non-resident defendants completed and posted, and the answer of Mary E. Baker then filed and general replication thereto, and was argued by counsel. "On consideration whereof, the court being of the opinion that item No. 21 in the will of Aaron Baker, deceased, which is as follows: 'I will that the balance of my lands not willed shall be sold and the money given to my wife for charitable purposes. I will that the balance of my bonds not willed shall be collected and the money given to my wife for charitable purposes'—is void because too indefinite and uncertain, and that the codicil to said will is also void because too indefinite and uncertain, and doth so decide; and the court being further of the opinion that the defendant Mary E. Baker, widow of Aaron Baker, deceased, not having renounced the provisions of the said will for her within the time required by law, is not entitled to participate in the distribution of the property mentioned in the said void devises and bequests, and that the same shall be distributed among the other heirs at law and distributees of the said Aaron Baker, deceased." The court then referred the cause to a commissioner with directions to state, settle, and adjust the accounts of the executors, and to ascertain and report who were entitled to the amounts in the hands of the executors arising from the property

mentioned in said void devises and bequests, and in what proportion, and any other matter deemed pertinent by him or any party interested in the matter may require. From which decree Mary E. Baker appealed to this court.

The principal question involved in this matter is, what was the intention of the testator? Was it his purpose and intent, by the words "for charitable purposes," to create a trust, making his wife, Mary E. Baker, trustee, to dispense the charities he intended? or whether such words can be construed to create a trust. It is asserted by counsel for appellant, and not denied, that the will was written by the testator himself, and, it is very probable, without the aid or advice of an attorney; and in construing the will it is our duty, as it would be in any case, to take the whole will together, and ascertain, if possible, the purpose and intent of the testator. He had evidently bestowed upon his next of kin as much of his property and substance as he intended they should have. He provided a reasonable support for his wife, the first object of his care and protection. Evidently the testator had no special charity in view. He points out no particular charity he intended should receive his bounty, gives no directions, and suggests no course to be pursued by his wife in dispensing the charities. His only purpose seems to have been to place at her disposal such funds as would enable her to exercise the generous and charitable disposition with which she was evidently endowed, in her own way and in any direction that she, in her discretion, saw proper. If he had placed this money in her hands with directions to build a church or some charitable institution, without particularizing to make it certain as to what he desired and intended to be carried out, it might be said he had created a trust, but one which was so indefinite and uncertain that it was void; but in the language used by him he meant no particular charities other than such as she might, in her discretion, see proper to bestow. The words "for charitable purposes" are mere precatory words, containing no command or instructions, but leaving the whole matter in the discretion of the legatee. 1 Perry on Trusts, § 119: "But no trust is implied where the words simply state the motive leading to the gift, as where the gift is to a person 'to enable him to maintain the children.' \* \* \* When a testator gave to his wife 'the use, benefit, and proceeds of his real estate for life and of his personal estate, absolutely, having full confidence that she will leave the surplus to be divided justly among my children,' it was held that the widow took the personal estate absolutely, subject to no trust, and that the word 'surplus' meant what was left unconsumed and undisposed of by her. And it may be added that the mere expression of a purpose for which a gift is made does not render the purpose obligatory." And in *Seamonds v. Hodge*, 36

W. Va. 304, 15 S. E. 156, 32 Am. St. Rep. 854, where it is held that the wife took an absolute estate in the property mentioned, and created no trust in favor of the children under this devise and bequest: "I give and bequeath to my wife, M. L., all of my estate, both real and personal, of every kind and description for the purpose of raising her children, to have and to hold, to her and her heirs forever." And it was there held that the words "for the purpose of raising her children" must be construed as the motive assigned for the gift. And in *Bain v. Buff's Adm'r*, 76 Va. 371, it is held that the words "for the sole and separate use of herself and child or children" do not give any estate to the child or children, but indicate the motive for the gifts to the mother. And *Schouler on Wills*, § 596, says: "American cases hold, moreover, that a gift to enable a legatee to confer a bounty on others is not a trust, but a beneficial legacy to him." See, also, *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731. In cases where it is difficult to determine whether the words used create a trust or not, it is said in *Page on Wills*, § 613: "The test, as laid down by the courts, is a simple one, the application alone being difficult. If the will clearly shows that the use of the property indicated is merely the motive which leads the testator to make the gift, and if the beneficiary is not limited in his discretion as to the use which he is to make of it, the gift does not impose a trust." Underhill on Trusts and Trustees, pages 28-31. In *Boyle v. Boyle*, 152 Pa. 108, 25 Atl. 494, 34 Am. St. Rep. 629, it is held: "A provision in a will, 'I give and bequeath to my wife all my property, real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children'—imports a gift, and gives to the wife, upon the death of the testator, a fee in the property with all its incidents, including the power to sell and to devise. The words referring to any remainder do not limit the wife's estate or the preceding words of gift, but are precatory, and do not create a trust in favor of the children." It is there further held: "The intention of a testator to create a trust must be apparent upon the face of his will apart from the mere existence of words of trust and confidence, or none will be deemed to exist. Mere precatory words or words of command or of explanation, contained in a will, are not enough to create a trust, or to establish an intention not to be gathered from a consideration of the operative words upon the face of the instrument." *Beck's Appeal*, 46 Pa. 527: "A testator, after bequeathing an annuity to his wife for her support in lieu of dower, directed his executors to allow her, during her widowhood, a further sum per annum to be paid in the same manner and at the same time with the yearly annuity, in addition thereto, 'for house rent.' Held: (1) That the bequest of the additional annuity

was absolute, dependent only on the condition of widowhood. (2) That the clause describing the object of the gift was not a condition subsequent to the bequest of the annuity, so as to defeat it, when and for so long as the widow ceased to be a housekeeper. (3) That the widow was entitled to the additional annuity so long as she remained the widow of the testator, though she did not keep house, and was not, therefore, obliged to pay rent." In *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286, the syllabus of the case is as follows: "A testator provided as follows: 'It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, to my dear wife E. A., and her heirs and assigns forever, and it is my request and desire that my said wife E. A. should by last will and testament devise and bequeath all of said property at her death remaining in her possession to my friend B. W., and to E. W., their heirs and assigns forever, share and share alike.' Held, that this did not create any trust, but that E. A.'s estate was absolute." Also, see note at end of the case. In his opinion in this case, Bartol, C. J., quotes with approval the rule laid down in 2 Story, Eq. Jur. § 1069: "It will be agreed on all sides that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation, and other words precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. *Meredith v. Henneage*, 1 Sim. 542. Accordingly, in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but as far as the authorities will allow to give to words of wills their natural and ordinary sense, unless it is clear that they were designed to be used in a peremptory sense." See, also, 1 Jar. on Wills, pages 396-7, and cases there cited. Appellees cite cases referred to in 1 Jar. on Wills, where it is held: "A gift to A. to dispose of among her children," or "a gift to A. for bringing up her children," gives A. no interest, but creates a complete trust for her children. The first, "a gift to A. to dispose of among her children," might create a trust if it so appears from the whole will. The second, "a gift to A. for bringing up her children," are almost the exact equivalent of the following words used in *Seamonds v.*

*Hodge*, 36 W. Va. 304, 15 S. E. 156, 32 Am. St. Rep. 854, before cited, where it is held that the words "for the purpose of raising her children" must be construed as the motive assigned for the gift. And in *Rhett v. Mason*, 18 Grat. 541, the clause in the will in controversy was: "I devise all my estate, in possession, remainder, reversion or in expectancy, to my beloved wife B. C. M., for her maintenance and support, and for the maintenance and support of our children, during her life and widowhood. In the event of her marriage, she is to be restricted to her dower and distributory share as in case of intestacy." Upon this language it was held that the widow was entitled during her widowhood to the whole profits of the estate, and there was no trust for the children.

In support of appellees' proposition that the bequest made in item 21 and codicil are void for uncertainty, they cite a long line of cases decided by this court, beginning with *Carpenter v. Miller's Ex'rs*, 8 W. Va. 174, 100 Am. Dec. 744, where it is held that a clause devising estate "to the propagation of the Gospel in foreign lands" is void for uncertainty. This citation is followed by *Bible Society v. Pendleton*, 7 W. Va. 79; *Knox v. Knox's Ex'rs*, 9 W. Va. 124; *Carskadon v. Torreyson*, 17 W. Va. 43; *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376; *Mong v. Roush*, 29 W. Va. 119, 11 S. E. 906; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389. In all these cases the devises and bequests were made attempting to create a trust for the benefit of particular charities named and specified, leaving no question as to the purpose and intent of the testator to create a trust, and in each case the bequest or devise was held to be void for uncertainty. Counsel for appellees argue three propositions: First. Was a trust created in said item 21 and codicil? Second. Were the gifts mentioned therein void because the beneficiaries were indefinite and uncertain? Third. Who is entitled to the money, if said gifts are void?

In our view of the case, as set forth in what has preceded, no trust was created by said item 21 and codicil, and the gifts mentioned therein are not void for uncertainty. Taking the whole will together, it was clearly the intention and purpose of the testator to provide his wife a fund which would enable her, solely at her discretion, to dispense charities in such manner as she might choose.

For the reasons herein given, the decree of the circuit court must be reversed, and this court doth construe the said item 21 of the will, and the codicil, to give to the said Mary E. Baker, wife of the testator, the money and property mentioned in said item 21 and codicil to be hers absolutely, and this court doth accordingly so decree.

(53 W. Va. 46)

**HICKOK v. CATON et al.**(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)**INJUNCTION—ENFORCEMENT OF JUDGMENT.**

1. A bill filed to enjoin a judgment rendered by a justice, as void, which fails to show that plaintiff was without adequate remedy at law, is bad on demurrer, and should be dismissed.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County;  
M. H. Willis, Judge.

Action by J. W. Hickok against A. O. Caton and others. Judgment for plaintiff, and defendants appeal. Reversed.

B. F. Ayers, for appellants. F. L. Blackmarr, for appellee.

McWHORTER, J. A. O. Caton brought his action before a justice of the peace in Ritchie county, against J. W. Hickok, and obtained judgment therein for \$125. Hickok took it to the circuit court of Ritchie county on certiorari. On the 20th day of October, 1898, the cause was heard in the circuit court on certiorari, the verdict of the jury before the justice was set aside, as well as the judgment therein, and the cause dismissed, and judgment for costs in favor of Hickok against Caton. On the 27th of October, at the same term, plaintiff, Caton, moved the court to set aside the order of judgment entered on the 20th of October, when the court made an order in default of the appearance of Hickok to prosecute his said writ of certiorari, the same was dismissed, and judgment was rendered in favor of Caton for his costs. At the May rules, 1900, defendant, Hickok, filed his bill in equity against the said A. O. Caton and S. G. Pyle, to enjoin the collection of the said judgment upon execution issued from the docket of the said justice of the peace upon said judgment, and praying that the said judgment and execution might be set aside and annulled and for general relief.

Plaintiff alleged in his bill that he first made a special appearance before the justice to dismiss the action for the reason that the justice had no jurisdiction, and submitted evidence to the justice that there never had been any dealings between the parties in Ritchie county, and that plaintiff, Hickok, was a resident of Tyler county, where the cause of action, if any there was, arose, and that the justice refused to dismiss the cause, and called a jury to try it, but that said jury was not sworn according to the provisions of section 86, c. 50, Code 1899, and that the jury rendered a verdict upon which the justice entered judgment in favor of Caton against Hickok; set out the facts of suing out his writ of certiorari, and the proceedings thereon as hereinbefore stated, alleging that plaintiff, Hickok, had no notice of the orders of

October 20th and 27th, and, he being a resident of Tyler county, and not of Ritchie county, he was entitled to notice thereof under the provisions of section 12, c. 127, Id., and further alleging that the order of October 20th, of the circuit court, setting aside the verdict of the jury and the judgment of the justice, and giving judgment to Hickok for his costs in the certiorari proceeding, was never set aside by the circuit court of Ritchie county, and still remains in full force as it was entered on the 20th day of October, and that the last order, of October 27th, dismissing the writ of certiorari, was illegal and improvidently entered, and was in violation of the provisions of section 3, c. 110, Id.; and exhibited with his bill as well the proceedings before the justice as in the circuit court of Ritchie county, alleging that, notwithstanding the judgment of the justice was set aside, said justice on the 30th day of January, 1900, furnished a transcript thereof from his docket, and said Caton caused the same to be recorded on the 2d of February, 1900, in the office of the circuit court of Ritchie county, in Law Execution Book No. 3, and on the same day caused an execution to be issued by the clerk of the said circuit court of Ritchie county to S. G. Pyle, sheriff of Tyler county, returnable at the March rules, 1900; that said Pyle, under said execution, had levied upon a certain house belonging to Hickok in Sistersville, Tyler county, and threatened to proceed to sell the same to satisfy said execution, and alleging that the transcript from the docket of said justice and the execution issued thereon were illegal and void—and prayed that the said Caton and said Pyle, sheriff, be enjoined from collecting the same, and that the said judgment and execution be set aside and annulled, and for general relief. To which bill the defendants demurred, and filed the answer of said Caton and Pyle, sheriff, averring that said Hickok had ample time and opportunity to be present at the trial before the justice, yet he failed and refused to attend either in person or by counsel, and that no motion was made to set aside the judgment of the justice, nor was the evidence offered before the justice saved by bills of exceptions; admitting the proceedings on the certiorari in the circuit court, and claiming that it was a fraud upon the part of Hickok to procure the dismissal of the cause in the absence of himself and counsel before the day on which it was placed on the docket for trial, and that respondents used no fraud or inducement or any means to prevent Hickok from defending his cause before the justice nor upon the writ of certiorari in the circuit court; and saying that said Hickok was guilty of gross laches and willful neglect about his defense. Respondents further aver that said Hickok did not make any motion to have said dismissal of his certiorari proceedings set aside, as he had a right to under sections 11, 12, c. 127, Code 1899; that

¶ 1. See *Justices of the Peace*, vol. 21, Cent. Dig. § 405.

Hickok had two remedies at law open to him—either to make application to have the dismissal set aside and his cause reinstated on the docket, or take an appeal to the Supreme Court—and that he was required to pursue his legal remedy, and not to enjoin the collection of the judgment in the court of equity; that the house levied upon in the town of Sistersville, and which the sheriff threatened to sell as alleged, is situated on leasehold property, and is a chattel interest, and liable to be sold under execution. Plaintiff filed an amended bill, to which defendants also demurred, which amended bill contained principally the allegations of the original bill, and further alleged that the justice before whom the action was brought was elected in and for, and resided in, Clay district, Ritchie county, and issued a summons against Hickok requiring him to appear before the said justice at J. Newman's office in Cairo, Grant district, in said county (said Newman's office named for the place of return of the summons being in Grant district, and without the district of Clay, in which said justice resided and was elected), and prayed that the issuing of said summons by the justice should be declared to be without jurisdiction, illegal, and void, and that said injunction granted be made perpetual, and said judgment and execution be annulled. Defendants, Caton and Pyle, answered said amended bill, denying the material allegations thereof. The court overruled the demurrer to the bill and amended bill. On the 3d day of July, 1901, the cause was heard upon the papers formerly read, and upon the motion to dissolve the injunction, when the court held that plaintiff was entitled to relief prayed for, and perpetuated the injunction without prejudice to the rights of the defendants, or either of them, to take such proceedings at law as they might be advised to bring, from which decree the defendants appealed.

It seems that the only question involved here under the decisions and rulings of this court and of the courts of Virginia is as to whether the plaintiff, who was the execution debtor, had an adequate remedy at law. In *High on Injunctions*, 230, it is said: "While the discussion of this branch of the preventive jurisdiction of equity, as applied to void judgments, as shown in the preceding sections, has demonstrated a remarkable conflict of authority upon the right of relief by injunction in such cases, the prevailing tendency of the courts seems toward the establishment of the simple test in such cases, of whether adequate remedy exists at law for the protection of the judgment debtor against the void judgment. Where such remedy exists, either by appeal, certiorari, application to the court itself which rendered the judgment, or in any other legal and adequate manner, no satisfactory reason is perceived why equity should depart from the universal rule of withholding its extraordinary aid to

redress a grievance which is remediable at law." See *Hudson v. Kline*, 9 Grat. 379. And in *Shay v. Nolan*, 46 W. Va. 299, 33 S. E. 225, it is held: "A bill for an injunction to the judgment of a justice on the verdict of a jury, which shows on its face that the plaintiffs have a plain, adequate remedy at law, is fatally defective, and on demurrer thereto the temporary injunction awarded should be dissolved, and the bill dismissed." And in *Railway v. Ryan*, 31 W. Va. 364, 6 S. E. 924 (Syl. point 1), 13 Am. St. Rep. 865: "A judgment pronounced by a justice without service of process upon or notice to the defendant is void. But as such judgment may be set aside, even when rendered upon the verdict of a jury, by the circuit court upon a writ of certiorari, the defendant in the judgment cannot obtain relief against it in a court of equity." The remedy at law is much simplified in the matter of judgments before justices, since it is held that an appeal lies therefrom as a matter of right, whether the action has been tried before the justice or a jury. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653. The defendant, in case the judgment of the justice was irregular, had a right of appeal to the circuit court of Ritchie county, and the amount of the judgment was sufficient to carry it from the circuit court to the Supreme Court of Appeals in case the circuit court committed error. The judgment of the justice having been vacated and set aside and the action dismissed by the circuit court, Hickok's remedy was and is by motion to quash execution for want of judgment to support it.

The bill failed to show that the plaintiff was without adequate remedy at law, the demurrer should have been sustained, and, this court proceeding to render such judgment as the circuit court should have rendered, the decree is reversed, the demurrer sustained, and the bill dismissed.

(53 W. Va. 158)

### TOWER v. WHIP.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)

EVIDENCE—HANDWRITING—APPEAL—HARMLESS ERROR—ACTION ON NOTE—PLEA—INSTRUCTIONS—JUDGE DE FACTO.

1. In an action upon a promissory note, when the defendant denies its execution, an expert as to handwriting may compare the signature to the note with the defendant's signature to pleas signed and sworn to by him and filed by him, and express his opinion whether the same person made the signature to the notes and pleas.

2. The allowance of bad pleas is harmless error, if no evidence is given under them.

3. A plea that a negotiable note signed by a party was procured by deception and fraud, in representing it to be a paper of different character, is not good against a holder for value, acquired in due course of business before maturity, unless the plea aver notice to the holder of such fraud and deception before he acquired the note.

¶ 3. See Bills and Notes, vol. 7, Cent. Dig. § 963.

4. Inconsistent or irrelevant instructions should not be given.

5. A judgment rendered by a special judge elected as provided by law is neither void nor reversible merely because he did not take the oath in article 4, § 5, of the Constitution. He is at least a judge de facto.

(Syllabus by the Court.)

Error from Circuit Court, Mineral County; R. W. Dailey, Judge.

Action by M. C. Totten against Sandford Whip. Judgment for plaintiff, and defendant brings error. On death of both parties, personal representatives were substituted, to wit, E. E. Tower as plaintiff, and E. J. Whip as defendant. Reversed.

Taylor Morrison and C. N. Finnell, for plaintiff in error. F. M. Reynolds, for defendant in error.

BRANNON, J. This was an action of debt, tried before a special judge, on a negotiable note, in the circuit court of Mineral county, brought by M. C. Totten against Sandford Whip, resulting in a verdict and judgment for the defendant, from which he has sued out a writ of error.

The defendant pleaded *nil debet*, and filed a plea (No. 3) saying that "he did not make or sign the note sued on," which was verified by affidavit. The defendant also filed two special pleas (Nos. 2 and 4), to the effect that a person unknown to Whip, pretending to be a dealer in land and a purchaser of farms, came to Whip's house, and falsely represented that he wished to buy Whip's farm, and, with intent to defraud, so ingratiated himself into the confidence of Whip that he agreed to sell his farm, and to close the bargain in two weeks; that said unknown person suggested that, in case he should not be able to meet Whip within that time, it would be necessary that he should have Whip's post-office address, and requested him to make a memorandum of it, and presented to Whip what he supposed to be a common note or memorandum book, and on the faith that what he was about to write was only such post-office address, and without intention to make any such note as that sued upon, he (Whip) did sign a paper of the character represented—a mere memorandum of his post-office address, and not as a note—and that said unknown person fraudulently covered up the note and concealed its contents so that he (Whip) did not and could not know that he was signing a note, and that thus his signature to the note, if it was his signature, was obtained, and therefore he did not knowingly make the note, and that he was tricked into making it; and that the note was without consideration. The defendant filed plea No. 4, to the same effect; averring the note, under the facts of fraud and false pretense, to be a forgery, and that the plaintiff was not a purchaser of the note for value before maturity.

Objection is made to plea 3 on the ground

that it does not deny the fact that the signature to the note is the signature of Whip. This point is not tenable. The plea says that Whip did not "make or sign" the note. If he did not make or sign it, it is not his note, for then he neither made it himself, nor authorized another. Section 40, c. 125, Code, only requires that, where a pleading alleges that a person "made" a writing, the affidavit shall deny the making. The affidavit is as broad and definite as the statute demands. This plea was not necessary, but is good in itself, and operates also as an affidavit to accompany the plea of *nil debet*, which at common law puts the execution of the note in issue; and the effect of that plea remains such yet, with the qualification that said affidavit must be filed with plea.

The vital question in this case is, did Whip make the note? He denied doing so, by pleas 1 and 3. On the trial the plaintiff offered a witness as an expert, and proposed that he inspect Whip's signature to the affidavits of the four pleas filed by him, and the signature of Whip to the note in suit, and say whether the same person made them, and proposed to prove by him that, in his opinion, the same person made all the signatures; but the evidence was rejected. In West Virginia it is settled law that the genuineness of an instrument cannot be proven or disproven by comparison with other writings. As a general rule, comparison of handwriting is not allowed. *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328. I never could see the soundness of this rule, but it was well-settled common law in England until statute wiped it away, and generally, but not everywhere, prevailed in the United States. It came to this state from Virginia. We have always regarded this as the Virginia rule, but, if so, *Hanriot v. Sherwood*, 82 Va. 1, has overruled it. But concede such to be the law in West Virginia; yet has the Supreme Court said in *Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346: "The general rule of the common law disallowing a comparison of handwriting as proof of signature has exceptions equally as well settled as the rule itself. One of these exceptions is that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury." The disputed paper "may be compared with other writings by such person proved or admitted to be genuine, and already properly before the court for other purposes, either as evidence in the case, or as part of the record." 15 Am. & Eng. Ency. L. 266. The defense on the trial stated that it was not admitted that the signatures to the pleas were in Whip's handwriting, but it was not denied. And is it not presumptive, in the case of a natural person, that a signature to a plea filed in court by him is his own, especially as it is certified to have been subscribed by him be-



fore the clerk? And he proffered it as his, and it would be *prima facie* his until shown not to be his. It would be different with a paper not in the case. Here it was part of the record. Could it be questioned that the jury might compare the note with the pleas? I think not. But our question is, can an expert make a comparison of these papers, and give his opinion? Yes, he can, because, if you once settle that a jury can do so, it is a subject of expert evidence. If the papers are such as to allow a comparison, expert evidence may be applied to them. *Vinton v. Peck*, 14 Mich. 287, is authority not only to allow comparison with other papers already in the cause, but also to show that experts may be called to make the comparison, and that it is better that the jury have the aid of experts, as few of us are competent to do so with success. 1 Greenl. Ev. § 578, thus states the law: "Where other writings, admitted to be genuine, are already in the case, here the comparison may be made by the jury, with or without the aid of experts." In *Hanriot v. Sherwood*, 82 Va. 1, expert evidence to make such comparison is held proper. In *Springer v. Hall*, 83 Mo. 693, 53 Am. Rep. 598, it is held that such expert evidence may be used to compare. This case is cited by the defense to show that comparison cannot be made with papers made after suit, but there the defendant proposed to use his signature to his own pleadings to prove that he did not make the note. Any amount of law can be cited to show that experts may compare writings and give their opinions. *Rogers, Expert Test.* § 133; *State v. Thompson (Me.)* 13 Atl. 892, 6 Am. St. Rep. 172. Much case law is cited to show that expert testimony is weak and unreliable. This may or may not be so. Courts differ as to this. Many regard it valuable, as it surely is in certain cases. We pass no opinion, as its weight is for the jury. Being admissible, we are not able to say that it would not have had weight; and, if such evidence might have been beneficial to the plaintiff, its rejection is error, as he was entitled to place before the jury all admissible evidence. *Kerr v. Lunsford*, 81 W. Va. 675, 8 S. E. 493, 2 L. R. A. 668. Counsel for defense argues that *Carskaddon* was not shown to be an expert on handwriting. He was cashier of a bank—had been for 12 years—and, as such, it was his business to examine signatures to checks to test their genuineness, and was acquainted with Whip's handwriting, and had frequently paid his checks. We think this entitled him to rank as an expert. Moreover, no objection was made on the specific ground of his incompetency. The witness, through modesty, did not claim to be an expert; but that is not necessary, if he states facts showing him entitled to express an opinion. *Rogers, Expert Test.* § 17; 15 Am. & Eng. Ency. L. 278.

It is assigned as error that pleas 2 and 4 were admitted. No evidence was given in

support of them, and no ground of reversal exists on that score, though the pleas are bad. *Amos v. Stockert*, 47 W. Va. 109, 84 S. E. 821. But as the case goes back to the circuit court, it is proper to pass on these pleas. If in fact Whip signed the note, he cannot get rid of it on the plea of fraud, misrepresentation, false pretense in its procurement, or want of consideration against the plaintiff, if a bona fide holder for value, without notice of such fraud, etc. For this, *Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506, is full authority. The pleas are also defective in not charging such notice to Totten before his purchase. *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576. Plea 4 is bad for same reasons, and also for putting in the duplicate defense that Totten was not a holder for value. That could be pleaded separately.

Two instructions were given on defendant's motion, of which the plaintiff complains. One is that, before a verdict for the plaintiff could be found, it must be proven "that the defendant's intestate, S. J. Whip, signed the note sued on, as his note." It is said this instruction is confused and misleading. The note was signed, "Sandford Whip." Evidence was given that Whip generally signed, "S. J. Whip," or "Sandford J. Whip." It is clear that, for a recovery, Whip must have signed his name to the note; that is, that it must not be a forgery. But if he did sign his signature of Christian and surname, leaving out the J., it binds him. A middle name is no part of a man's name. Counsel of plaintiff says that it was intended to tell the jury that the signature to the note was not good, because not signed "S. J. Whip." If so, it would be clearly bad—the instruction would be. But I do not so construe it. The note, as signed, is binding on Whip, if not a forgery. The words "as his note" give some trouble. What do they mean? If evidence had been given under the special pleas to show that Whip had been, by fraud and trick, induced to sign a paper different from what he designed, I would say those words would make the instruction bad, as telling the jury that it would be no note; that he must have signed with purpose to make a note, which is not so as to a bona fide holder for value, which the law presumes Totten to be. Those words perform no office, and must be omitted, if the instruction should be again asked. Another instruction is that the jury should find for the defendant unless "M. C. Totten had possession of the note in his lifetime." That is true, but what evidence was there to raise that question? Totten in his life brought the suit, and then had the note, and, as the court instructed the jury on plaintiff's request, "the production in evidence of the note sued on is sufficient evidence that M. C. Totten had possession of the note in his lifetime." There is no evidence to justify said instruction No. 5 of plaintiff, because it rais-

ed an issue not pertinent to the case, and was in conflict with that given for plaintiff. We can only justify it by saying it availed not, in view of the other instruction. But what did the jury think about it? Did it think the plaintiff must expressly prove that Totten had the note in his lifetime? We cannot say.

Counsel for plaintiff asks us to hold that as the special judge took only the oath specified in section 11, c. 112, Code 1899, and did not take the oath found in section 5, art. 4, of the Constitution, the judgment is therefore bad, and bases this assignment on *State v. Burnett*, 47 W. Va. 731, 35 S. E. 983; holding that a special judge must take the constitutional oath. I dissented from that feature in that case, and I still think such special judge need not take that oath, as the Legislature thought, because it required another oath; but the court does not now pass on that question, not deeming it important to do so. The court is unanimous, however that question may be, that the act of the special judge is nevertheless valid as the act of a *de facto* judge. We think so, on general common-law principles. See Judge Dent's opinion in *State v. Cross*, 44 W. Va. 328, 29 S. E. 527; dissent in *Dial v. Hollandsworth*, 39 W. Va. 6, 19 S. E. 557; *Walcott v. Wells* (Nev.) 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478. It is generally held that an oath, though required by law, is not indispensable, but is a mere incident, and does not confer the office, and is not the office itself, though the person be punishable for acting without taking it. *Mechem*, Pub. Off. §§ 255, 262; *Throop*, Pub. Off. § 629. It is there said that the officer regularly elected, not taking the oath, ranks above a *de facto* officer, and is one *de jure*, by defeasible title—a lawful officer until turned out. Therefore the court now disapproves of the expression of opinion in *State v. Burnett* that the acts of a special judge are *coram non iudice* for want of oath. A judgment would be neither void nor voidable for that cause. *State v. Carter*, 49 W. Va. 709, 39 S. E. 611, is utterly inconsistent with that feature of the *Burnett* Case, in holding that a judgment by one acting by authority or color of office is valid, though not lawfully elected or appointed, or disqualified to hold the office. In that case, section 15, c. 7, of the Code was cited, providing that "all judgments given and acts done by any person by authority or color of office before his removal therefrom . . . shall be valid though it afterwards be decided or adjudged that he was not lawfully elected or appointed or was disqualified, or that the same had been forfeited or vacated." *Franklin v. Vandervort*, 50 W. Va. 412, 40 S. E. 374, is to same effect. So this is no cause for reversal.

For reasons given above, the judgment is reversed, the verdict set aside, a new trial is

granted, special pleas 2 and 4 are stricken from the record, and the cause remanded for further proceedings.

(53 W. Va. 372)

**MORGAN et al. v. WETZEL COUNTY COURT.**

(Supreme Court of Appeals of West Virginia. April 25, 1903.)

**MANDAMUS TO COUNTY COURT—RELOCATION OF COUNTY SEAT—DECLARING VOTE—BALLOTS—INJUNCTION.**

1. A writ of mandamus lies to compel a county court to convene and ascertain and declare the result of a vote upon the relocation of a county seat, where it has failed and refused to do so.

2. An injunction does not lie to restrain ballot commissioners from putting on the ballots to be used at a general election the question of the relocation of a county seat, when the county court has made an order submitting such question to vote. Such an injunction is null and void, and does not render invalid a vote upon such question.

3. An injunction does not lie to restrain the holding of a public election authorized by law. (Syllabus by the Court.)

Error to Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by B. L. Morgan and others against the county court of Wetzel county. Judgment for defendant, and plaintiffs bring error. Reversed.

B. L. Butcher, for plaintiffs in error. T. P. Jacobs and E. B. Snodgrass, for defendant in error.

**BRANNON, J.** The county court of Wetzel county submitted to the voters at the general election in November, 1900, the question of the relocation of the county seat. Certain citizens and taxpayers obtained an injunction against the ballot commissioners restraining them from putting on the ballots to be used at the election the question of the relocation of the county seat at Pine Grove, and they did not put the question on the ballots used at the general election. However, voters voted upon that question in hundreds of the ballots. At some of the precincts the commissioners of election made and returned along with the pollbooks and other papers of the general election separate certificates of the result of the election at those precincts upon the county-seat question within the time fixed by law, but at a number of precincts where votes were cast upon the question the commissioners did not make out any certificates of the result upon that question, though they made a memorandum of the result on the pollbooks and tally sheets. At the regular meeting of the board of canvassers of the election to canvass the returns as to public officers the board did canvass the returns as to the county-seat question appear-

ing on the certificates sent in from those precincts where such certificates were made and sent in with the other returns, and ascertained and declared that the result was for relocation of the county seat 44 votes, and against it 491 votes. Several weeks after the election certain citizens procured said commissioners at the precincts from which no certificates had been sent to make out and send to the clerk of the county court certificates of the result of the election at those precincts upon the county-seat question, which were delivered to the clerk April 8, 1901. At the second regular term of the county court after the election, in April, 1901, John Lavelle and others moved the county court to file the said delayed certificates, and to summon the election officers at the precincts to give evidence of the truth stated in the certificates, and to account for the delay in making the certificates, and to consider the memoranda on the pollbooks and the tally sheets in support of the certificates, and to consider the memoranda made by the board of canvassers touching the election, and from all such evidence to declare the result of the election upon the county seat. The order of the county court upon said motion shows that the court declined to consider said delayed certificates because they had been made out since the adjournment of the canvassing board, and filed since the regular January term, and because returned to the clerk by private persons, and not under seal; and the court declined to summon the election officers, and declined to entertain any and all said motions made by Lavelle and others, and repeated that it declined to consider said delayed certificates or evidence touching the election upon the county seat. It refused to allow said delayed certificates to be filed. After this action of the county court, B. L. Morgan and others obtained from the circuit court an alternative mandamus commanding the county court to convene in regular session, and ascertain and declare the result of the vote at the election held in the county on November 6, 1900, "on the question of the relocation of the county seat at Pine Grove upon the separate certificates heretofore delivered by the election officers to the clerk of said court and those delivered to the said clerk on the 3d day of April, 1901, and to enter the result thereof of record as required by law, or show cause, if any it can, why it should not do so." The circuit court refused a peremptory mandamus, and Morgan and others obtained a writ of error.

The first question is, does mandamus lie in the case, or is certiorari the proper remedy? It is useless to go over what has so often been discussed, where mandamus does and does not lie, except in short space. Likely I could not state it better now than to repeat point 1 of the syllabus in *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470: "The writ of mandamus properly lies where the

inferior court refuses to take jurisdiction where by law it ought to do so, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged error occurring in the exercise of its judicial discretion while acting within its jurisdiction." The inferior tribunal may be compelled to act, if it refuses to do so. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72. We may not just say that the county court refused jurisdiction, but virtually so. It reached that result by refusing to go on to judgment. It declined to take up the evidence, to consider the certificates and other matters calling for decision in one way or the other. It refused to begin to consider a case plainly within its jurisdiction. This is virtually a renunciation or refusal of jurisdiction, because it refused it in an instance to those entitled to call for it in a matter of which it had jurisdiction. If it be not exact to say that the county court refused jurisdiction, we can say that, "having obtained jurisdiction in a cause, it refused to proceed in the due exercise thereof." The motion was to declare the result of the election upon the relocation of the county seat, of course upon all returns, questioned and unquestioned. This the county court had never done. The action of the board of canvassers which ascertained the result on the election certificates then before it did not operate in law, was a nullity, because the result of a vote upon a county-seat question must be declared by the county court, not by the board of canvassers. *Brown v. Board*, 45 W. Va. 826, 82 S. E. 168, and *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165. The county court thus refused to perform a function required by statute of it, which it had not yet performed. Certiorari lies where the tribunal has performed its office, for correction of error. Here the county court declared no result on any of the returns.

But before we can award the mandamus we must see what is the effect of that injunction against the ballot commissioners. That was an injunction against holding any election upon the county-seat question. Does injunction lie to stop an election for public officers? "Acts of public officers pertaining to the calling, conducting, and certifying the results of elections, being the exercise of political functions of great importance, are rarely and reluctantly interfered with by court of equity. Owing to the imperative necessity of protecting expressions of the popular will in the selection of officers and in other matters, and of having the results of such expressions accurately ascertained, numerous safeguards against fraud and abuse, and remedies for the correction of error and violations of duties, are usually provided by statute, so that the existence of means of redress by statutory proceeding usually affords ample ground for refusing

equitable remedies. Accordingly, where an election is called in pursuance of a law authorizing it, a court of equity has no power to restrain the officers from holding or the people from voting at such election; and they cannot be punished for disobeying an injunction issued in such a case, as the court has no jurisdiction to issue the writ. \* \* \*

And a court of equity is without power to restrain county commissioners from ordering an election for the removal of a county seat where the statute providing a mode of contesting elections furnishes a remedy." 1 Spell. Inj. & Extra. Rem. § 630; also, section 721. "It has been held that, the power of holding an election being a political power, equity has no jurisdiction to restrain officers intrusted by law with the duty of holding elections from the exercise of such power." 2 High on Inj. § 1316. "If the court has no jurisdiction over the matter involved, or has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants cannot be punished for contempt for its violation. For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction, and no attachment for contempt, since the mandate is absolutely void." High on Inj. § 1425. "The power to hold elections is a political one, and a court of equity has no jurisdiction to enjoin the proper officer from holding an election. An injunction issued in such case is void, and gives no ground for attachment for contempt." 10 Am. & Eng. Ency. L. 817; Paine on Elections, § 940; McCrary on Elections, § 386. Kindred principles are stated in *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53, 25 Am. St. Rep. 792, and *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, 5 L. R. A. 334, 25 Am. St. Rep. 840. It cannot be thought that the people had not a right to vote upon the question when an order of the county court, made under authority of a statute, gave them right to vote. The injunction being void, there was no obligation to obey it. *State v. Blair*, 39 W. Va. 704, 20 S. E. 658; *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53, 25 Am. St. Rep. 792. We shall not decide whether the certificates are good or bad, or any alleged irregularity touching them, or anything as to the result of the election, as these are matters within the jurisdiction of the county court, and it has not passed on these matters.

Therefore we reverse the judgment of the circuit court, and award a peremptory mandamus to the county court to convene and ascertain and declare the result of said election upon the question of the relocation of the county seat of Wetzel county at Pine Grove.

(33 W. Va. 524)

## PARR v. CURRENCE et al.

(Supreme Court of Appeals of West Virginia.  
May 2, 1903.)

## EJECTMENT—CO-TENANCY—EVIDENCE—INSTRUCTIONS—ADVERSE POSSESSION.

1. In an action of ejectment, in which the question of co-tenancy is involved, and evidence strongly tending to establish the same, it is error to instruct the jury that "if they believe from the evidence that the defendants were in the possession of the land in controversy under a claim and color of title adverse to the title claimed by the plaintiff, and exercising open, notorious, visible, and exclusive possession of the said land, claiming title to the extent of the boundary mentioned in the deed under which they claimed title, exercising such acts of ownership and control over said land as residing upon it, clearing the land, and cultivating the land for more than ten years next before the commencement of this suit, that then they should find for the defendants"; ignoring the question of co-tenancy, and the bringing of knowledge of such adverse holding home to the plaintiff.

2. Under section 9, c. 90, Code 1899, in an action of ejectment against a co-tenant having an equitable interest in the land in controversy, the legal title to the whole of the land being vested in the plaintiff, it is not necessary or proper that the declaration mention the equity in the defendant, that being a matter of defense.

(Syllabus by the Court.)

Error from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Genevieve B. Parr against Jonathan Currence and another. Judgment for defendants, and plaintiff brings error. Reversed.

C. W. Dalley and Strader & Strader, for plaintiff in error. Harding & Harding and W. B. Maxwell, for defendants in error.

McWHORTER, P. This is an action of ejectment for 790 acres of land in Randolph county, brought in the circuit court of said county by Genevieve B. Parr against Jonathan Currence and William Currence. The tract of land sued for was granted by the commonwealth of Virginia by patent dated the 1st day of January, 1851, to Caleb Bog-gess, who died intestate, leaving the plaintiff his sole heir at law. On the 9th day of May, 1898, the defendants entered their plea of not guilty, and an order of survey was entered. On the 15th of October, 1901, the defendants entered their disclaimer as to certain portions of the land in controversy, and a jury was impaneled, and on the 17th of October returned a verdict in favor of the defendants. The plaintiff moved to set aside the verdict on the ground that the same was contrary to the law and the evidence, which motion, being considered by the court, was on the 25th of October, 1901, overruled, and judgment entered for costs for the defendants.

The plaintiff filed two bills of exception, which were duly signed, sealed, and made a part of the record, numbered, respectively,

"2" and "3." A writ of error was granted the plaintiff, the first error assigned being the giving to the jury of instruction No. 6, asked by the defendants, and set out in plaintiff's bill of exceptions No. 2. In the trial of the case plaintiff put in evidence the said grant for the 790 acres to Caleb Bogges, proved by witnesses the death of Caleb Bogges prior to the institution of the suit and that plaintiff was his sole heir at law, and it was admitted at bar that the defendants were in possession of part of the land in controversy claimed by them. The defendants offered in evidence on their part a deed of Melvin Currence to Jonathan Currence dated the 1st day of January, 1877, and recorded on the 5th day of May, 1890, under which the defendants claim to be holding their possession, which deed was for a tract of 500 acres, which included a large part of the 790 acres in controversy. In rebuttal plaintiff offered in evidence—and which was permitted to be read to the jury—a copy of a paper purporting to be an agreement between Caleb Bogges and William H. Currence whereby it was agreed by said Currence that he and James McCall would convey to the said Bogges, without warranty, any title which they might have to five undivided sixth parts in value of the said tract of 790 acres, and, that being done, the said Bogges agreed to convey, without warranty, his title to one undivided sixth part in value of the said tract, and the parties agreed that, when partition should be made between them of the said land, the said Currence was to have his said sixth part thereof at either end he might prefer, by a line run across the said tract parallel to the end lines thereof. Said agreement was signed by the parties under seal, and witnessed by J. W. Crawford, and had the following indorsement thereon: "The foregoing is a copy of a paper this day produced by Melvin Currence to John S. Hoffman as an agreement between his father, William H. Currence, and Caleb Bogges, which he said he had found. I recognized the body of the writing to be that of John S. Hoffman, the signature of Caleb Bogges thereto as his writing, and the signature of J. W. Crawford as a witness thereto, as his writing, August 9th, 1871. James H. Logan." Plaintiff also introduced in evidence a copy of an agreement in writing between Melvin Currence and Caleb Bogges dated October 12, 1868, which paper recited the fact that Joseph Hart made a deed to William H. Currence and James McCall for a tract of land on the waters of Middle Fork river, and that Currence and McCall had divided the said tract by a line running lengthwise through the center of it, north, 40° east, into two equal parts of like form, and assigned the southeastern half to Currence and the northeastern half to McCall, and, reciting the fact that the part assigned to Currence lapped onto the 790 acres granted to Bogges, then referred to the agreement

signed by said Currence and Bogges, whereby Bogges was to convey his interest of one-fifth in value (without reference to the improvements) of the lap, and that said Currence was to make a special warranty deed to Bogges for the residue of said land, and recited, further, that the said Currence died leaving eleven heirs, the said Melvin, being one of them, had purchased the interest of four of the other heirs, and closed with the words: "Now, I agree that James H. Logan may set apart to the said heirs and their assigns such fifth part in value of the said lap of the said land so conveyed to my father, the said William Currence, and the residue of the said land to the said Bogges. Witness the following signature this 12th day of October in the year 1868. Melvin Currence." The agreement was witnessed by John A. Hutton. Oral evidence was introduced to prove the making and execution of said agreements.

The instruction No. 6 given by the court to the jury on behalf of the defendants is as follows: "The court instructs the jury that if they believe from the evidence that the defendants were in the possession of the land in controversy under a claim and color of title adverse to the title claimed by the plaintiff, and exercising open, notorious, visible, and exclusive possession of the said land, claiming title to the extent of the boundary mentioned in the deed under which they claimed title, exercising such acts of ownership and control over said land as residing upon it, clearing the land, and cultivating the land for more than ten years next before the commencement of this suit, that then they should find for the defendants." If the evidence was sufficient to satisfy the jury of the execution of the agreements offered in evidence by the plaintiff then the plaintiff and defendants were co-tenants of the property in controversy, and the possession of one was the possession of all, or the possession was held for the benefit of all the co-tenants. In *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102 (Syl., point 2), it is held: "A tenant in common out of possession has a right to rely upon the possession of his co-tenant, as one held according to the title and for the benefit of all interested, until some action is taken by the other evidencing an intention to assert adverse and hostile claim." And point 3 of same syllabus: "One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied with any action amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession." And in *Bogges v. Meredith*, 16 W. Va. 1 (Syl., point 1), it is held: "An actual ouster of one tenant in common cannot be presumed, except where the possession has become tortious and wrongful by the disloyal acts of the co-tenant, which must be open, continued, and notorious, so as to pre-

clude all doubt of the character of his holding or the want of knowledge thereof by his co-tenant. This conduct must amount to a clear, positive, and continued disclaimer and disavowal of his co-tenant's title, and an assertion of an adverse right; and a knowledge of this must be brought home to his co-tenant."

The declaration in this case was served on the 5th day of March, 1898. While the deed from Melvin Currence and wife to defendant Jonathan Currence bears date the 1st day of January, 1877, and was acknowledged on the 10th day of the same month, it was not recorded until the 5th day of May, 1890, less than eight years prior to the institution of this action. Prior to such recordation defendants' possession was presumed to be for the benefit of all the co-tenants if the cotenancy was by the evidence established. In *Boggess v. Meredith*, cited, at page 25, 16 W. Va., Judge Greene, in speaking of the possession of a tenant in common, says: "He occupies such fiduciary relation to his co-tenant that it is well settled that the law will never presume that he has actually ousted his co-tenant, or that there has been a conveyance to him by such co-tenant, unless he disclaims the title which he holds with his co-tenant, asserts an adverse title, and brings home to his co-tenant distinct knowledge of such adverse title and disclaimer." *Hudson v. Putney*, 14 W. Va. 561. And in *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269 (Syl., point 4): "As the possession of one co-tenant is the possession of all, laches, acquiescence, or lapse of time cannot bar the right of entry of a co-tenant until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge." *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604-609, 40 S. E. 395. If *Boggess* and *Currence* entered into the contracts or agreements that were put in evidence by plaintiff—and whether they had or not executed such agreements was a question purely for the jury—then they were co-tenants, and possession held by one or the other of them or their privies was the possession of all the co-tenants, and could not become adverse without notice to the other of the repudiation of such holding and of an adverse claim. Instruction No. 6 given for the defendants totally ignores the plaintiff's theory of cotenancy, and upon which there was evidence tending to establish such cotenancy. As to the weight of such evidence as given, no opinion will be here expressed, as the case must go back to be again tried by a jury. The exercise of the acts of ownership and control over said land as set out in the instruction, such "as residing upon it, clearing the land, and cultivating the land by the defendants," are not inconsistent with their possession as co-tenants, and are such as any tenant in common might have exercised for himself and on behalf of the other owners.

Under *Boggess v. Meredith*, and other authorities cited, the said instruction should not have been given as presented.

Plaintiff's bill of exceptions No. 3 sets out the instruction, asked for by the plaintiff, and refused by the court, as follows: "The court further instructs the jury that if they believe from the evidence that William H. Currence, the father of the defendant Jonathan Currence, and Caleb Boggess, executed an agreement in writing bearing date the 31st day of May, 1855, and that the paper purporting to be a copy thereof, introduced in evidence, is a copy of said agreement, then from the time of the execution of said contract the said Caleb Boggess was the owner of all the land in the declaration described except one undivided sixth of that portion of the same described in said agreement by metes and bounds until the time of his death, and that at his death the plaintiff became the owner thereof; and if they further believe from the evidence that Melvin Currence, son of said William H. Currence, claiming to have acquired the interest formerly held by his father in said land, except the share of his brother Jonathan, executed the deed to the defendant Jonathan Currence bearing date the 1st day of January, 1877, a copy of which was introduced in evidence, and if they further believe from the evidence that the defendant William H. Currence went into possession of part of the land in controversy in 1877, after the execution of said deed to the defendant Jonathan Currence, under a verbal agreement with his father, the said Jonathan Currence, and has remained in such possession ever since, such possession, under the evidence and circumstances in this case, was not adverse to said Boggess or the plaintiff before the recordation of said deed on the 5th day of May, 1890, unless it is shown by the evidence that before the recordation of the said deed, and ten years before the institution of this suit, notice was brought home to the plaintiff or her father, Caleb Boggess, that the defendants were holding adversely and claiming all the land in controversy; and the plaintiff is entitled to recover from the defendants the land in controversy except the one undivided sixth interest in that portion of the 790 acres described in the paper offered in evidence as a copy of an agreement between Caleb Boggess and William H. Currence, as to which undivided sixth the plaintiff has waived her right to recover." There was evidence sufficiently tending to prove the tenancy in common to submit the facts on which it depended and to have authorized the giving of the instruction asked by the plaintiff, and the same should have been given.

It is insisted by counsel for defendants in error that under section 9, c. 90, Code 1899, to entitle her to put in evidence the agreements offered by her, the plaintiff should have stated in her declaration that she was claiming an undivided share or interest in

the land in controversy, stating what she so claimed. The action was brought for the whole tract, plaintiff holding the legal title thereto, and she had established her legal title to the 790 acres. The agreements offered in evidence conveyed no title, but were merely executory contracts. Under the common law such contracts were no defense in an action of ejectment. The agreements were proper to be introduced by the plaintiff for the purpose of refuting the evidence of defendant on the question of adversary possession and establishing the co-tenancy. The statute (sections 20-22, c. 90, Code 1899) provides for equitable defenses preserving the equitable rights of the defendants, whether they shall set up such defense in the action or not, and, the defendants in case at bar not having availed themselves of such defense, the plaintiff, by her waiver in writing to her right to recover more than five undivided sixth parts of the property sued for, secured to the defendants their one undivided sixth part without resort to equitable proceedings to recover the same in case plaintiff should recover in her action the whole land in controversy. In *Talbott v. Woodford*, supra, 48 W. Va. 449, 37 S. E. 580 (Syl. point 1), it is held: "Acts of exclusive ownership by one of two co-tenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other co-tenant, and, unless he brings suit within ten years thereafter, his right of recovery will be bound by the statute of limitations." See, also, *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395. In case at bar the possession was not changed; the deed of January 1, 1877, was made to the party already in possession, and there was nothing to call the transaction to the attention of plaintiff or her ancestor at least until the 5th of May, 1890, the date of the recordation of the deed.

It follows from what has been said that the third assignment of error, in overruling plaintiff's motion to set aside the verdict of the jury and award her a new trial, and in rendering judgment against her in favor of the defendants, is well taken. The judgment complained of must be reversed, the verdict set aside, and the case remanded to the circuit court of Randolph county for a new trial to be had therein.

**BRANNON, J.** (concurring). Counsel for Currence puts the proposition that the plaintiff cannot recover a part interest because the declaration claims the entirety. The declaration is right. If the plaintiff had legal title to only five-sixths, then it would be proper to claim that only; but she has legal title to the whole. True, that legal title is subject to an equitable title from the compromise contracts, but that would not prevent recovery at common law, but by statute would, if the defendant chooses to use it, prevent total recovery. I incline to think

that, if the plaintiff had not disclaimed one-sixth, she could have recovered all. Currence could have pleaded his equity to one-sixth, and thus averted recovery of the sixth. He did not do so, and the plaintiff could recover all, and Currence's right would not be affected, because saved by section 22, c. 90, Code 1899. Currence did not defend on that; but, if he had done so, his right would be left him. The plaintiff brought in papers showing Currence's right to the sixth. Whether those papers would have rendered a recovery of the whole error, as Currence did not rely on them, we need not say, in view of the plaintiff's disclaimer. I mean to say, as the purpose of this note, that recovery is not prevented by reasons of the declarations going for the whole upon the legal title. The argument of surprise will not do in face of a verdict for the defense. I agree with *McWHORTER, J.*, as to the instructions.

(58 W. Va. 515)

**FERRELL v. FERRELL et al.**

(Supreme Court of Appeals of West Virginia.  
May 2, 1903.)

**ACTION — COMMENCEMENT — EQUITY — JURISDICTION — INFANT — SERVICE OF PROCESS — REFORMATION OF DEED — MISTAKE — BILL OF REVIEW — ESTOPPEL.**

1. The issuance of a summons brings a suit into existence at its date.

2. Where there are only two defendants to a bill in equity, one adult, the other infant, and, after summons issued, though not served, the bill is filed in term, with the consent of the adult, and the court appoints a guardian ad litem for the infant, and his answer is filed, there is thus a cause for the action of the court, and it has jurisdiction to decree upon the matter of the bill, and its decree is neither void nor erroneous for the mere cause of want of service of the summons, or that the bill was not filed at rules.

3. There need not be service of process on an infant. The appointment of a guardian ad litem and his answer for the infant stand in place of such service.

4. Equity will entertain a bill to reform a deed where it is alleged the scrivener has by some mistake so drafted it as to not execute the intention of the parties.

5. Generally, to warrant equity to reform a deed for mistake, the mistake must be mutual; but where there are not two parties to the contract, and by mistake of the scrivener the instrument does not execute the purpose of the party executing the deed, equity will reform the deed at his instance.

6. A release of error in a decree will bar a bill of review to reverse it.

7. If one sign a written contract without acquainting himself with its contents, he is estopped by his own negligence from asking relief against its obligation, if his signature is procured without fraud.

(Syllabus by the Court.)

Appeal from Circuit Court, Logan County;  
**M. S. Doolittle, Judge.**

Bill by **Floyd Ferrell** against **F. A. J. Ferrell** and others. Decree for plaintiff, and defendants **Ferrell** appeal. Reversed.

¶ 7. See *Contracts*, vol. 11, Cent. Dig. § 418.

Campbell, Holt & Duncan, Sheppard & Goodykoontz, and H. K. Shumate, for appellants. John B. Wilkinson and John S. Marcum, for appellee.

BRANNON, J. F. A. J. Ferrell, owning a tract of 300 acres of land, had prepared the draft of a deed of gift by which he proposed to divide the land between four sons, one named Floyd, and a daughter, Anna. He was then a widower. The draft bore date May 4, 1881. By one of the sections of the deed he gave Floyd all the land from the mouth of Warm Hollow running up the river by given boundary. By another section he gave to his daughter his residence as shown below. He did not sign the draft. He concluded later to marry, and, desiring to provide for the wife whom he was to marry, he took the draft to a lawyer, H. Clay Ragland, and stated this purpose to him, and told him that he desired his future wife to share equally with his daughter, Anna, that portion of land mentioned in the draft which he proposed to give his daughter, and also that portion of the land which the draft gave to Floyd from Warm Hollow up to a rock fence above the same, so as to take from Floyd's land five or six acres of bottom land and a small portion of the hill land, and requested the attorney to so amend the draft as to accomplish his intention, and the attorney interlined in the section relating to Anna Floyd the words, "And it is further provided that my future wife whoever she may be is to share equally with my daughter Anna, and in case she marries to her lands is to be added all the land from the Warm Hollow up to the rock fence." This made the section read thus: "With condition that my daughter Anna Ferrell is to have the house I, F. A. J. Ferrell now lives in and the field and orchard around the houses and timbers and coal enough to support the land and fire during her natural life-time, that is to say as long as she remains a single woman and at her decease then the lands and houses is to belong to my son Andrew T. Ferrell's part and it is further provided that my future wife whoever she may be is to share equally with my daughter Anna and in case she marries to her lands is to be added all the land from the Warm Hollow up to the rock fence." The section giving land to Floyd Ferrell was by inattention left unchanged in the draft. Without reading the paper, and being told by the attorney that he had made the proper changes in the deed to carry out his intention, he signed and acknowledged the deed, and lodged it in the clerk's office. The said F. A. J. Ferrell married shortly after this. The town of Matewan occupies the portion of the land given by the deed to Floyd Ferrell lying between the Warm Hollow and the rock fence, the five or six acres which it was designed to take from him and give to the wife, and, Ferrell and wife having sold various lots in the

town, the defect in the deed was discovered, and, the question of the title to the lots arising, F. A. J. Ferrell sued out, April 1, 1893, a summons in a chancery suit against Floyd Ferrell and Mary Ferrell, wife of F. A. J. Ferrell, to reform and correct said deed so as to make it carry out the intention of its maker. Floyd Ferrell was an infant, and the summons was not served or returned; but on April 21, 1893, in the open court of Logan county, Ferrell filed his bill, with consent of his wife, and H. C. Ragland was by the court assigned guardian ad litem for Floyd Ferrell, who filed a formal answer for the infant, placing the infant's rights under the protection of the court. Mary Ferrell filed an answer. Depositions were taken by the plaintiff. The cause resulted in a decree reforming the deed in the respect already indicated. This decree dates September 9, 1893. On April 5, 1901, Floyd Ferrell filed a bill of review to reverse the decree for error of law. F. A. J. Ferrell and his wife defended this bill of review. Later Floyd Ferrell made a paper under seal, called a "power of attorney," constituting H. C. Ragland his attorney and counselor, and directing him to dismiss the bill of review, and releasing all error in the decree which it was filed to reverse. Motion to dismiss was made by Ragland, and resisted by the attorneys Marcum & Wilkinson, who filed the bill of review, and time was given them to file affidavits to oppose the motion for dismissal. Later Floyd Ferrell sent Ragland a letter, saying that he had been informed that Ragland had filed "some sort of a paper" authorizing him to dismiss the suit, and saying that he did not know what paper it was when he signed it, and that he had employed Marcum & Wilkinson to represent him, and wished the suit prosecuted, and requesting Ragland to withdraw the paper and surrender it to Marcum & Wilkinson. A motion to withdraw this paper was made, and resisted by Ferrell and wife. Floyd Ferrell filed his own affidavit that he went to Logan C. H. to look after the suit, and while there "his father and Thomas West and others kept after him to get him to sign some sort of a paper about the matter, and he refused several times to do so, but finally, to get rid of them, he signed the paper without at the time knowing what it was, or that it contained any authority to dismiss his bill." The answer of Ferrell and wife to the bill of review was filed July 24, 1901, and no response was made to it until November 1, 1901, when the court overruled exceptions to the answer then made for the first time, and the plaintiff replied generally to the answer, and moved to submit the case, and the defendants opposed the motion, and asked a continuance to give time to take proof to support their answer, and also moved that persons named in their answer as having purchased lots in the litigated land be made parties, and the court took time to consider.



On the next day the court made a final decree allowing Floyd Ferrell to withdraw said power of attorney, and refusing to continue the case, and refusing to make such new parties, and finding error in said decree of September 9, 1893, and reversing that decree, and overruling a motion of Ferrell and wife to remand the original cause to rules for process and to mature the same, and striking the case from the docket. From this decree Ferrell and wife have appealed.

We must find whether there is error of law in the decree which was reversed by the decree entered upon the bill of review, and in doing so we must look only for error apparent on the face of the record, and cannot look at depositions, as this is a bill of review for error of law, not new evidence. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66. One point made against the decree is that no writ was served on Floyd Ferrell, and the court had no authority or jurisdiction to docket the cause. The summons was not returned, the bill was not filed at rules, but in term, and no rules taken upon it. There were but two defendants—Mary Ferrell, who appeared, and consented to the filing of the bill, and the infant, Floyd Ferrell, who appeared by guardian ad litem. When the summons issued there came into existence a suit. Service of process is only to notify the parties of the suit. What need of it in this case as to the infant? Code 1899, c. 125, § 13, dispenses with service upon an infant, and makes the appointment of a guardian ad litem take its place. Though served, there must be a guardian; and service is entirely useless, as it performs no office. *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. 291. Pleadings may be filed either at rules or in term in open court. *Bank v. Distilling Co.*, 41 W. Va. 530, 22 S. E. 792, 56 Am. St. Rep. 878. The only purpose of rules is to give a process of maturing the case for hearing; but the case comes at last into court for its action. Here there was no need of maturing. The appearance of the parties dispensed with that. The case was in court; it was not out in the country; the bill just where it must have gone at last, had it been filed at rules.

Another point made against the decree is that the court had no authority to appoint a guardian ad litem. As there was in esse a suit, the Code gave express authority and mandate to appoint one. As to the appointment of Ragland, he was not an unfit person for guardian simply because he amended the deed, and was, after appointment, and filing his answer, compelled to give testimony by F. A. J. Ferrell. He filed the usual answer, placing the infant's interest under care of the court.

Another point made against the decree is that it was contrary to law. Here it is said that the bill shows that when the draft of the deed had been amended Ferrell did not read it, and is thus guilty of negligence. The bill

shows that he was misled by the assurance of the attorney that the draft had been so amended as to work the intent he had in mind, and that he was unlearned, and would hardly have discovered the mistake had he examined the papers. If, in fact, the scrivener did make the mistake, should this inadvertence preclude relief, and destroy the right of Mary Ferrell? "Mistake may be defined to be some unintentional act, omission, or error arising from unconsciousness, error, ignorance, forgetfulness, imposition, or misplaced confidence." *Kerr, Fraud & Mistake*, 396. In this case the paper failed to carry out the intent from error or defect of expression. The scrivener did not use language to make it do so. "An error of expression occurs when the parties enter into an agreement, and afterwards, in reducing its terms to writing, make a mistake, so that the instrument does not express the contract it was intended to evidence." 20 Am. & Eng. Ency. L. 821. Here there was no agreement, but there was fixed intent and purpose not carried out. "Where it is clear that an instrument does not express the intent of the parties, owing to the innocent omission or insertion of a material stipulation, equity has jurisdiction to grant relief by way of reformation on ground of mistake." "Thus, where there is a mistake of a scrivener which prevents the instrument from expressing the intent of the parties, it will be reformed." 1 Am. & Eng. Dec. in Eq., 239; *Western Mining Co. v. Peytona Co.*, 8 W. Va. 406; *Allen v. Yeater*, 17 W. Va. 128; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902; 2 *Pomeroy*, Eq. § 853. But it is said that, to call on equity to reform a document the mistake must be mutual, and a mass of citation is made to support the proposition. This is true. Where it is the mistake of both parties, equity will reform; where of one party only, it cannot reform because of mistake of that one only, as that would impose on the other a contract he never assented to, and the court would not reform, but rescind. The demand of mutuality does not, however, apply to a mistake that is one purely that of a scrivener. "Where a contract is explained by the parties, and he is directed to prepare a deed in accordance with such explanation, he may be properly regarded as agent of both parties, and his mistake in preparing the instrument will be deemed the mistake of both, or, rather, proof of his instructions will be proof of the precedent agreement, and the discrepancy between these instructions and the instrument as drawn will be evidence of the mistake." 20 Am. & Eng. Ency. L. 823. "Where there is no mistake as to the terms of an agreement, but through a mistake of the scrivener, or by any other inadvertence in reducing it to writing, the instrument does not express the agreement actually made, it may be reformed by the court. It is only where an action is to reform the agreement itself that it is necessary to allege in the pleadings and prove on

the trial that the mistake was mutual." *Born v. Schrenkelsen*, 110 N. Y. 55, 17 N. E. 339. In *Pitcher v. Hennessey*, 48 N. Y. 424, the court held that, where there was no mistake about the agreement and the only mistake alleged was in the reduction of that agreement to writing, such mistake of a scrivener or of either party, no matter how it occurred, may be corrected. And we read from *Stines v. Hays*, 36 N. J. Eq. 364: "The jurisdiction of the court of chancery to relieve against deeds drawn up by a mistake contrary to the intention of any of the parties is, said Mr. Spence, of a very early date. 1 Spence, Eq. Jur. 633." It would seem queer that, where there is no contract on valuable consideration, but a father, in making a deed giving his land to his children, directs a scrivener to do a certain thing, and by mistake he fails, there can be no relief for want of mutuality. What right has Floyd Ferrell? He paid nothing. So held in *Mitchell v. Mitchell*, 40 Ga. 11, because the grantee was a volunteer.

This is enough to decide the case, because, seeing no error of law in the decree, that ends the bill of review; but it seems further that, if there were error of law, it was released by the power of attorney, and it was error to allow its retraction, and disregard it in the decree on the bill of review. That paper was delivered and entered in the case. It at once operated. "The defendant in error may plead release of all errors or a release of all suits; and these pleas, if found for him, will forever bar the plaintiff." 3 Bacon, Abridg. 380. "And a release of errors in the same instrument with the warrant of attorney is good." *Id.*; *Hite's Heirs v. Wilson*, 2 Hen. & M. 268; 2 Cyc. 1007. True, Floyd Ferrell says he signed the power of attorney to get rid of importunity, and did not know what he was signing. A poor excuse. Can it be expected that a court would entertain such a plea to a solemn sealed instrument importing sufficient consideration? End of litigation and peace and danger of liability for costs is a good consideration. It is law as old as the hills that a sealed instrument imports consideration. A deed is good without consideration. The seal imports it. 2 Minor's Inst. 663. Unless a statute allows, the consideration imported by a seal cannot be controverted, or that it was not intended. 3 Minor, 150, 152. "One is never required to and never should execute a written instrument without first becoming fully acquainted with its contents. He should read it, if able; or, if illiterate, have it read to him. And when he has signed a written contract the law prima facie presumes that he discharged this duty. Therefore, whether in fact he did it, or chose to waive the privilege, the signature binds him." Bishop, Contracts, § 346. He does not pretend that it was misread, or that he directed a writing operating otherwise, or that duress was used. The simple truth is, he meant it at the time; he meant to let the second wife and little children

of his aged father have something for home and bread, because he thought it just and humane, as it was. Afterwards, from persuasion or other cause, he changed his mind. In deference to counsel, I refer to some cases cited in opposition to the view just stated: *Girard v. St. Louis (Mo.)* 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556. It holds that to a plea of release in an action for personal injury a reply that the release was obtained by fraud, while the plaintiff "was unable from pain and suffering from the injury to comprehend his act in signing it, and that he never assented thereto," was a good answer to the plea. Was there any ailment disabling Floyd Ferrell when he signed this release? He does not say so. Another cited case is *Lord v. American (Wis.)* 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815, holding that a release "signed without knowledge of its contents, and without any intention to execute such an instrument, is inoperative." But the party was not able either to read or write English. Floyd Ferrell could do so, we presume. Another case is *Bliss v. N. Y. C. Railroad (Mass.)* 38 N. E. 65, 39 Am. St. Rep. 504, holding that, if a plaintiff testifies that soon after a railway accident, "while suffering from it, and dazed and rattled thereby," he was taken to the office of the railroad company, and asked what the damage to his clothing was, and, on stating what it was, two papers were presented, one of which he understood to be a bill for such clothing, "and the other was said by an officer of the company to be a mere matter of form," and, if he signed both papers without reading, and accepted the sum named as damage to his clothing, and the papers were a receipt for and release of damage for the personal injury, this was sufficient evidence to go to the jury of fraud in procuring the papers. Certainly. Here were bodily pain, incapacitating the party for business, ignorance of the contents of the papers, actual false representation as to the character of the papers—actual fraud. What has that case to do with this? To the contrary, from the same state from which the second case comes (Wisconsin), we have *Albrecht v. Milwaukee Co.*, 58 N. W. 72, 41 Am. St. Rep. 30, holding that "one who has signed a written instrument without being induced by fraud or deception cannot avoid its effect on the ground that at the time he signed the paper he did not read or know its contents; and the fact that the party could not read English or understand the contents of the paper is no excuse." See note, page 33, 41 Am. St. Rep., and *Borden v. Richbond*, 37 Am. St. Rep. 632, and note 635, containing abundant authority to sustain this holding.

Argument against this release is made on the ground that Ferrell's counsel was not consulted, and we are cited to some remarks from the Wisconsin court, found in *Bailey on Master's Liability for Injuries to Servants*,

487, to the effect that a release after action begun and counsel employed, in his absence, should not bind the party, unless the utmost good faith be shown. Here I ask, where is any bad faith on the part of the father shown? It may be—though we cannot say—that the father and his friends may have urged the son not to ruin his father by taking the land, and render him in old age liable to breach of covenant for lots sold, and impoverish his little children. This was not fraud. It was entirely permissible. What right had this son to property which his father had, by mistake, given him without pay, to the bankruptcy of father, wife, and children? Was it improper for the father and his friends to address such considerations to the son on the score of humanity and filial duty? Was this fraud? Was this bad faith? Was it fraud thus to seek peace from litigation with a son in old age? Which had the higher moral claim, father or son? Whose property? When we come to look at the Wisconsin case from which the remarks cited from Bailey are taken, we find that the remarks were used in a case where a railroad company got the release from the injured woman when she had no advice, and her physician, acting on behalf of the company, urged her to execute it, though she desired to postpone it until she could see her counsel. The company agent told her the company would defeat her, and, if it did not, her counsel would absorb her recovery by fees. There is nothing akin to that in this case. We have not access to two other cases cited, but from quotations from them they have little or no bearing on the case. But, though this release was a positive bar to the bill of review, it can be utterly dispensed with, and still the case is for F. A. J. Ferrell for the simple reason that there is no error of law on the face of the record of the decree sought to be reversed by the bill of review.

We reverse the decree pronounced upon the bill of review on the 1st day of November, 1901, and dismiss the bill of review.

(58 W. Va. 314)

#### WOMELSDORF v. O'CONNOR.

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

#### CANCELLATION OF NOTE—FAILURE OF CONSIDERATION—PURCHASE-MONEY NOTES—WARRANTY DEED—RIGHTS OF PARTIES.

1. There is jurisdiction in equity to cancel promissory notes for total failure of consideration and enjoin an action at law thereon.

2. A purchaser of land under general warranty deed will not be compelled to pay notes given for purchase money when there has been a decree canceling the deed vesting title in his grantor because of fraud in such grantor in procuring such deed, and also canceling, for such fraud, the deed to such purchaser from such grantor.

3. Though one to whom land has been conveyed with general warranty deed, and who has lost the land by a decree canceling both the deed vesting title in his grantor and also the

deed to such purchaser, on account of the fraud of such grantor in procurement of the deed to him, has conveyed the land away, yet such purchaser will not be compelled to pay notes given to his grantor for purchase money, whether such purchaser has been made liable or not to his grantee on account of his own warranty.

4. O'Connor conveyed land to Womelsdorf with general warranty. In a suit by O'Connor's grantor to cancel the deed to O'Connor, and also the deed from O'Connor to Womelsdorf, on account of the fraud of O'Connor in procuring his deed, there was a decree canceling both deeds. In a suit in equity by Womelsdorf to cancel notes given to O'Connor for purchase money, O'Connor cannot, to defeat relief to Womelsdorf, demand that he be placed in statu quo by the reconveyance of the land by Womelsdorf to him.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by O. C. Womelsdorf against J. P. O'Connor. Decree for defendant, and plaintiff appeals. Reversed.

E. D. Talbott, for appellant. J. A. Bent, for appellee.

BRANNON, J. Patrick O'Connor conveyed a tract of 205 acres of land to John P. O'Connor, and John P. O'Connor conveyed it to O. C. Womelsdorf, and Womelsdorf conveyed it to the Roaring Creek Coal & Coke Company, and that company conveyed to Diller and Terry, trustees. John P. O'Connor conveyed to Womelsdorf with covenant of general warranty, and Womelsdorf paid down to O'Connor \$1,537, and gave O'Connor two notes of \$768.75 each for deferred purchase money. As will appear from O'Connor v. O'Connor, 45 W. Va. 354, 32 S. E. 276, Patrick O'Connor brought a suit against John P. O'Connor, Womelsdorf, and the coal company to set aside the deed from Patrick O'Connor to John P. O'Connor, and the deed from John P. O'Connor to Womelsdorf, and the deed from Womelsdorf to the coal company, and they were by the decision in that case wholly annulled. Later, John P. O'Connor brought an action at law against Womelsdorf upon the two notes given by Womelsdorf to John P. O'Connor for unpaid purchase money under the conveyance of the land from O'Connor to Womelsdorf, when Womelsdorf filed a bill in the circuit court of Randolph county against O'Connor to enjoin the suit at law upon said notes and to cancel the notes. An amended bill was filed, making Diller and Terry parties. The amended bill brought Diller and Terry and the coal company in, and set up the conveyances of the land to them, and averred that they had assumed to pay the notes to O'Connor, and that the liability of Womelsdorf under his warranty to the coal company was uncertain, and that he ought not be compelled to pay O'Connor unless he could be exonerated from liability to the coal company, and it would be unjust to compel him to pay O'Connor, and still answer his warranty to the coal company. He asked that these matters

be settled. The bill proceeded upon the theory that O'Connor was insolvent, and that the land had been taken from Womelsdorf and his vendees by decree of this court setting aside said deeds. O'Connor was insolvent. The court heard the case upon the bill, amended the bills, demurrers by O'Connor, his answers, replications, answers of Terry claiming that he, not O'Connor, was entitled to the money in the hands of Womelsdorf, special reply by O'Connor to Terry's answer, and depositions; but the court, after reciting that the cause was heard on the whole record as stated, sustained the demurrers, and dismissed the bill and amended bill, and Womelsdorf appeals.

This is a suit by Womelsdorf to cancel notes and be relieved from paying them by reason of badness of title to land conveyed by general warranty. He could either defend at law or go into equity. Equity can cancel the notes. The general law gives equity jurisdiction to cancel notes given without consideration. Besides, section 6, c. 126, Code 1899, allows either suit. *Ludington v. Tiffany*, 6 W. Va. 11; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146. It is clearly settled law that even where it is not the case of unpaid purchase money under an execution contract for the sale of land, but where a deed has been made, the purchaser will not be compelled to pay purchase money remaining in his hands and look to his warranty, where the grantor is insolvent and title defective. O'Connor is insolvent, and the deed he received from Patrick O'Connor, and that made by John P. O'Connor to Womelsdorf, utterly annihilated by decree. Does any one suppose that O'Connor could enforce the lien reserved in his deed to Womelsdorf in equity? Why, then, should he collect it at law? *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. 972, and cited cases. O'Connor and Womelsdorf were both parties to the O'Connor suit declaring said deeds void, and it is *res judicata* between them on that point. It settles that the land is gone from Womelsdorf, and is sufficient eviction. *Harr v. Shaffer*, 43 S. E. 89, 52 W. Va. —. Counsel for O'Connor would impress upon us the law of actions upon a covenant of warranty; would treat this as if it were a suit by Womelsdorf to recover back money paid upon the land under a breach of warranty. It is not such a suit. It is a suit to enable Womelsdorf to keep in his hands purchase money for his indemnity. I should rather say, not for his indemnity, should he lose the land, but to be relieved from paying money for land already irrevocably lost to him. Counsel tells us that the law touching actions on covenants of warranty requires that the covenantee place the covenantor in statu quo—that is, that Womelsdorf give O'Connor back the land before he can recover—and that he cannot do this, as he has conveyed it away. As just stated, this is not that kind of a suit. But O'Connor

nor gave Womelsdorf nothing to be given back—passed no title in fact. Pay O'Connor purchase money when Womelsdorf got nothing from him! A startling proposition! The title to the land was given back, over both their heads, to Patrick O'Connor, and the right of that decree binds both as *res judicata*. If Womelsdorf still had the land, it would be another case. He has it not to give back, not merely because he sold it, for that sale is gone, but because O'Connor never conferred it upon him, and it has gone back to Patrick O'Connor by law. Where a grantee loses his land from a superior adverse title, is an action on the warranty defeated for want of reconveyance? Or can a right to be exempt from paying purchase money be defeated by such demand? Here the land is lost by superior claim to that of John P. O'Connor. He cannot return it. 8 Ballard, Real Prop. 382.

Again, counsel would tell us that Womelsdorf cannot stay the collection of the notes, but must pay them, because he has never been called on by the coal company to make good his warranty. I do not deny the position that, where one parts with all interest in the land warranted, he parts with all right to or control over those covenants that go with the land, and can only regain the right to use them by being made liable upon his own warranty and paying his liability. *Rawle, Cov. for Title*, § 215; *Maupin on Marketable Title*, § 158; *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414. But that doctrine is inapposite in this case. That would apply if Womelsdorf were suing to recover for money he had paid. This is a suit to keep from paying when he gets nothing.

It is charged that Womelsdorf was a party implicated in the fraud practiced by John P. O'Connor on his uncle in getting an absolute deed under promise to return it if he did not pay for the land in three days, as set forth in 45 W. Va. 354, 32 S. E. 276, and equity will not help him. The evidence does not show that when Womelsdorf bought of O'Connor he knew of John P. O'Connor's pledge to return the deed in three days. O'Connor in the first suit, as a witness, exonerated Womelsdorf from the imputation, though he now charges it. This inconsistency discredits him. If even Womelsdorf had known of it, he did not know that O'Connor had changed the writing from three to fifteen days, and had no reason to believe that O'Connor would not pay as he agreed. But Womelsdorf paid the purchase money to O'Connor, \$1,537.50. Would he have done so if he had known of such change of the writing? And as Patrick and John P. O'Connor were uncle and nephew living together, even if Womelsdorf had known of the change, he did not know of any want of authority to change it or that it would not be satisfactory. The former decision did not find Womelsdorf a participant with John P. O'Connor in the fraud, but only that, as the

latter's deed was void, he could confer no title on Womelsdorf. Womelsdorf denied that he was aware that the land had not been paid for.

I do not see that Womelsdorf could bring into the case the coal company and Diller and Terry, and litigate whether they were entitled to recover against him on the warranties in deeds to them, as that would introduce for litigation matters in which O'Connor had no interest. But as they agreed to pay these very notes to O'Connor they were proper parties as to that. They were really brought in in order that, if Womelsdorf should be decreed liable, the money might be decreed to them, as O'Connor would be liable to them under his warranty. I do not think these various matters could be litigated in a suit limited to the question between Womelsdorf and O'Connor—whether Womelsdorf was liable to pay the notes. But as we hold he is not liable, this is immaterial.

Holding, as we do, that as the land is lost to Womelsdorf he cannot be made to pay the balance of the purchase money, we reverse the decree, and cancel the two promissory notes made by O. C. Womelsdorf to John P. O'Connor for \$768.75 each, in the record mentioned, and award a perpetual injunction against the prosecution by said O'Connor of the action at law in the circuit court of Randolph county in his name as plaintiff against said Womelsdorf, based on said notes.

(52 W. Va. 523)

GEISER MFG. CO. v. CHEWNING et al.  
(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

EQUITY—PROCEDURE—WRIT—FRAUDULENT  
CONVEYANCE—BILLS TO SET ASIDE—PRIORITIES—REFERENCE—NOTICE OF PROCEEDINGS.

1. The process to commence a suit in equity, or an action at law, is a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. The date of the writ is prima facie evidence of the time of its issuance. When the bill or declaration is filed in the suit or action, it relates back to the issuance of the writ.

2. J. W. C. executed a deed of trust, bearing date on the 31st day of May, 1897, to secure the payment of an alleged debt to his brother. On the 15th day of June, 1897, the G. M. Co., a creditor of J. W. C., commenced its suit, and, at the August rules following, filed its bill against J. W. C. and others to set aside the deed of trust as fraudulent, and to subject the property thereby conveyed to the payment of its demand. On the 21st day of June, 1897, B. B. recovered a judgment against J. W. C., and on the 7th day of July, 1897, commenced his suit, and at July rules of the same year filed his bill against J. W. C. and others for the purpose aforesaid. The deed of trust was set aside by decree entered in both suits, heard together. *Held*, the demand of G. M. Co. has priority of the judgment in favor of B. B., and is entitled to be paid in full out of the proceeds of the sale of the property, before the judgment of B. B., or any part thereof, shall be paid.

3. Where a commissioner to whom a cause has been referred by an interlocutory decree, in

his regular proceedings to adjust, settle, and report the matters so referred, takes the depositions of witnesses to enable him to act upon the subject, his general notice of such proceedings is sufficient, without a special notice from him or the adverse party that such depositions will be taken.

(Syllabus by the Court.)

Appeal from Circuit Court, Monroe County; J. M. McWhorter, Judge.

Bill by the Geiser Manufacturing Company against J. W. Chewning and others. Decree for plaintiff, and defendants appeal. Modified.

R. L. Clark and J. D. Logan, for appellants. John Osborne, for appellee.

MILLER, J. This, with the cause of Baldwin Ballard against W. S. Chewning and others, was here once before, upon appeal granted to defendant W. S. Chewning from the decree of the circuit court of Monroe county, made in said causes, heard together on the 23d day of March, 1899. Said decree decides that a certain deed of trust, executed by defendant J. W. Chewning to L. P. Dunn, trustee, bearing date on the 31st day of May, 1897, to secure to W. S. Chewning, a brother of grantor, the payment of an alleged demand for \$2,750, was and "is fraudulent per se on the face thereof, and is void, and was and is set aside; and it is further adjudged, ordered, and decreed that the plaintiffs [Geiser Manufacturing Company and Baldwin Ballard] have a lien on the land in the bills and proceedings mentioned [being the same lands in said trust deed described] for the amounts of their respective demands; that they have a right to enforce the same in said causes; and that said causes be referred to W. McD. Johnston, a commissioner of the said circuit court, to ascertain and report the amount of real estate owned by the defendant J. W. Chewning; what liens, if any, were against said real estate prior to the institution of the suits of the plaintiffs; the amounts the plaintiffs are entitled to recover from the defendant J. W. Chewning; and any other matter deemed pertinent by himself, or required by any party in interest." That decree was affirmed by this court, 49 W. Va. 508, 39 S. E. 170. After the said causes had been remanded to the circuit court, Commissioner Johnston executed said order of reference, and ascertained and reported, as "Class 1," a judgment in favor of Baldwin Ballard against J. W. Chewning, recovered on the 21st day of June, 1897, for \$294.88, with interest from the date last aforesaid and \$2.35 costs, amounting, in the aggregate, on the 15th day of October, 1901, to \$373.64; in "Class 2" a debt due the Geiser Manufacturing Company, amounting on said 15th day of October, 1901, to \$656.81, and a judgment in favor of E. N. Crews, agent for C. V. Crews, against J. W. Chewning, L. Rowan, and J. D. Logan, for \$96.18, rendered on the 4th day of January, 1898, which is reported to be for the use and bene-

fit of J. L. Rowan and J. D. Logan, and on the 15th day of October, 1901, amounted to \$117.96.

The said Geiser Manufacturing Company excepts to the report because it gives said Baldwin Ballard a priority over said company, and because said report includes in class 2 the said judgment in favor of E. N. Crews. Said J. W. Chewning excepts to said report, which finds the said balance of \$656.81 against him in favor of said company, when the proof taken and filed shows that said debt is entitled to a credit of about \$500. Commissioner Johnston, among other things in his said report, says: "Your commissioner would further report that the attorney for J. W. Chewning contends that the debt due the Geiser Mfg. Co. should be credited by \$400 instead of the \$185, and that the sale of the trustee G. W. Graves was void by reason of the fact that the trustee became the purchaser of the trust property. Your commissioner, believing the question raised to be one of law, respectfully refers the matter to the court for a decision. The testimony taken in reference to this matter, as well as all testimony used before your commissioner in the taking of said accounts, is herewith returned as a part of this report." The testimony referred to in said report is the depositions of W. C. Harvey, Jr., and J. W. Chewning. The caption thereof states that they were "taken before W. McD. Johnston, commissioner of Monroe circuit court, at his office in the town of Union, W. Va., on the 26th day of September, 1901, pursuant to notice for the taking of certain accounts in the chancery cause of Baldwin Ballard against J. W. Chewning et als. and the Geiser Mfg. Co. against the same, now pending in the circuit court of Monroe county, W. Va., which are to be read and used as evidence in the taking of said accounts and on the hearing of said cause." The Geiser Manufacturing Company also excepts to the reading of these depositions for any purpose, because, as it alleges, it had no notice of the time or place of the taking thereof, and no such notice appears in the record.

On the 31st day of October, 1901, the said circuit court heard said two causes together upon the papers formerly read therein, the mandate of the Supreme Court of Appeals of West Virginia, the report of Commissioner W. McD. Johnston, with exceptions to said report by the said Geiser Manufacturing Company and by the defendant J. W. Chewning, the depositions of witnesses taken before said commissioner, with the exceptions to the reading of the depositions of W. C. Harvey and J. W. Chewning by the Geiser Manufacturing Company, the petition of J. D. Logan filed that day by leave of the court, and waiver of process by the defendants to said petition; and same were argued by counsel, whereupon the court sustained the exception of the Geiser Manufacturing Company to said report, and overruled the said

exception of J. W. Chewning taken thereto, and also sustained the exceptions of the Geiser Manufacturing Company to said depositions of W. C. Harvey and J. W. Chewning, and excluded said depositions; and without recommitting said report the court corrected the same, and thereupon adjudged, ordered, and decreed that the said company and parties should recover from the said J. W. Chewning as follows, to wit: The Geiser Manufacturing Company, \$656.81; Baldwin Ballard, \$373.84; J. D. Logan and J. L. Rowan, \$117.96; and J. D. Logan, \$30.65. Each of said sums is to bear interest from the 15th day of October, 1901, and said Ballard and the Geiser Manufacturing Company are decreed their respective costs in their said suits. It is further decreed that unless said J. W. Chewning shall pay said sums, as required, within 30 days after the rising of the court, then John Osborne and J. D. Logan, who were by the court appointed special commissioners for the purpose, were authorized and directed to sell the lands in the bills and proceedings mentioned, at public auction, after giving the notice prescribed. The decree further provides that out of the proceeds of the 115 poles of land the debt of J. D. Logan shall be first paid, and that the proceeds of the sale of the residue of said real estate shall be paid pro rata upon the debts hereinbefore decreed, except the \$117.96 decreed to J. L. Rowan and J. D. Logan, which shall be paid pro rata as to \$50.87 part thereof only. And the defendant J. W. Chewning tendered his amended answer to the bill of complaint of the Geiser Manufacturing Company in the nature of a cross-bill, to the filing of which amended answer the Geiser Manufacturing Company objected, and the court refused to permit the same to be filed.

From this last decree the said J. W. Chewning was allowed an appeal, who assigns as error: That the circuit court erred in overruling his exceptions to the commissioner's report; that he should have been allowed credit for \$440 instead of \$193 on the debt decreed to the Geiser Manufacturing Company; that the court erred in sustaining exceptions to the depositions of W. C. Harvey and J. W. Chewning, and refusing to allow them to be read; that said court erred in failing to recommit the cause to the commissioner with instructions to retake said depositions; erred in rejecting appellant's amended answer; erred in pronouncing final decree without making G. W. Graves, trustee, a party to the cause; erred in not considering appellant's answer filed in the cause at the October term, 1898; and erred in not holding void the sale of the engine mentioned in the proceedings of said cause.

The question presented to the circuit court by the bills in each of said two causes was and is the alleged fraudulency of the said deed of trust. The court on the first hearing, "without passing on the objections of

W. S. Chewning to the reading of the answers, interrogatories and answers thereto (no objections being set out in the record), and without passing on the evidence of the witnesses examined in the case, was of opinion that the deed of trust executed by J. W. Chewning to L. P. Dunn, trustee, is void on its face; that the same shall be annulled and set aside, and that the plaintiffs have a lien on the land in the bill and proceedings mentioned, for the amount of their respective debts; and that they have the right to enforce the same in this cause." The court expressly adjudicated three matters, viz., that the said deed of trust was and is void upon its face, that it be and was annulled and set aside, and that the plaintiffs, Baldwin Ballard and the Geiser Manufacturing Company, have liens on the land in their bills and proceedings mentioned (being the lands in the said trust deed described) for the amounts of their respective demands, and that they have the right to enforce the same against said lands in their said causes; but the court did not pass upon, or adjudicate, any other matter or thing.

The indebtedness of said J. W. Chewning to the Geiser Manufacturing Company is evidenced by his three several promissory notes—two for \$220 each and one for \$210, each bearing date on the 29th day of July, 1895, and payable to said company on the 1st day of December, 1895, 1896, and 1897, respectively, with exchange and interest. These notes were given for the purchase price of a certain Geiser steam engine on wheels, which said J. W. Chewning had bought from said company. Said J. W. Chewning on the same day executed and delivered his deed of trust, bearing even date with the notes, conveying said engine to G. W. Graves, trustee, to secure the payment of said notes, in which deed it was, among other things, expressly stipulated and provided that "in case default shall be made in the payment of any one of the above notes or part thereof," etc., "then the said company shall have the right to declare all the above notes due, and then or in either of said causes named said trustee aforesaid shall take immediate possession of the property thereby conveyed," etc., "and upon notice from the Geiser Manufacturing Company shall proceed to sell the same at public auction upon such terms, and at such time and place, and after such notice as shall to him seem proper and suitable, and after paying the costs and expenses of executing this trust and reasonable attorney fees he shall apply the balance, if any, to the payment of the notes and interest hereinbefore mentioned," etc.

On the 22d day of March, 1898, the defendant J. W. Chewning filed his answer to the plaintiff Geiser Manufacturing Company's bill, to which answer the plaintiff replied generally, in which answer he, among other things, alleges that "it is true, as alleged in said bill, that he purchased from plaintiff

an engine at the price of \$——, of which he paid \$32.50, and for the residue of said purchase money he executed to G. W. Graves, trustee, a deed of trust on said engine, a copy of which deed is filed with complainant's bill. On an inspection of said paper it will be seen that, if respondent made default in the payment of said balance of purchase money for the period named in said deed of trust, then the trustee was directed to make sale of said engine and fixtures on the terms set forth in said deed; but respondent alleges that, after advertising the said property, the said trustee sold the said engine and fixtures, and purchased the same himself at the price of \$185, and that he afterwards on the —— day of —— 18——, sold the said engine and fixtures at the price of \$400, an advance on the price at which he himself undertook to purchase said property of the sum of \$215; and respondent submits that a trustee cannot sell property under a deed of trust, and become the purchaser thereof himself; that the sale by said trustee to himself was illegal and void; and he further submits that the price at which Ballard purchased said property must inure to the benefit of respondent, and that, instead of giving respondent credit for the sum of \$185, he should have given him credit for the sum of \$400, the amount at which the said property was sold to said R. S. Ballard and W. C. Harvey; and respondent avers that the said G. W. Graves, trustee as aforesaid, who was also the agent of the Geiser Manufacturing Company, took possession of said engine and run the same for his own benefit and profit for a period of one year before he sold the same to Ballard and Harvey; and respondent avers that by his so running and using said engine for said period the said engine was greatly worn and materially damaged, at least to the amount of \$150; that if said engine had been sold by said trustee before it had been so worn and damaged by twelve months' constant use it would have been sold for at least \$150 more than it did sell for to said Ballard and Harvey, to wit, it would have brought the sum of \$550, at least, and respondent submits that on that account the claim of plaintiff against him should be credited with that amount. He therefore prays that the said amount may be credited on the claims of plaintiff against him, and, if so done, he submits that he does not owe the plaintiff one cent." A credit of \$18.50 as of February 3, 1896, and a credit of \$174.50 (being \$185, proceeds of the sale of the engine, less \$10.50, expense of executing deed of trust) as of August 14, 1897, are given by the commissioner in his report. There is no error in the calculation of said balance of \$656.81, after allowing said credits. The plaintiff Geiser Manufacturing Company makes no exception thereto. The depositions of W. C. Harvey, Jr., and J. W. Chewning, excepted to by plaintiff and excluded by the court, prove that G. W. Graves, trustee, be-



came the purchaser of the engine at his sale thereof made as trustee about the middle of August, 1897, for \$185, and that in May, 1898, he sold said engine to said Harvey and R. S. Ballard for \$400. We see no reason why the circuit court sustained the exceptions to and excluded the said depositions. They were proper evidence to prove the said credit of \$174.50, net proceeds of the sale of the engine, and the date on which said credit therefor should be given on the notes.

In *McCandlish, Adm'r, etc., v. Edloe et al.*, 8 Grat. 330, 333, it is held: "Where a commissioner, in his regular proceedings to adjust and settle accounts referred to him, takes the depositions of witnesses to enable him to act upon the subject, his general notice of such proceedings is sufficient, without a special notice from him or the adverse party that such depositions will be taken." The circuit court therefore erred in sustaining the exception to the said depositions, but the credit which they establish, having been properly given by the commissioner, the error is not prejudicial to the appellant.

If the sale of the engine made by Graves, trustee, to himself, is void, as claimed by appellant, no person is bound thereby. If it be voidable only, although the appellant be prejudiced, he cannot have it set aside in this collateral way, but must resort to a direct proceeding upon a proper case for the purpose. It does not appear that the plaintiff the Geiser Manufacturing Company participated in any manner in either of said sales or had notice thereof. The alleged misconduct of the trustee, if it be misconduct, cannot impair the rights of the plaintiff to collect its demand from the debtor. *Carter v. Neal*, 71 Am. Dec. 136, 24 Ga. 346. The appellee Geiser Manufacturing Company cannot be charged with the \$400 for which Graves sold the engine the second time. Therefore, the said exception of appellant to the commissioner's report relating to that matter was properly overruled by the court. The amended and supplemental answer tendered by J. W. Chewning, and, on objection thereto, rejected by the court, is in substance the same as his original answer, with the addition of the prayer that it be treated as a cross bill and that process be awarded thereon. It was properly rejected.

The said causes are not brought or prosecuted under section 2 of chapter 74 of the Code of 1890, but are instituted under section 2 of chapter 133, to avoid the said deed of trust executed by J. W. Chewning to L. B. Dunn, trustee. Plaintiff Baldwin Ballard recovered his judgment against defendant J. W. Chewning on the 21st day of June, 1897, nearly a month after said deed of trust had been executed to Dunn, trustee, and at the rules held on the first Monday in July, 1897, filed his bill against said J. W. Chewning and others attacking said deed of trust. The summons commencing his said suit was issued, and bears date, on the 7th day of July,

1897. The Geiser Manufacturing Company without obtaining judgment on its demand filed its bill against the same parties for the same purpose at rules on the first Monday in August following, but the summons commencing the suit was issued, and bears date, on the 15th day of June, 1897. The court, by its decree appealed from, in effect held that the said judgment in favor of Baldwin Ballard, and the said demand of \$656.81 in favor of the Geiser Manufacturing Company, reported by the commissioner, were and are of equal dignity and priority, and shall be paid pro rata out of the proceeds of the sale of said lands. This is error. In *Foley v. Ruley et al.*, 50 W. Va. 158, 40 S. E. 382, 55 L. R. A. 916, this court says, citing *Wallace's Adm'r v. Treagle*, 27 Grat. 479: "It is plain by the very terms of this statute the creditor, assailing successfully a fraudulent conveyance, is placed in the same position, and is entitled to the same relief, as if he had already obtained a judgment or decree against his debtor. What is that position, and what is that relief? Plainly, a lien upon the property of the debtor, just as if he had, at the filing of his bill, already obtained a judgment or decree. The statute places the creditor who assails a fraudulent conveyance, if he succeeds in vacating it, in the position of one already having obtained a judgment or decree, and his lien subsists from the time of filing his bill." In that case one judgment had been acquired before the date of the fraudulent conveyance. Other judgments had been recovered after the date of the deed, and before the bill was filed, and there were creditors at large. The court held that in distributing the funds it was to be applied, first, to pay the judgment recovered before the deed was made; second, to the judgments recovered before the bill was filed; third, to the creditors at large who joined in the bill; fourth, to the creditors by petition before the death of Henderson in the order in which their petitions were filed; fifth, to all the other creditors pro rata. No West Virginia case has been found in which this question has been discussed, but the argument of Judge Christian is a strong one. The statute gives the creditor such relief in respect to the estate as he would be entitled to after obtaining a judgment or decree for the claim which he might be entitled to recover. The language of the statute puts the attacking creditor upon the ground occupied by the judgment creditor, and by construction the Court of Appeals of Virginia and this court have determined that it gives the attacking creditor a lien because it gives him the same relief which he would be entitled to after obtaining a judgment for the claim. Therefore, in so construing that statute the courts hold that a judgment is a lien upon real estate fraudulently conveyed by the debtor before the date of the judgment. Obtaining judgment against the debtor gives a lien. Filing a bill under section 2 of chapter 133



to set aside the fraudulent conveyance gives the attacking creditor a lien. That is the starting point of all these decisions. If judgment is recovered before such a bill is filed, the judgment creditor has priority; if after the bill is filed, the attacking creditor has priority. In reaching this conclusion, the equitable principle that the diligent are to be favored is not overlooked. A judgment creditor, without filing a bill to set aside the fraudulent conveyance or to enforce the lien of his judgment, and incidentally set aside the fraudulent conveyance, could never satisfy his judgment out of the property. By his failure to institute such proceedings the grantee in the fraudulent conveyance would keep the property, and the judgment creditor would never be paid. To obtain relief it is just as necessary that he come into a court of equity as it is that the creditor at large file his bill under said section 2. He who files his bill first shows the greater diligence in respect to that matter. But the judgment creditor having asserted his claim in a court of law before the creditor at large took any step whatever, it may be doubted whether the latter has been the more diligent or has been first to assert his claim. However that may be, the construction put upon the statute in question in *Wallace's Adm'r v. Treacle*, which has undoubtedly been followed in this state, although the question has never come up for adjudication in this court, is so logical and reasonable and so well considered that it ought not to be disturbed. It is a case out of which this whole doctrine of preferences acquired under said statute arises. It goes no further than is here stated. This court has never extended or enlarged it, nor in any way altered the rule as there laid down. To change it now would be to tear up the very foundation of the whole doctrine." See *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643; 13 Am. St. Rep. 860.

Lest the term, "from the time of filing his bill," used in the case above cited, be misunderstood and misapplied, we deem it proper to apply to this language the force and effect which must be given to it. The Code of 1899 (section 5 of chapter 124) says: "The process to commence a suit, shall be a writ commanding the officer to whom it is directed, to summon the defendant to answer the bill or action." In *U. S. Blowpipe Co. v. Spencer et al.*, 46 W. Va. 590, 33 S. E. 342, Brannon, J., speaking for the court, says: "And I must assert that, upon a review of the authorities, the issuance of the writ, generally speaking, is the beginning of the suit, if no statute controls." *Jackson's Adm'r v. Hull*, 21 W. Va. 601. There should be no difference, under our statute, between law and chancery as to this. In *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431, the court says: "The suing out of the writ of summons in an action at law is, in this state, the commencement of the action; but the

date of the writ is not conclusive, but is prima facie, evidence of the date of the commencement of the action." In *Ross v. Luther*, 15 Am. Dec. 341, note, it is held that, "where the issuance of the writ is regarded as the commencement of the action, its date will be deemed prima facie evidence of the time of its issuance." In *Harmon v. Byram's Adm'r*, 11 W. Va. 511, 521, the question was whether Patton was a purchaser pendente lite. The court says: "The subpoena was issued on the 3d day of January, 1872, and was served on the defendant Byram on the 6th of the same month. On the 20th day of January of the same year the purchase was made, and the bill was filed at February rules following. A subpoena served is not a sufficient lis pendens, unless a bill be filed; but when a bill is filed, the lis pendens begins from or relates back to the service of the subpoena." 3 Sug. 459; *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766. In *O'Connor v. O'Connor*, 45 W. Va. 354, 361, 32 S. E. 276, 278, English, J., for the court, uses this language: "The purchase was made on September 1, 1893, the suit was instituted on the 15th day of August, 1893, and the process had been served before this purchase was made, and before the bill was filed. The process having been served on the defendant Womelsdorff on the 18th day of August, and on John P. O'Connor on the 23d of August, and the bill filed at October rules, the lis pendens related to the service of the writ. From that time the suit was pending." Judge Brannon, in discussing this question in *U. S. Blowpipe Co. v. Spencer*, supra, says: "The point is made that this suit was barred because not brought within six months, on the theory that service was not within that time. I doubt the correctness of *Stone v. Tyree*, 30 W. Va. 687 [5 S. E. 878], in its holding that lis pendens dates from the service of subpoena only. In an action at law the suit dates from the writ issued. *Newman v. Chapman*, 2 Rand. 93 [14 Am. Dec. 766]. Authorities there shown date it in a chancery suit from service. This ruling is based upon the English chancery practice, from the fact that never till bill filed did writ issue, and the mere filing of a bill before writ was no suit; but now our Code [Code 1887, c. 124, § 5] says that 'process to commence a suit shall be a writ,' applying to both chancery and actions at law. A suit exists at its date." Judge English, who filed a dissenting opinion in the case above cited, among other things, says: "Was this suit commenced within six months after the plaintiff filed its account in the clerk's office? Now, while there is some diversity of opinion upon this question, the weight of authority appears to be that the suit or action is commenced when the writ issues;" thus agreeing with the other members of the court as to this particular question, notwithstanding any previous opinion which may

have been entertained by him. *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925.

From the English chancery practice of filing the bill before issuing the writ originated the idea that the filing of the bill is the commencement of the suit, and upon this theory the terms "commencement of the suit" and "the filing of the bill" have been used as correlative and equivalent in meaning. It must be observed that our statute places a suit in equity and an action at law upon the same basis as to the issuance of the writ commencing the same. It seems that the great weight of authority fixes the issuance of the writ as the commencement of the suit or action; that the date of the writ is *prima facie* evidence of the time of its issuance; and that, when the bill or declaration is filed, it relates back to the issuance of the writ. In this class of cases it is generally considered a race of diligence by the creditors of the fraudulent debtor. Legal remedies are for the active and diligent. "*Lex vigilantibus favet.*" The creditor discovering the fraudulent conveyance of his debtor immediately commences his suit by causing summons to be issued commanding the debtor to answer the bill to be exhibited against him. It is the duty of the sheriff or other officer of the court, wherein the suit or action is instituted, to serve the process commencing the same, and the process may be executed on or before the return day thereof. The creditor thus diligent should not be postponed for some other creditor, who may have first secured service of his writ, as it may be, through favoritism of the officer to the one, or negligence toward the other. It will not do to say, in answer, that the first creditor might have had service made by an individual. He may, but is not required to do so. He is entitled to the services of the public officer, chosen by the people for the purpose. The right of a party to priority should not be made to depend on the date of the service of his writ. We therefore hold that the commencement of the suit or action is the issuance of the writ, except in the action before a justice, for which the statute provides otherwise, and that, when the bill is filed, it relates back to the time of the issuance of the writ.

Applying the foregoing principles to this case, the said Geiser Manufacturing Company has priority over Baldwin Ballard. The judgment against said J. W. Chewning in favor of said Crews, reported for the use and benefit of said J. L. Rowan and J. D. Logan, having been recovered on the 4th day of January, 1898, after the commencement of both of said suits, is not entitled to equal dignity and priority, and to be paid pro rata, with the said debt due the Geiser Manufacturing Company or the judgment in favor of Ballard. The court therefore erred in holding that \$50.87, part thereof, should be paid pro rata with the debts decreed in

favor of said plaintiffs. The decree further provides that \$30.65, with interest from the date thereof, shall be first paid out of the proceeds of the sale of the 115 poles of land, to J. D. Logan. The reason for this preference is not given. It is presumed to be correct.

The decree of the circuit court is therefore hereby modified in so far as it holds that the demands of said Baldwin Ballard, the Geiser Manufacturing Company, and part of the said judgment in favor of Crews are of equal dignity and priority, and entitled to payment pro rata as aforesaid. The decree of the circuit court is hereby modified to the extent that the debt, interest, and costs decreed to the Geiser Manufacturing Company be, and the same is, first in priority, and shall be first paid out of the proceeds of sale of the land in the deed of trust described, except the proceeds of said 115 poles thereof; that the said debt decreed to Baldwin Ballard is second in priority, and is entitled to be next paid out of said proceeds, except as aforesaid; that after the payment of said \$30.65, with its proper interest, out of the proceeds of the sale of said 115 poles of land, the balance thereof, if any, shall be applied to the payment of said Geiser Manufacturing Company and Ballard in their priority as herein stated, if that be necessary; and leave is reserved to said J. L. Rowan and J. D. Logan to take any proper proceedings to have the surplus of said proceeds, if any, after payments as aforesaid, applied to the discharge of the judgment in favor of Crews, of which they are the beneficiaries. The decree of the circuit court aforesaid, so modified, is affirmed, with costs to the Geiser Manufacturing Company against the appellant; and said causes are remanded to the said circuit court for such other proceedings as may be proper for the execution of said decree of sale.

(52 W. Va. 381)

MARTIN v. MARTIN et al.

(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—  
EQUITY—JURISDICTION.

1. A devise to B. K. M., "and to his child or children by him begotten in lawful wedlock," of certain real estate, and, if the said B. K. M. should "die without leaving any child or children living at the time of his death begotten by him in lawful wedlock," then over, the said B. K. M. having had no child either at the date of the will or at the time of the death of the testator, but four children having been born to him in lawful wedlock after the death of the testator, does not entitle the children to take an interest in the land as joint tenants or tenants in common with the said B. K. M., and they cannot have partition of the land as against him.

2. Jurisdiction in equity to construe wills is limited and special, and will only be exercised as incident to general equity jurisdiction, and then, in a particular case, only to the extent

of determining whether or not the relief sought can be granted.

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County; John W. Mason, Judge.

Bill by Jesse H. Martin against Benjamin K. Martin and others. Decree for defendants, and plaintiff appeals. Affirmed.

John Bassel and Campbell, Holt & Duncan, for appellant. Henry M. Russell and W. S. Meredith, for appellees.

POFFENBARGER, J. This is a suit for partition, in which the granting or refusing of the relief sought depends upon the construction of the will of Jesse Martin, of Marion county. The testator had no children born in wedlock, but left several illegitimate children born of Cinderella Koon, a woman who resided with him. For three of these children, Melissa Koon, Benjamin K. Martin, and John Jefferson Martin, he provided in his will. The devise of a tract of land lying in Marion county, on the waters of Tygart's Valley river, to Benjamin K. Martin, is the clause involved, and reads as follows: "4th. I will and bequeath and devise unto Benjamin K. Martin infant son of said Sindrella Koon single woman that now lives with me and to his child or children by him begotten in lawful wedlock all my real estate in Marion County on Booths Creek and its waters and on the waters of Tigar's Valley river containing four hundred and eighty acres more or less which I hold under sundry titles purchased of different individuals together with all and singular the appurtenances thereunto belonging subject to the conditions and limitations hereinafter named." The conditions and limitations referred to in the foregoing clause are found in the eighth clause of the will, and read as follows: "If the said Benjamin K. Martin die without leaving any child or children living at the time of his death begotten by him in lawful wedlock then the above legacy and bequest of real estate is to go to the said John Jefferson or his lawful children if he be dead leaving at the time of the death of the said Benjamin K. but if he be dead leaving no lawful child or children at the death of the said Benjamin K. then the said legacy of the said Benjamin K. shall descend to said George T. Martin."

The bill for partition was filed by Jesse H. Martin, son of Benjamin K. Martin, against the said Benjamin K. Martin, Sarah B. Hunsaker, Bertie E. Holt, and Nettie Martin, sisters of the plaintiff, and alleges that the plaintiff is entitled to one-fifth of the land, on the theory that, under the fourth clause of the will, the said Benjamin K. Martin and his four children take equal shares of the land in fee simple, each child born to the said Benjamin K. Martin taking his full equal share at his birth, Benjamin K. Martin having sold 9 acres of the land to

John F. Bice, who afterwards conveyed the same to Charles Smith, and a tract of about 14 acres to George W. Manley, which is now claimed by Harriett Manley and John R. Manley. Said Smith and Harriett and John R. Manley are also made parties defendant.

The bill shows that Benjamin K. Martin was born February 29, 1844; that the will was made April 2, 1852; that Jesse Martin, the testator, died May 1, 1859; that Benjamin K. Martin married April 5, 1866; that Jesse H. Martin, the plaintiff, was born of said marriage February 14, 1867; and that Sarah B. Hunsaker (née Martin), Bertie Holt (née Martin), and Nettie Martin were born of said marriage, respectively, May 10, 1870, February 2, 1874, and November 1, 1881. So Benjamin K. Martin had no child or children either at the date of the will or at the time of the death of the testator.

The demurrer of Benjamin K. Martin to the bill was sustained, and the bill dismissed on the 20th day of July, 1899. The plaintiff, Jesse H. Martin, died in April, 1901, after having made a will by which he devised his interest in the land to Charles E. Manley, Charles Powell, C. L. Shaver, and Reuben Anderson, giving one half to Manley, and the other half to the other three persons in equal shares. These devisees have appealed from the decree sustaining the demurrer and dismissing the bill. In their petition for the appeal they set out the death of the plaintiff, and exhibit with it his will and the record of the probate thereof, and aver that they are the persons to whom the plaintiff therein devised his interest in the tract of land in controversy.

Counsel for the appellee, Benjamin K. Martin, insist that, before an appeal could be taken, the suit must have been revived in the name of the personal representative of Jesse H. Martin in the court below, although it is admitted that there is no express provision in the statute relating to revivor in a case in which there has been a final decree before the death of the plaintiff, but no appeal taken prior thereto. As supporting this contention, Booth v. Dotson, 93 Va. 233, 24 S. E. 935, is cited. In that case, Booth recovered a judgment in an action of debt against Dotson, assigned the judgment to his brother, and afterwards died. A writ of error was allowed in his name, but it was dismissed, although it was agreed by the parties that the judgment had been assigned as aforesaid. What the court would have done had the assignee of the judgment procured the writ of error in his own name, after showing by his petition that he was the owner of the judgment, is not intimated. Had that been done, the case would have been very much like this one. "Where one of the parties to a suit or action dies before the taking of an appeal or writ of error, if the cause of action survives, the appeal or writ should be prosecuted by or against the legal representatives of the decedent. At common law, in

both personal and real actions, when plaintiff in error dies before the assignment of error, the writ of error will abate." 2 Cyc. 769. The subject-matter of this suit is real estate, with which the personal representative has nothing whatever to do. He has no title to it, and no duty relating to it is devolved upon him by the will. All the testator's right, title, and interest are vested by the will in these appellants. In respect to it, they as fully represent him as his heirs would had he died intestate, in which case his legal representatives, as to the land, would have been his heirs. The appellants, therefore, are not only the only persons having any interest in the suit, but they have shown that fact in their petition. It could have been controverted here by the appellee, but he has not done so, and it must be taken as true. *Phares v. Saunders' Adm'r*, 18 W. Va. 336, 340. In that case it was held that a revival of the judgment in the court below was unnecessary, and that, if the personal representative alleged in his petition that since the judgment was rendered the defendant had died and that petitioner had been appointed administrator of the personal estate of the decedent, it was sufficient to entitle him to prosecute the writ of error. By the death of the defendant and appointment and qualification of his administrator, the title to the claim in controversy vested in the latter, and empowered him to prosecute the appeal. So, here, the will of Jesse H. Martin has vested the title to the land in the appellants, and given them the right to prosecute any proceeding that is necessary to the protection of that title. The motion to dismiss should be overruled.

Proceeding now to consider the main question, it is first to be noted that no case has been decided by this court, which involved the construction of a will like this one. *Graham v. Graham*, 4 W. Va. 320, has been cited as sustaining the contention of counsel for the appellee, that Benjamin K. Martin took, under this will, an estate tail, which, by our statute, section 9, c. 71, Code 1899, is converted into an estate in fee simple. That section reads in part as follows: "Every estate in land so limited that, as the law was on the seventh day of October, in the year one thousand seven hundred and seventy-six, in the state of Virginia, such estate would have been an estate tail, shall be deemed an estate in fee simple." If the words determining the estate of Benjamin K. Martin are such as would, under the law as it was in Virginia prior to October 7, 1776, have created an estate tail, the theory of counsel for appellee is correct. There is no clause in the will which can be said to indicate a contrary intention. In fact, the various clauses all taken together strongly indicate an intention on the part of the testator to keep his estate, as far as possible, in the hands of certain of his illegitimate children, for these clauses are full of limitations over, upon cer-

tain contingencies, from one to another. The chief characteristic of an estate tail is that it ties up the property in a family. The statute in which estates tail originated, and known as the "Statute De Donis Conditionalibus," was called a family law. 2 Min. Ins. 81. In clause 8 of the will it is provided, as to the property given Melissa Ann Koon, that if she die before she marries, leaving no children alive at her death, it is to go to Benjamin K. Martin and John Jefferson Martin in equal parts, if they be living; but, if either of them be dead without leaving lawful child or children, it is to go to the survivor; and if one be dead, but leave children, one moiety is to go to those children and the other to the survivor; and if both be dead leaving children, their children are to have it; and if both be dead, leaving no children, it is to go to George T. Martin. As to the property given to John Jefferson Martin, it is provided that, if he die leaving no lawful child or children living or in being, it is to go to Benjamin K. Martin, if living; but, if dead and leaving child or children living at his death, it is to go to his child or children; and, if he be dead leaving no child or children, his interest is to go to George T. Martin. By a codicil, the testator afterwards substituted his brothers, John Martin and Joseph Martin, for George T. Martin.

So the intent of the testator, as gathered from the terms of the will, does not, in any way, conflict with the idea or theory of a limitation in tail to Benjamin K. Martin. It remains, however, to determine, whether, under the rules of construction applicable to wills, the estate of Benjamin K. Martin is so limited that, as the law was prior to October 7, 1776, it would have been an estate tail. The language of the will in *Graham v. Graham*, cited, is entirely different in some respects from that used here. In that instrument there was no gift over in default of issue or heirs. Here, there is. So far as the report of that case discloses, there was no reference in the will to any default of issue. Here the will says, if the said Benjamin K. Martin die without leaving any child or children living at the time of his death, begotten by him in lawful wedlock, the property shall go to others named. In the *Graham Case* there were clauses indicating an intention that the property disposed of should never go out of the family. As to all of the property so given, there was one clause which said, "I give unto them and their heirs forever, according to the way they are stated." This language expressly creates an estate tail. No such language is found anywhere in this will. For these and other reasons which might be assigned, *Graham v. Graham* is not applicable here.

While an estate tail may be general, naming only one parent by whom the heirs contemplated are to be procreated, and in that the sex may or may not be designated, or special, naming both parents by whom the

heirs who are to inherit shall be procreated, and in that they may be designated and limited by sex, it is essential to an estate tail that the instrument creating it shall contemplate an indefinite failure of heirs of the class named. In other words, no particular time is named when the failure shall occur. It is left uncertain as to whether it will ever occur, and made certain that the estate shall never end as long as there are descendants of the first taker within the class to whom the estate is limited. 2 Min. Ins. 80, 81; 3 Jar. Wills (5th Am. Ed.) 200; 2 Blk. 110-115. In view of this, the words, "If the said Benjamin K. Martin die without leaving any child or children living at the time of his death begotten by him in lawful wedlock," are very important in the construction of this will. If the language had been "if he die without issue," or if the gift over had been in default of issue, a different case would be presented. These words would clearly have imported an indefinite failure of heirs; but the language of this will does not do so. The first taker under the will, Benjamin K. Martin, could have had no child or children living at the time of his death, and yet have had lineal descendants, born in lawful wedlock, surviving him, who could have taken the inheritance, if limited to them. But the language used cuts them out. Ordinarily, the words "child" or "children" are words of purchase, vesting a new estate in those persons, and not words of limitation, ineffectual to vest an estate, but effectual to mark out the limits of the ancestor's estate, showing it to be an estate of inheritance, and prescribing the course of descent. Therefore, when they are used in a deed, they are never words of limitation, and they are always words of purchase in a will, unless the context and circumstances are such as to show that they were used in the sense of heirs, and with the intent to make them words of limitation. 2 Min. Ins. 75, 76, and 81; 3 Jar. Wills (5th Ed.) 174-199. See 6th Ed. vol. 2, pp. 383, 390. When they are so used as to be words of limitation they do not constitute an express limitation in tail. The devisee takes such an estate by implication. "Thus a devise to A. and his children and their heirs, if A. has children at the time of the devise, is a joint estate in fee simple in A. and those children; but if A. have no children at the time of the devise, the obvious intent of the testator can only be effected by supposing that he used the word 'children' in the sense of issue, and so, in order to accomplish the intent, A. would take by implication, such as is allowed in wills, an estate tail." 2 Min. Ins. 75. But such implication does not arise when the words which, under those conditions, are supposed to have been used by the testator in the sense of issue, negative the theory of an indefinite failure of issue. "We now proceed to inquire into the grounds upon which words importing a failure of issue are restrained to such

failure at the death, in regard to real estate. It is clear that they receive this construction where the event of dying is confined to a definite age. Thus a devise to a person and his heirs, with a limitation over if he shall die under the age of twenty-one and without issue, is construed, not as creating an estate tail, with a contingent remainder dependent on the event of the first taker dying under the specified age (as would be the effect, if the words were construed to import an indefinite failure of issue), but as a devise in fee simple, subject to an executory limitation over in the event of the prior devisee's death under the given age and leaving no issue surviving him. The same principle probably would be considered as extending to every case in which a dying without issue is combined with an event personal to the individual, as the event of his dying without issue and unmarried, or without leaving a husband or wife, which is the meaning of 'unmarried' in this situation." 3 Jar. Wills (5th Ed.) 308, 309. See 6th Ed. vol. 2, p. 468. "Where the testator expressly devises over the estate in the event of the preceding devisee dying without leaving issue living at the time of his death, the language of the will seems to exclude all controversy; and yet we have an adjudication on the simple point in *Doe d. Barnfield v. Wetton*. The restricted construction, however, has been sometimes adopted where the intention was much less unequivocally expressed. Thus, in *Porter v. Bradley*, where the testator devised certain lands to his son P., his heirs and assigns forever; but his will was, that in case he (P.) should happen to die leaving no issue 'behind him,' then that his (testator's) wife should take the rents, and have his indoor goods, as long as she should continue his widow, and no longer; and after her decease or marriage, then the lands so devised to P. as aforesaid, unto his son J. and his heirs, chargeable with fifty pounds apiece to the testator's daughters and their issue within a twelvemonth after he (J.) should enjoy the same; but in case J. should die before P., and P. should not leave any issue of his body begotten, then the testator directed the lands to be sold and the money to be paid to the daughters. The court of K. B. held, upon the authority of *Pells v. Brown*, that the words imported a dying without issue living at the death, considering the words 'leaving no issue behind him' as equivalent in point of fact to the words 'living William' in that case; and Lord Kenyon considered the subsequent parts of the will to convey the same idea; for the deviser had mentioned [quere, treated?] this event as likely to happen in the lifetime of his widow or of his younger son or daughters." 3 Jar. Wills (5th Ed.) 312. See 6th Ed. vol. 2, p. 470. In *Pells v. Brown*, Cro. Jac. 590, the devise was to the testator's son, Thomas, and his heirs forever, and, if he died without issue living, William, his brother; then William to have those

lands to him and his heirs and assigns forever. There the court held that Thomas did not take an estate tail, but an estate in fee, subject to an executory devise; for it was said the clause, "if he die without issue," was not absolute and indefinite, whensoever he died without issue, but it was with a contingency, if he died without issue, living William; for he might survive William, or have issue alive at the time of his death, living William, in which case William should never have it. In *Barnfield v. Wetton*, 2 B. & P. 324, referred to by Jarman, the syllabus reads as follows: "Devise 'to S. S., her heirs and assigns, forever; but, if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death, then to F. B. and his heirs.' Held, that the devise in fee to S. S. was not restrained by the subsequent words to an estate tail, and that the devise over to F. B. was a good executory devise." From these authorities it seems very clear that the language of this will is insufficient to constitute and vest an estate tail.

That it does is contended for, however, upon what is known as the "Rule in Wild's Case," 6 Co. 17, A. and B. There the devise was to a person and his children, and that person had no child at the time of the devise, and the court held that the parent took an estate tail, saying: "The intent of the deviser is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his (the deviser's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation." The principle was applied in *Davie v. Stevens*, Doug. 321, where the devise was to the testator's son, S., when he should accomplish the full age of 21 years, of the fee simple and inheritance of Lower Shelstone, to him and his child or children forever; but, if he should happen to die before 21, then over to the testator's wife forever. S. was unmarried at the death of the testator, and it was held that he took an estate tail, there being no children to take an immediate estate by purchase. So, also, in *Seale v. Barter*, 2 B. & P. 485, where the devise was as follows: "It is my will that all my lands and estate shall after my decease come to my son J. and his children lawfully to be begotten, \* \* \* and for default of such issue, then" over in like manner to a daughter. J. had no child at the date of the will, but a living daughter at the testator's death, and the court held that he took an estate tail. In *Broadhurst v. Morris*, 2 B. & Ad. 1, the testator devised all his share of two estates to his daughter for life, and at her decease to her husband for his life, and at his decease he directed the whole legacy to him should go to the testator's grandson B. and to his children lawfully begotten forever; but, in default of

such issue at his (B.'s) decease, to G. and his heirs. B. was unmarried at the testator's death, and the court held that the devise conferred upon him an estate tail. It will be noticed that in all these cases the language was such as to import that the testator contemplated and intended an indefinite failure of issue. That, as has been said, is an essential characteristic of a limitation in tail. It is clearly wanting in the devise contained in the will now under consideration. Again, it must not be overlooked that an estate vesting under the rule in *Wild's Case* is not one expressly limited in tail. It is only by construction that in such case an estate tail is found and declared. By construction of the whole will it is found that it was the intention of the deviser that the children should take under the will, and that there is no other estate which can be vested in them. They cannot take as mediate devisees, because they are not in existence. They cannot take as remaindermen, because the gift is immediate. That they may have any estate under the will, which clearly shows the intent that they shall have an estate under it, it is necessary to hold the word "children" to be a word of limitation and not of purchase, and declare the existence of an estate tail, an estate of inheritance vested in the parent to descend to the child, and which, under the statute of *de donis*, could not be defeated by the parent, except by fine or common recovery—methods devised by the courts for the purpose of avoiding that statute and releasing the property. 2 Min. Ins. 83, 84; 2 Blk. 117. Had there been an express limitation in tail, the restricted construction resulting from the use of the words, "without leaving any child or children living at the time of his death begotten by him in lawful wedlock," would not affect the estate, it is said in 3 Jar. Wills (5th Ed.) 312, note "v"; 6th Ed. vol. 2, p. 470, note "r." This would harmonize with the rule of construction that, if an estate is conveyed, or interest given, or benefit bestowed, in one part of the will, by clear, unambiguous, and explicit words upon which no doubt could be raised, to destroy or annul that estate, interest, or benefit, it is not sufficient to raise a mist or doubt from other terms in another part of the instrument. The terms to rescind and cut down the estate or interest before given must be as clear and decisive as the terms by which it was created. 2 Min. Ins. 953; *Thornhill v. Hall*, 8 Bligh, 88, 107; *Collet v. Lawrence*, 1 Ves. Jr., 269; *Blake v. Bunbury*, 1 Ves. Jr. 195, note 4; *Mooberry v. Marye*, 2 Munf. 453; *Rayfield v. Gaines*, 17 Grat. 1; *Barksdale v. White*, 28 Grat. 227, 228, 26 Am. Rep. 344; *Stark v. Lipscomb*, 29 Grat. 326. Had an estate tail been vested by technical language in *Benjamin K. Martin*, it is probably true that it would not be altered by the use of words indicating that an indefinite failure of heirs was not contemplated. But it is unnecessary so to decide, for no such estate had been ex-

pressly created. It is not intended here to decide, however, that the appellee has not an estate in fee simple. The discussion thus far is intended only to cast light upon the character of the will, with a view to ascertain whether the appellants are entitled to partition. If, at the time of the devise, whether that be the date of the will or the date of the testator's death in this case, Benjamin K. Martin had had children, they would undoubtedly have taken a joint estate with him. "Thus a devise to A. and his children and their heirs, if A. has children at the time of the devise, is a joint estate in fee simple in A. and those children." 2 Min. Ins. (3d Ed.) 83; *Buttar v. Bradford*, 2 Atk. 220; *Hatterly v. Jackson*, 2 Strange, 1172. "What is meant by the time of the devise is not quite settled. It seems, however, to be the better doctrine that we are to understand by it, not the date of the devise, but the period when it is to take effect, whether that be the death of the testator, or a time subsequent to that. \* \* \* It may be proper to add that a devise or grant to A. and his children, supposing that there are children living then, or at the testator's death, creates a joint tenancy in A. and those children." 2 Min. Ins. (3d Ed.) 84. The language of this will is: "I will and bequeath and devise unto Benjamin K. Martin \* \* \* and to his child or children." Under no rule of construction can it be said that this language relates to a time subsequent to the death of the testator. The time of the devise is clearly not subsequent to that date. If the gift could be regarded as one to a class, including the father, the children would be excluded. An immediate gift to a class, one to take effect at the death of the testator, comprehends only those in being at that time. *Jar. Wills* (6th Ed.) vol. 2, 167. "A number of persons are properly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews'; but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." 1 *Jar. Wills* (6th Ed.) 262; *Page on Wills*, § 540. But if, at that time, none of the objects of the gift exist, all the children who may subsequently come into existence will take by way of executory devise. 2 *Jar. Wills* (6th Ed.) 180.

Nothing in the will militates against the view that the gift to Benjamin K. Martin and his children is immediate. No future time for distribution is fixed or indicated by any clause, nor does such intent appear from an analysis of the whole will. By the seventh, tenth, and eleventh clauses, provisions are

made for the care and education of B. K. Martin and the care of the real estate until his attainment of the age of 21 years, but this does not conflict with the vesting of the estate in him. His guardian and the executors of the will, charged with these duties, were required to stand in a trust relation toward him. Their possession was not in exclusion of his right. On the contrary, it was for his benefit and the protection of his estate. The subjecting of lands devised to trust for partial purposes, such as the raising of money, payment of annuities, or the like, does not make the gift one in futuro. Such provisions do not postpone the vesting in possession. 2 *Jar. Wills* (6th Ed.) 170. Such postponement requires an anterior gift, unless the language of the devise itself expressly, or taken in connection with the context or other expressions in the instrument, fixes a future time for distribution or vesting in possession. 2 *Jar. Wills* (6th Ed.) 168. But if the gift were held to take effect upon the attainment of the age of 21 years by B. K. Martin, his children would still be excluded, for none had been born to him at that time. Being immediate, and to a person and his unborn children, the devise cannot be considered as one to a class. One of the reasons for this is that the rule governing such devises would exclude the children, and thereby defeat the clearly expressed intention of the testator. Its application in *Wild's Case* would have wholly excluded the children. The long line of cases falling under the rule in *Wild's Case* all condemn the theory that such devises are gifts to classes. They also firmly establish the proposition that the children do not take as joint tenants or tenants in common with the parents under such devises. Could they have so taken, the courts would not have been driven to the necessity of devising another way of giving them anything at all under such wills. It was said that the devise was immediate, and that they could not take as immediate devisees, because they were not in being. While all these precedents deny the existence of a joint tenancy or tenancy in common, none have been found which hold the other way. Hence it is established that under a devise to a person and his children, he having no children at the time of the devise, neither a joint tenancy or tenancy in common between the parent and after-born children is created, unless by some other part of the will it appears that the testator so intended.

But if the devisee has a child at the time of the devise, such child will take an equal share with the parent. *Hatterly v. Jackson*, 2 Str. 1172; *Moore v. Leach*, 50 N. C. 88; *Gay v. Baker*, 58 N. C. 344, 68 Am. Dec. 229; *Hunt v. Satterwhite*, 85 N. C. 73; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236. In such case, the estate will open and let in after-born children. Where the devise was to A. for life, and after her death to her chil-

dren, it was held that the mother and all the children took as joint tenants, and that it was no objection that, by this means, the several estates began at different times. *Hatterly v. Jackson*, 2 Str. 1172.

As it is manifest that the appellants have no present right to possession or enjoyment of any part of the land, it becomes wholly unnecessary to determine whether an estate in fee simple is vested in the appellee. If the will gives him a life estate only, and the remainder in fee to the children, the appellant is not entitled to have partition of the land. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, with the array of authorities there cited, settles this question beyond controversy.

What estate the father does take is an interesting question. Under similar wills, some of the courts have held that he takes an estate in fee simple. *Bentz v. Bible Society*, 86 Md. 102, 37 Atl. 708; *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; *Gillespie v. Schuman*, 62 Ga. 252; *Silliman v. Whittaker*, 119 N. C. 89, 25 S. E. 742. On the other hand, some courts have held that the will vests in him a life estate, and the remainder in fee in the children—*Carr v. Estill*, 16 B. Mon. 309, 63 Am. Dec. 548, holding that a devise "to Mary Baker Didlake and her children," she having had no children at the time of the devise, gave her a life estate and the child the remainder in fee; *Fales v. Ourrer*, 55 N. H. 392, holding that a deed to a woman and her children, she having had no child at the time, gives her a life estate only, and remainder in fee to her after-born child; *Turner v. Ivie*, 5 Heisk. 222, in which the will was peculiar.

It is claimed, however, that although the appellants, if entitled to take by way of remainder, cannot have partition, the court may in this suit construe the will. A suit can never be entertained for the sole purpose of construing a will. There must be an actual litigation in respect to matters which are proper subjects of equity jurisdiction, such as relief on behalf of an executor, trustee, cestui que trust, or legatee. It is a special and limited jurisdiction incident to general equity jurisdiction over trusts and administrations. *Pom. Eq. Jur.* §§ 1156, 1157. This being true, the court cannot be called upon to interpret the will, further than is necessary to determine whether the person is entitled to the relief sought by his bill. It is true, equity has jurisdiction for compulsory partition; but, if it clearly appears that the plaintiff is not entitled to have it, he cannot require the court to say whether he may at some future time be in a position to demand it.

For the reasons here given, the decree is right and should be affirmed.

BRANNON, J. I concur in the conclusion. My reason is that, by the will, Benjamin K. Martin took a life estate, and his children,

no matter when born, the remainder. These children cannot have partition until the life estate ends. I do not think that the question of fee tail arises, because, by the will, estates for life and remainder are created. It says, "I will, bequeath, and devise to Benjamin K. Martin and to his child or children." If the testator had stopped there, the law given by Judge POFFENBARGER, to show that the children could not take because born after the testator's death, would apply; but the testator did not stop there; he went on and told both Benjamin K. Martin and the children that the devise was "subject to the conditions and limitations hereinafter named." Go on, then, down the paper to those "conditions and limitations" thus annexed to the devise, and we find the language, "If the said Benjamin K. Martin die without leaving any child or children living at the time of his death, then the above legacy and bequest of real estate is to go to the said John Jefferson or his lawful children." Here he tells Benjamin that he has only a life estate; else why give it to John Jefferson, if Benjamin has no children? But how if he has children? The will answers that it goes to his children. Where else would it go? We might well say that, if there were not above an express devise to the children, the limiting clause would, by strong implication, give to the children living at their father's death, as there may be legacies by implication where there is manifest intent to do so. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; *Schowler on Wills*, § 561; *Page on Wills*, § 468. But go back, and we find an express devise to the children; and the last clause tells what is meant by that devise to them; tells that they take only at the death of the father. The question whether the plaintiffs have right to a partition depends on the construction of the will, whether they have any estate under it, and, if so, what, and I think this is essentially included in the ratio decidendi, and ought to be decided. After a little thought, the testator's intent seems plain.

(52 W. Va. 581)

**POWERS-TAYLOR DRUG CO. v. FAULTONER et al.**

(Supreme Court of Appeals of West Virginia. March 28, 1903.)

**INSOLVENCY—PREFERENCES—RIGHTS OF CREDITORS.**

1. Where an insolvent debtor, with intent to prefer certain of his creditors, sells his property to a third party, who is cognizant of the purpose of said sale and participates therein, and the proceeds of sale are paid to certain creditors, leaving others unpaid, and the creditors so preferred are parties to the transaction, and enter into it for the purpose of obtaining the preference, such sale is not fraudulent in fact, unless there be evidence sufficient to establish the fraudulent intent; mere intent to prefer being, alone, insufficient to establish it.

2. In such case, however, the preference so given is in violation of section 2 of chapter 74



of the Code of 1899, and the preferred creditor must bring in the money so received to be distributed ratably in payment pro tanto of the debts due to him and the creditors at whose instance the transaction is set aside.

McWhorter, P., and Dent, J., dissenting.  
(Syllabus by the Court.)

Appeal from Circuit Court, Summers County; J. M. McWhorter, Judge.

Action by the Powers-Taylor Drug Company against E. N. Faulconer and others. Judgment for plaintiff, and defendants appeal. Reversed.

Miller & Read and Charles M. Alderson, for appellants. Dunsap & Garnett and Bogges & Bogges, for appellee.

POFFENBARGER, J. J. H. Jordan appeals from a decree of the circuit court of Summers county, holding him liable to the creditors of E. N. Faulconer in the sum of \$2,500, on the theory that he obtained the property of Faulconer by a sale made to him by Faulconer with intent to hinder, delay, and defraud the creditors of the latter. Faulconer was the owner of a drug store in Hinton, and, having become indebted to the extent of insolvency, he sold his stock of goods and accounts to Jordan for the sum of \$1,200 in cash. In the store there was a soda fountain, on which there was a lien for \$156.10, and this was assumed by Jordan, in addition to the \$1,200. At the time of this sale, some of Faulconer's creditors had obtained judgments against him amounting to about \$400, and acquired some execution liens upon the property. Jordan was the cashier of the Bank of Summers, and at the time of his purchase that institution held a note of \$750, made by Faulconer, and indorsed for his accommodation, it seems, by John W. Flanagan, J. M. Ayers, W. H. Sawyer, H. Ewart, and James H. Miller, who are amply good for the amount. It was in part renewal of a \$1,000 note which had been given some time before, and reduced by payment. Out of the purchase money of the drug store, Jordan, by direction of Faulconer, paid said note and the judgments, and, after paying some other small amounts, gave Faulconer the balance, amounting to \$25.92, part of which Faulconer says he paid out on other debts. Immediately after this transaction, Jordan sold a one-half interest in the drug store to Harrison Gwinn and Wade Gwinn for \$1,250, who have, since early in March, 1900, conducted the business under the firm name of Gwinn Drug Store; that being the date of the alleged second sale. It is further shown that Jordan borrowed the money with which he bought the store from the bank, and that in the second transaction Gwinn gave Jordan his note, which was also discounted. Some time afterwards the Powers-Taylor Drug Company and the Owens-Minor Drug Company, corporations, brought a suit in the circuit court, under section 2 of chapter 74 of the Code of 1899, to have

the sale and transactions had by Faulconer. Jordan, the bank, and the Gwinns declared a charge and transfer, within the meaning of said statute. The bill also attacked the sale as fraudulent in fact, and prayed that it be set aside as to plaintiff's debts; that the preference given to the bank be set aside; that the proceeds of sale be distributed pro rata among the creditors who should unite in the suit and contribute to its cost; that a decree be entered against Jordan and the bank for the full amount of the goods, fixtures, etc.; and that general relief be granted. The bill was answered by all the parties to the transaction, denying all charges of fraud and intent to hinder and delay the creditors of Faulconer, as well as any attempt to create a preference, and also that Jordan, the bank, and the Gwinns had any knowledge of any fraudulent intent on the part of Faulconer or of any of the parties, or intent on his part to prefer any of his creditors. The answers were separate, and Jordan averred that he purchased in good faith, and without any notice of Faulconer's insolvency or of any fraudulent intent on his part. The decree held Jordan liable to the creditors in the sum of \$2,500, required him to pay to the Powers-Taylor Drug Company \$204.45 and to the Owens-Minor Drug Company \$341.72, with interest on both sums from the date of the decree, and the costs, and awarded executions against him, and referred the cause to a commissioner to ascertain the further indebtedness of Faulconer existent at the time of sale. In the appeal from the decree, Faulconer and the Gwinns joined.

As stated in the opening sentence, the decree is predicated upon the finding of actual fraud upon creditors, perpetrated by the appellants, or one of them (Faulconer), and knowingly participated in by the others. This finding is based upon evidence tending to show that Jordan and the Gwinns knew of the insolvency of Faulconer, and of his intent to defraud, hinder, and delay his creditors, and that the inadequacy of the price paid by Jordan was such as to indicate fraud in the transaction. As strengthening this view, it is pointed out that he disposed of one-half of the property for almost as much as he paid for the whole of it. Another circumstance is that he purchased without having taken an invoice, or ascertained in any other way just what he was buying. Another is that the accounts due and owing to Faulconer, the amount of which does not appear, were not examined and considered in the negotiation for the purchase, and nothing was said about them, except that Jordan made a casual inquiry as to their probable amount, to which Faulconer replied that they might amount to \$1,000, \$1,500, or \$2,000. Jordan says he inferred from the response that Faulconer did not consider his accounts worth much. It also appears that at the time of the sale the Owens-Minor Drug Com-

pany, and probably other creditors, were pressing Faulconer for payment and had been doing so for some days, and that Sawyer, one of the indorsers of the note held by the bank, was aware of it; and there is evidence tending to show that he took part in the sale as an adviser of Faulconer, he being an attorney. James H. Miller, another one of the indorsers, at the instance of Jordan, ascertained the liens and judgments against Faulconer, and had something to do with the sale made by Jordan to the Gwinns. Jordan testifies that he proposed his purchase to Faulconer, who first declined to sell at the price offered and finally paid, but afterwards returned and said he had concluded to sell at that price, and, as a reason therefor, stated that there were some judgments against him. According to the testimony of Faulconer and Jordan, this proposition was made with the view and purpose of buying, and then reselling to Gwinn, who had before that time asked Jordan to notify him if he found an opening for a drug business; Gwinn then having a son at Richmond engaged in the drug business. On the morning of the day before the proposition was made by Jordan to Faulconer, or by Faulconer to Jordan—for they differ as to who made it—Sawyer had asked Jordan if he knew of anybody who wanted to buy a drug store. Jordan then telephoned inquiry to Gwinn, who replied that he still wanted to locate his son in the drug business. Then Jordan made his proposition, and Faulconer accepted, as has been stated. Before reselling, to Gwinn, Jordan invoiced the goods, and it does not appear just what the invoice showed. Some time after the sale of the interest to Gwinn, he consolidated his own drug store with the one owned by him and Jordan, and it appears that Faulconer remained in the store for a time as a clerk.

Unless the alleged inadequacy of price is accepted as a controlling circumstance in the case, the evidence undoubtedly establishes that Faulconer had no intent or purpose other than to prefer his creditors. What was done by Sawyer, Miller, and the bank, conceding all that is claimed against them in the way of participation, imports nothing more than a purpose and design to obtain payment of the note held by the bank and indorsed by some of the alleged actors. This could not be done by a purchase of the property to the exclusion of those creditors who held execution liens. Hence it was necessary to its accomplishment that these creditors should be paid. It does not appear that, in attempting to do this, these indorsers and the bank endeavored to give Faulconer any personal advantage, nor that he endeavored to obtain such advantage. All of the purchase money, according to the evidence, with the possible exception of \$4 or \$5, went to the creditors, and nothing was left to Faulconer. In its most unfavorable light, therefore, it was a conversion of the property into money

by sale, and payment of the whole proceeds upon certain debts; leaving others unpaid and leaving the debtor entirely stripped of his property. At the very root and basis of the law of fraudulent conveyances lies a secret trust or advantage secured to the grantor by the conveyance, which puts upon the transaction the character of fraud, and conclusively establishes the intent on the part of the grantor to hinder and delay his creditors and prevent them from reaching his property, while he, in a secret manner and upon a secret trust, contrary to the purport of his conveyance, holds onto his property, or a part of it. All of this is clearly and effectually negated and precluded by the evidence in this case. In thus disposing of his property at private sale and preferring certain of his creditors, contrary to the statute though it be, Faulconer says he obtained more money for it than it would have brought at public sale. If so, he thereby obtained the advantage of reducing his indebtedness by sale of his property to a sum less than would have existed after the sale of his property under executions and the application of its proceeds, but by so doing he withheld no part of the property or its proceeds from his creditors. Granting that it was his purpose to obtain the highest price possible for his property, and thus reduce his indebtedness as much as possible, it does not make the transaction fraudulent, although in effectuating this purpose he violated the statute against preferences. No discussion of this proposition is necessary, for the principle is clearly announced in the well-written opinion in *Herold v. Barlow*, 47 W. Va. 750, 755, 36 S. E. 8.

The alleged inadequacy of price is not sufficient to overthrow the intent and purpose which so clearly appear from all the evidence and circumstances. On the assumption that the value of the store and accounts was \$2,500, Jordan paid a little more than one-half of that value; but it would be unsafe to stand upon that valuation, for it is by no means established by the evidence. All that appears in support of that is Jordan's claim that he sold a half interest for \$1,250, and that the invoice taken at that time is said to have amounted to \$2,500. This is entitled to but little weight. While Jordan says he retained an interest, he did so for only a short time. The Gwinns took all the property, and there is no intimation that Jordan received anything but the note. On the whole, about \$1,200 seems to have been the real amount of money involved in each transaction. There is no evidence directly indicating what the actual cash value of the stock of goods and accounts was, or what they would have brought at a sale. The notes and accounts are spoken of disparagingly, and there is no evidence tending to show that they were of any considerable value. But the question here is not what the property was worth. It is whether Jordan or Gwinn was a bona fide

purchaser, and the inadequacy of price is only a circumstance indicating *mala fides*. It must be such inadequacy as makes it a badge of fraud, and that requires such inadequacy as to make the transaction unreasonable and unconscionable, not merely such as indicates that a good bargain was made by the purchaser. The latter is all that can be said of the inadequacy in this case. Hence it is wholly insufficient to brand the sale as fraudulent.

Having thus determined that the sale is not infected with fraud in fact, so as to make it void as against creditors, it remains to inquire whether the transaction falls under the ban of the statute against preferences. For the appellants, it is insisted that the case is within the principle announced in *Merchant & Co. v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813, where it is held that an insolvent debtor may sell his stock of merchandise to a disinterested party, take his notes in payment therefor, and assign the notes in payment of a debt due to a bona fide creditor. If the facts disclosed by the evidence placed this case on the footing of the one just referred to, and made it necessary to pass upon the soundness of that decision, I should be inclined to question it. It enables an insolvent debtor to do indirectly what he is forbidden to do directly by the plain and express language of the statute, namely, to turn his property over to a part of his creditors to the exclusion of others. It is claimed that warrant for this is found in the last clause of section 2 of chapter 74 of the Code of 1899, which enables the insolvent debtor to transfer bonds, notes, securities, or other evidences of debt in payment of, or as collateral security for the payment of, a bona fide debt, or to secure any indorser or surety, whether such a transfer is made at the time such debt is contracted or inforesement made, or for the payment or security of a pre-existing debt. This clause neither expressly authorizes the sale or transfer of any property to be so applied, nor the conversion of property into notes or money for such application. It deals with evidences of debt only. The first part of the section says that every transfer, which includes a sale, or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor, or to secure such a creditor or any surety or indorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts owed by such debtor at the time such transfer or charge is made. This part of the section forbids the gift, sale, conveyance, or assignment by an insolvent debtor of any of his property, whatever its form, so as to create a preference. But for the proviso at the end of the section, nothing could be so disposed of by him.

How far does it qualify the general inhibition of acts by an insolvent debtor? Only to the extent that he may so dispose of paper representing indebtedness due to him. To hold that he may convert his property into money or notes, and turn them over to his creditors, simply undermines the statute, and virtually destroys it and defeats its whole purpose. It is no answer to this to say that the statute permits the owner of property, although insolvent, to dispose of it by sale to a bona fide purchaser, and pay the proceeds on his indebtedness in the ordinary course of business. A mercantile house, open and running in the usual way, although the owner is insolvent, differs widely from such a house closed, with its owner insolvent, and having passed the title to some one else, and the proceeds of the sale of the entire business and property handed over to a part of the creditors to the exclusion of the others. Such a transaction is an act of insolvency. It is such a sale as the statute contemplates shall be taken for the benefit of all the creditors, and fixes upon the property or its proceeds the character of a trust fund, which may be followed up by the injured creditors in the manner prescribed by statute. If the purchaser has not paid all the purchase money, it is liable in his hands. Such creditors as have been paid ought to be compelled to refund a proper proportion, to the end that the purpose of the statute may be effectuated. The distinction adverted to between sales made by an insolvent debtor in the ordinary course of business, and the sale of all his property, or such a portion of it as clearly shows a purpose to quit business, is plainly stated in the great case of *Curtis v. Leavitt*, 15 N. Y. 9, the opinions in which cover nearly 300 pages. It was not the case of a sale to a bona fide purchaser, but an incumbrance, in respect to which the question arose whether it was within the New York statute against fraudulent conveyances and preference by money corporations. One point of the syllabus reads as follows: "But where an insolvent or failing debtor proposes to stop business and wind up his affairs, and for that purpose assigns the whole or the mass of his property, he must devote it unconditionally to the payment of his debts. He can make no reservation in his own favor until all his creditors are satisfied. The adjudged cases on the subject go upon this principle, but the principle has no application to transactions like those now in question." The principle which was held to apply and govern that case was that where "there is no evidence of any intent to delay or defraud creditors, but, on the contrary, the evidence proves a design and expectation of going on in business and paying all debts as fast as they matured, and the trust deeds were made to raise money in order to enable the company thus to go on and pay its debts, \* \* \* the reservations in the deeds for the benefit of the company were appropriate

to such a transaction, and in themselves were innocent and lawful." Our statute is not so liberal in respect to the charges upon the property of an insolvent debtor. On the fact of his insolvency, everything turns, and intent of the parties to the transaction by which a preference is given is not taken into account. The word "sale," as used in this statute, is not expressly limited to a sale to the creditor. Whether it is to be so limited is matter of construction, and the construction of the statute ought to be such as to give it the effect intended by the Legislature, so far as that intent is made plainly manifest by the statute. The force and effect of the statute ought not to be frittered away by refinement and technicality—certainly not by a mere play upon words. This statute is in derogation of the common law, it is true, and ought not to be so construed as to be carried beyond the purpose for which it was passed. But it ought to be liberally expounded for the accomplishment of that salutary purpose—the ratable distribution of the assets of an insolvent person among his creditors. That is nothing more than equity—equality.

In this view, however, the majority of the court do not concur. But we hold that where the insolvent debtor, the purchaser, and the preferred creditors all join in the design to give preference, and execute that purpose by a sale of the property, and payment of the proceeds thereof to certain creditors, to the exclusion of others, the preference so given is within the statute, and will be set aside, and the fund thus diverted will be apportioned among the preferred creditors and the unsecured creditors who attack the transaction within the time and in the manner prescribed by the statute. In the first case decided by this court under the present statute (*Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797), Judge Brannon, speaking for the court, said: "No matter is it if Armstrong were not a creditor. The debts are preferred. As indicated above, my opinion is that, if a person purchase property of an insolvent debtor, not for cash, but agree, as a part of the transaction, to devote the consideration to pay certain creditors of the seller to the exclusion of others, that is an act falling under the bar of the statute, though such purchaser be not a creditor. He is a party to the very act prohibited—that of applying the insolvent's estate to certain preferred creditors." In point 3 of the syllabus it is held that "the form of the instrument or act by which the preference forbidden by the statute—whether by deed of trust, assignment, or sale—is accomplished is not material, so that it results in such a preference; it being the design of the statute to prevent an insolvent debtor from devoting his property to work a preference among his creditors." It may be said that this case does not fall within the express terms used in *Wolf v. McGugin*, but it is undoubtedly within the spirit of that decision, as well as the design and spirit of the statute,

if the evidence establishes that the Bank of Summers, the preferred creditor, Jordan, the purchaser, and Faulconer, the insolvent debtor, performed their respective parts in this transaction with the purpose and design to give the preference. This is denied by all these parties. But what rule of evidence shall be applied? May not the real character of the transaction be established by the relation and conduct of the parties and the surrounding circumstances, as in the case of fraudulent conveyances, despite the protestation of the parties to the contrary? Here the purchaser was the cashier of the bank. He says he resold to Gwinn, who was the president of the bank. The purchase money was borrowed by Jordan from the bank, and then he took Gwinn's note for \$1,250, and discounted that in the bank. It is to be noted here that the \$50 added in the Gwinn note was only \$2 more than the discount on the two notes for four months at the rate of 6 per cent., which strongly indicates that Jordan was a mere instrument or agent in the transaction; Gwinn paying all the expenses. On the face of the matter, there is another significant indication, and that is that Jordan was only nominally a co-owner with Gwinn after the alleged resale to him. Shortly after this transaction, Gwinn consolidated with the Faulconer Drug Store another drug store, and then Jordan ceased to be an interested party; but it does not appear, and is not intimated, that he ever received anything from Gwinn by way of payment for the property, except the one \$1,250 note. It is also admitted that two of the indorsers on that note were officers and stockholders of the bank. Whether they were Sawyer and Miller, who took part in this transaction as attorneys—the one representing Faulconer, and the other Jordan—is not shown by the testimony; but the fact remains that officers and stockholders of the bank were indorsers, and were benefited by this preference—a circumstance rendering it probable that the bank may have been induced to do just what it is charged it did do. It appears, also, that the transaction was consummated at the bank, and that Jordan did not allow the purchase money to go out of his hands, but paid it directly to the bank and the justice in whose court the judgment against Faulconer had been recovered, all by direction of Faulconer. Both he and Jordan protest that this was not by prior agreement, and that the direction was given after the sale was consummated; but the transactions were all so nearly contemporaneous and so related and intertwined with one another that they may be viewed as a single occurrence, and that what was actually done was the thing agreed to be done. If the bank stands upon the same footing as an individual would stand upon in a like transaction, it would undoubtedly be charged with having obtained a preference. Ordinarily the proof required to charge a corporation differs from what is required in the case of an individual.

Corporations act only through their agents, and the power of an agent is always limited. The governing power, under the charter and by-laws, is the board of directors; and the president and other managing officers, though clothed with great power and responsibility, do not bind the corporation, unless acting within the scope of their authority. For this reason, there has been conflict of opinion both here and in England as to whether a corporation is liable for the fraud and false representations of its officers and agents. But it is now well settled in this country that they are if the officer or agent, when perpetrating the fraud or making a false representation, is acting within the general scope of his authority. 7 Am. & Eng. Enc. Law (2d Ed.) 830, 831. Here it is not a question of the proof of fraud, but it is analogous, for it is the question of an agreement of a corporation to obtain a preference contrary to the statute and the consummation of that agreement, and the actual appropriation to its own use of money which the statute declares shall belong to all the creditors. It certainly requires not more, but less, proof, in such a case, than in an effort to charge the corporation with fraud. It is certainly within the general scope of the powers of the president and cashier of a bank, for it relates to the collection of a debt—a thing which falls peculiarly within the power of the officers of a bank. "By the weight of authority, when an officer of a corporation does an act which constitutes a fraud upon a third person, or upon another corporation, of which he is also an officer, the first-mentioned corporation is chargeable with notice of the nature of the transaction, although the fraud is perpetrated for his own benefit, where he also represents the corporation in the transaction." Clark on Corp. 2195. "The position of defendant's counsel, that one of its executive officers may have proper notice of a fact which should control its action, and, concealing it, allows its other officers to act adverse to the interests of the party for whose benefit the notice inures, and that such adverse action is legal, is not sound. \* \* \* It was the duty of the officer receiving such notice to advise all other employees of such fact, and the bank would be none the less concluded by it if he failed to do so." Getman v. Second National Bank, 23 Hun, 498, 503; Ingalls v. Morgan, 10 N. Y. 178; Welser's Adm'r's v. Denison, Id. 68; 61 Am. Dec. 731; Bank v. Canal Co., 4 Paige, 127; Railroad Co. v. Schuyler, 34 N. Y. 30. No good reason can be assigned for holding that the purpose and design imputed to the Bank of Summers, and its participation, by its officers, in the transfer by which it obtained a preference, cannot be established against it by circumstantial evidence, and the circumstantial evidence bearing upon that question is abundantly sufficient. Hence the circuit court should have compelled said bank to pay the plaintiffs their pro rata share of the \$750 which it received.

For the reasons given, the decree complained of must be wholly reversed, and the cause remanded, with directions to enter a proper decree, requiring the Bank of Summers to pay out of said sum of \$750 to the plaintiffs their pro rata shares of the residue thereof; allowing the bank, of course, to participate with them pro rata in the distribution of said fund.

McWHORTER, P. (dissenting). Powers-Taylor Drug Company and Owens-Minor Drug Company, corporations, who sued on behalf of themselves and such other creditors of E. N. Faulconer as should come in and contribute to the costs of the suit, filed their bill in equity in the circuit court of Summers county against E. N. Faulconer and John H. Jordan in his own right and as cashier of the Bank of Summers, the Bank of Summers, a corporation, and Harrison Gwinn and Wade Gwinn, partners as the Gwinn Drug Store; setting up their respective claims, which had been reduced to judgments, against defendant Faulconer; alleging that he had been engaged in the drug business at Hinton, and having become involved to the extent of hopeless insolvency, and being in debt to the Bank of Summers in the sum of \$750; that said Faulconer was the owner of a stock of drugs, fixtures, etc., then in his store in the city of Hinton, of the value of \$1,500, and also was the owner of certain book accounts, notes, claims, and demands due and owing to him, of the value of \$——; that on the 26th day of February, 1900, said Faulconer attempted to sell and transfer the said stock of goods, accounts, claims, etc., to the defendant John H. Jordan, cashier of the Bank of Summers; that the only consideration paid for said stock of drugs, fixtures, book accounts, claims, etc., by the said Jordan, cashier, was the payment of a note of about \$750 due the defendant Bank of Summers by said Faulconer; that the sale of said stock of goods, etc., was made by the said defendant Faulconer for the purpose and with the intent to hinder, delay, and defraud his creditors, and that the said sale and transfer did delay and defraud said creditors, and especially plaintiffs, and that said defendants John H. Jordan, and John H. Jordan, cashier of the Bank of Summers, and the said bank, had notice of the fraudulent intent and purpose of the said Faulconer in making said sale and transfer, and participated in the said fraud by aiding and abetting him, and that said sale and transfer were attempted on the part of the said Faulconer, who was then insolvent, and whose insolvency was known to said Jordan and to the bank, to give preference and priority to the said bank by securing the bank said note of \$750, and by such sale and transfer did give the said bank a preference to the exclusion and prejudice of the other creditors, and that the sale and transfer were null and void as to said preference, even if there was no actual fraud in the transaction; that said goods, fixtures,

accounts, etc., shall be taken for the benefit of all the creditors of Faulconer, and applied and paid pro rata upon all his debts, or such as should come in and contribute to the cost of the suit; that said stock of drugs, fixtures, etc., were attempted to be sold and transferred without any invoice, or any steps being taken to ascertain their true value, and that no consideration whatever was taken of the value of the said stock, but that the sale and transfer were made solely for the purpose of saving the debt due to the Bank of Summers, to the exclusion and prejudice and in fraud of the rights of the other creditors of said Faulconer; and alleging that said bank and Jordan should be held for the full amount of the value of said stock of drugs, fixtures, book accounts, claims, notes, demands, etc., which went into the hands of said Jordan and said Bank of Summers by reason of the attempted sale and transfer. They further alleged that some days after the said sale and transfer the defendants Jordan and the bank made sale of the said stock of goods and fixtures to the defendants Harrison Gwinn and Wade Gwinn, partners as the Gwinn Drug Store, in whose possession said drugs, goods, fixtures, etc., were, and being sold by them, and that said Gwinn Drug Store became the purchaser thereof with full knowledge of the facts and circumstances of the attempted sale and transfer by Faulconer to the defendants Jordan and the Bank of Summers; and praying that the attempted sale and transfer be set aside and held for naught as to plaintiffs' debts; that the preference given to the Bank of Summers in order to exclude and prejudice the other creditors of said Faulconer be set aside; that the proceeds of said sale be proportioned pro rata among all the creditors of said Faulconer who will contribute to the cost of the suit; that a decree be entered against said Jordan and the bank for the full amount of the goods, fixtures, accounts, etc., that was received by them by reason of said attempted sale and transfer; that all proper inquiries be made and accounts taken; and for general relief.

The defendants John H. Jordan and Wade Gwinn filed their demurrers. The defendants, J. H. Jordan, E. N. Faulconer, and J. H. Jordan, cashier of the Bank of Summers, filed their separate demurrers and answers, in all of which demurrers plaintiffs joined, and replied generally to the answers. The demurrers, being considered, were overruled. John H. Jordan filed his answer as cashier; averring that the Bank of Summers was a corporation doing a banking business in the city of Hinton; that they were then informed that defendant Faulconer was not solvent on February 26, 1900, but that they were not aware of the fact at that time that the bank was the holder and owner of a note for \$750 made by defendant Faulconer, and payable to John W. Flanagan, J. M. Ayers, W. H. Sawyer, H. Ewart, and James H. Miller, and indorsed by them to the bank;

that said note was one of a series of renewals of a note given more than a year before, and had been curtailed from \$1,000 to \$750; that said indorsers on said note were perfectly and absolutely solvent on the 26th of February, 1900, and were still solvent; that said bank did not desire the collection or payment of said note; and that the solvency or insolvency of the defendant Faulconer could not in any way affect said bank, and denying that either he, as cashier, or the bank, had any transaction with said Faulconer with respect to the sale or purchase of said property of Faulconer, or of any part of it; that, after said sale was made, Faulconer paid said note, as they were informed, out of the proceeds of said sale; that neither said bank nor said Jordan, cashier, had any interest in said sale, or any connection therewith, or with the application of the proceeds; but admitted that a sale was made to Jordan on his own individual account, but neither said bank nor its officers had any interest or transaction with said Faulconer, and denied emphatically that the only consideration for the property sold was the payment of said note of \$750, but averred that the actual consideration paid by Jordan in his own name was \$1,200 in cash, and the assumption by him of a lien, recorded, of James W. Tufts against the soda fountain included in said sale, of about \$150, and also of the payment of \$20 on account of rents, and denied all fraud or knowledge of fraud in any transaction, or that there was any action or transaction on their part to give preference to any creditor of said Faulconer by which any preference or priority might be secured, or the rights of any creditor be prejudiced, or that they were liable in any way for the transaction of said Faulconer or any other person, or that said sale and transfer were made for the purpose of saving the debt due by Faulconer to the bank, or that the stock of merchandise, drugs, etc., went into the hands of either Jordan, cashier, or the bank, or that either of them sold or transferred the property to defendants Gwinn, or either of them, or to any person. J. H. Jordan, in his separate answer, denied all allegations of fraud or fraudulent intent or knowledge of fraud, and denied all material allegations of the bill; alleged that he bought the goods for \$1,200 cash, and assumed the trust debt lien upon the soda fountain due James W. Tufts, for \$156.10; that he borrowed the \$1,200 from the Bank of Summers, making his note therefor, which was indorsed by James H. Miller; that, out of the \$1,200 so borrowed and paid to Faulconer, \$750 was paid to the bank, at Faulconer's direction, to pay the note for that amount, and he also paid execution liens in the hands of constable on said property amounting to about \$400, which were paid by direction of said Faulconer, and the residue paid to Faulconer in cash; that said bank had no interest in securing a preference, or in buying or attempting to

consummate said sale, as its debt represented by said note was perfectly and absolutely safe and secure, as each indorser was solvent and good for the amount thereof; that respondent did not know the financial condition of Faulconer, and had no knowledge thereof, except to the extent of said liens and debt due to the bank, and when he decided to purchase said stock he examined all of the records to see what, if any, liens were against the property; that the payment to the bank was not made at the suggestion of respondent, as it was not a lien against the property; that, after his purchase was made, respondent informed H. Gwinn, who acceded thereto, and he and his son Wade came to Hinton, and Gwinn immediately repaid respondent the amount of his cash payment, and he turned the business, property, and stock over to them (the Gwinns), to take it as of the date of respondent's purchase of February 26th, and, of the \$1,200 paid by them to him, he paid off his note in bank, and the business had, since the 6th of March, 1900, the date when Gwinns refunded to him his money, been run in the name of Gwinn Drug Store; and filed with his answer the original contract of purchase, and alleged that the purchase was made in the utmost good faith, and without any intention of affecting the creditors of said Faulconer by preference, or prejudicing in the least any one, and denied that any sale or transfer was made by any person to the Gwinns, except himself. The defendant Faulconer, in his answer, admitted his liability for the claims of the plaintiffs, and averred that he intended to pay them as soon as he could; that he had been unfortunate in business, and was not able to pay; denied all allegations of fraud, or knowledge of fraud, contained in said bill; that he became involved with his creditors, and was unable to pay them as fast as their claims became due; that a number of judgments were procured against him, and executions issued, prior to the 26th of February, 1900, and, not being able to meet all his liabilities, decided to sell his stock of drugs, and went to see Jordan, and, after considerable negotiation, they agreed on the sale, and the property was turned over to him. The price paid by Jordan was \$1,200, and the assumption of the Tufts debt, of \$156.10, secured by lien, which was, as respondent believed, a fair price, and considerably more than could have been realized out of the property at forced sale. The sale was made only in the interest, as he conceived, of his creditors. That the debt owing to the bank was not mentioned between them until after the sale was made. Then, at the instance of respondent, the debt was paid to the bank. That he desired the bank debt first paid, because when he first went into business he borrowed \$1,000, all of which was applied in the payment of the purchase money for the stock, and his friends, the indorsers, had indorsed the note

to give him a start, and it had been renewed from time to time and curtailed until the balance due on last renewal was \$750. That after the payment of said sum and \$400 to pay off the liens and executions against said stock of the \$1,200, there was a balance of \$25.92, all of which he paid out on other debts due by him. Denied that Jordan, as cashier, or the bank, had anything to do with the said sale, so far as he knew. That the sale was made in absolute good faith, and without fraud or fraudulent intention, and neither Jordan nor either of the Gwinns had any information of the insolvency or the extent of the indebtedness of respondent. That there was no contract, express or implied, between any of the parties to said sale, except that contained in the written agreement between Jordan and himself of the 26th of February, and the consideration as therein stated. And denied that the sale was made with the intent to hinder or delay creditors, or that said sale and transfer did so hinder and delay and defraud his creditors, or either of them; and denied that Jordan or any other person had knowledge of any such intention, as none such existed, or that Jordan or any one else aided or abetted in such transaction, or that any one knew that respondent was insolvent at the date of the sale; and denied that such sale and transfer was an attempt to give preference and priority to any person, or that the sale was made in order to give said bank preference on account of its debt, or to save the said debt to the bank; and alleged that said property was sold to Jordan at a reasonable and fair price, and for much more than it would have brought at forced sale under legal process. That after said sale to Jordan the property was turned over to defendants Gwinn, but of that transfer, and the terms thereof, respondent was not advised. That he was employed to assist said Wade Gwinn at a salary of \$50 per month, and the salary was all the interest he had in the business.

The depositions of defendant H. Gwinn and of R. E. Dunlap, attorney for plaintiffs, were taken and filed on behalf of plaintiffs, and the depositions of defendants Faulconer and Jordan were taken on behalf of defendants, and filed in the cause. On the 14th of February, 1901, the defendant E. N. Faulconer tendered his petition, showing that after the sale of his drug business he had filed his petition in bankruptcy in the District Court of the United States for the District of West Virginia, and that on the 10th day of September, 1900, he was adjudged a bankrupt; that plaintiffs were included in his petition and schedules, and had actual notice of the proceedings; that the debts of plaintiffs were such as would be released by a discharge in bankruptcy, and that this suit was founded upon a claim from which a discharge would be a release; and averred that no adjudication or decree could be entered in said chan-



every cause against him, or in any wise affect his interest, until said matters were adjudicated by the bankruptcy court, and that said suit could not be finally heard, and the matters therein determined, at that time; and praying that the plaintiffs be made parties to the petition, and that the suit be stayed as provided by the bankruptcy laws, and for general relief. To the filing of which petition, plaintiffs objected. The objection was overruled, and the petition filed, and process thereon was waived by the plaintiffs, as well as by defendants Jordan and the bank, and plaintiffs replied generally to the petition; and on the same day the cause came on to be heard on the bill and exhibits filed, and the said answers and exhibits, and general replications to all the answers, upon the depositions, and upon the petition of Faulconer, which was treated as his amended answer, and general replication thereto, and all the proceedings theretofore had and papers read; and the court, being of opinion that the sale of the stock of drugs, etc., was made by Faulconer to Jordan with the intent and for the purpose of hindering, delaying, and defrauding the creditors of Faulconer, and that Jordan, the purchaser, had notice of such fraudulent intent on the part of Faulconer, and the sale was for a grossly inadequate consideration, and that the sale and transfer was for the benefit of all of Faulconer's creditors, and that the said Jordan was liable to the creditors of said Faulconer for \$2,500, the full value of said stock of drugs, etc., shown by the invoice made in the sale to H. Gwinn (said Jordan having disposed of the stock of drugs, etc.), decreed that Jordan be held liable to the creditors of Faulconer for the said sum of \$2,500, and that plaintiffs, the Powers-Taylor Drug Company and Owens-Minor Drug Company, by reason of the institution of this suit, and being the only creditors, up to that time, who had united in the suit and contributed to the expenses thereof, were entitled to the payment of their debts in full, and decreed to said Powers-Taylor Drug Company \$204.45, and to the Owens-Minor Drug Company \$341.72, against said John H. Jordan, with interest from the date of the decree on said sums and the costs of their suit, and execution was awarded against Jordan, in favor of the plaintiffs, respectively, for said sums and costs; and the cause was referred to a commissioner to ascertain the further indebtedness of the said Faulconer which existed at the time of sale. From which decree the defendants J. H. Jordan, E. N. Faulconer, H. Gwinn, and W. Gwinn appealed.

The first assignment of error is in overruling the demurrer to plaintiffs' bill. It is claimed by appellants that all lien creditors of Faulconer were proper and necessary parties to the bill. In Hogg's Eq. Pr. § 184, it is said: "In a suit to set aside a conveyance as fraudulent, and subject the property embraced therein, or so much thereof as is nec-

essary, to the plaintiff's debt, it is not necessary to convene the other creditors of the debtor, and ascertain the liens; but the parties directly concerned and connected with the conveyance, or interested as grantees or assignees, must be before the court, in order that full determination of the matter, binding all parties interested, may be had in the cause; but further than this the rule does not extend." State v. Bowen, 38 W. Va. 91, 18 S. E. 375; Core v. Cunningham, 27 W. Va. 206; Blubaugh v. Loomis, 48 W. Va. 666, 37 S. E. 794; Pethel v. McCullough, 49 W. Va. 520, 39 S. E. 199. Appellants cite Hill v. Proctor, 10 W. Va. 59, and Livesay v. Feamster, 21 W. Va. 83, (Syl., point 5). In the first of said cases it is held that "all persons materially interested in the subject of controversy ought to be made parties in equity, and, if they are not, the defect may be taken advantage of, either by demurrer, or by the court at the hearing." This was a suit to enforce the specific performance of a contract of sale of real estate against the heirs of Joseph O. Kendall, when parties who claimed an interest in the land were not made parties, and who were necessary parties to the suit, in order that the rights of all might be adjudicated therein. The case of Livesay v. Feamster was a suit brought by a judgment creditor to enforce his judgment lien, where it was held that he should have made formal defendants to his suit all creditors who had obtained judgments against the debtor in the courts in the county wherein the lands were situated which he sought to subject to his judgment. James W. Tufts, who had the trust deed on the soda fountain, it is claimed, was a necessary party; but his interest could not be affected by anything done in the suit, and Jordan, the purchaser of the goods, had assumed the payment of his claim, and the list of execution lien creditors filed with the demurrer of the Gwinns had been paid off by Jordan at the direction of Faulconer, and they had no interest in the suit.

The second assignment is that, after overruling the demurrer of the Gwinns, it was error to decree on the merits of the cause; that a rule should have been awarded against them to answer the bill. The decree is simply a personal decree against John H. Jordan, who had answered the bill, and the rights and interests of the Gwinns were in no way affected by the decree. Section 30, c. 125, Code 1899, requiring a rule against the defendant to answer the bill after his demurrer is overruled, can only apply to a defendant whose interests will be affected by the decree. The defendant Jordan is the only party whose interests are in any way affected by the decree, and he was in no wise prejudiced by failure to award a rule against the Gwinns to answer; hence he cannot complain; and it is insisted by the appellees that, the Gwinns not in any manner being affected by the decree—the same being in no wise



prejudicial to their interests or rights—the appeal should be dismissed as to them. *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303 (Syl., point 7), 8 Am. St. Rep. 66: “The appellate court will not reverse a decree unless it is to the prejudice of the appellant.” And if a failure to award the rule against the Gwinns was error, not being prejudicial to any of the appellants, it would not be cause for reversal of the decree. *Clark v. Johnston*, 15 W. Va. 304 (Syl.): “It is not sufficient to reverse a decree that there is error in it. The error must be prejudicial to the appellant, or it will not be reversed on his application.” The appeal should be dismissed as to the defendants Gwinn.

The third assignment of error is in holding the sale to Jordan by Faulconer to have been with intent to hinder, delay, and defraud the creditors of Faulconer. It is true, defendant Jordan, in his answer, denies all the allegations of fraud. But he knew of the failing financial condition of defendant Faulconer. He knew that he was largely in debt. Faulconer had gone to him and told him his circumstances—that there were judgments against him up there in court; “that these people were pushing me, and, if it was about to be sold, that the price would not amount to anything; and that, if I could sell, I would rather do it. And Mr. Jordan said he was authorized to invest \$1,200 by Mr. Gwinn, and I knew that would be more than I could get if it was sold.” It is difficult to determine from the answer of Jordan whether he bought the property for himself or for Gwinn. He says that when he learned that Faulconer desired to sell, he communicated with Gwinn by telephone, who was absent, sick, and Gwinn directed him to go ahead and make the purchase; that, after a careful inspection of the property, he purchased the entire stock and property for \$1,200 cash, and assumed the Tufts lien for \$156.10. He says, Gwinn not being able to be present, respondent made the purchase in his own name; that after the purchase was made he informed H. Gwinn, who acceded thereto, and immediately thereafter Gwinn repaid respondent the amount of his cash payment, and he turned the business, property, and stock over to the Gwinns, who took it as of the date of his purchase. In his deposition he states that after making an investigation, and figuring on what Faulconer actually had there, he made the purchase without any actual inventory; says he never had any experience in the drug business before this transaction; that he took a business man's precaution in looking after the debts and liens against the stock, and had an inventory taken of the stock after the purchase, and before he sold, but did not remember exactly what the invoice amounted to, nor the definite value that was placed on the stock as to the invoice. The Gwinns gave him their note for \$1,250, and asked him to remain or retain an interest in the business

for a while. While Jordan claims that he did not know the extent of the indebtedness of Faulconer, he must have known that he was at the time insolvent. Faulconer admits that at the time he was insolvent, and Jordan says that he looked after the debts and liens against the stock. Positive proof to establish a fraud is not required. In *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854 (Syl., point 1), it is held: “In showing the fraud necessary to impeach a conveyance, the fraudulent intent of the parties may be shown by the circumstances attending the transaction. Circumstantial evidence is not only sufficient, but is often the only evidence that can be adduced.” *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; and *Bump on Fraud*, Con. § 184: “It is not necessary that the grantee shall have actual knowledge of the debtor's intent to delay, hinder, or defraud his creditors, in order to render the transfer void. A knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on the inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge, in contemplation of law. The nature and circumstances of the transaction may sometimes be such as must apprise the grantee of its character and object. Things speak for themselves. If he has notice of facts sufficient to put him on the inquiry, he cannot be deemed a bona fide purchaser.” And in section 494: “The notice of the fraud need only be sufficient to put a man of ordinary prudence and experience in business transactions upon the inquiry.” And section 379, *Wait on Fraud*, Con.; *Shealy v. Edwards*, 75 Ala. 411; *Temple v. Smith*, 13 Neb. 513, 14 N. W. 527. While it is a fact that both Jordan and Faulconer say that Jordan did not know the extent of Faulconer's indebtedness, yet he was told by Faulconer that debts were pushing him, and that he was likely to be sold out, which was certainly enough to put Jordan upon his inquiry; and it does not appear that he even pursued such inquiry beyond the execution creditors; did not even seek to learn from Faulconer whether he had further indebtedness, but only seemed desirous to find what claims were liens upon the property he was purchasing. It was his duty at least to have had such information as Faulconer was able to give him in relation to his indebtedness. He purchased all the property of which Faulconer was possessed. The sale by a debtor, who is seriously involved, of the whole of his property, has been held to create a violent presumption of a fraudulent intent, so far as existing creditors were concerned. See *Wait on Fraud*, Con. § 231, and cases there cited. In *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960 (Syl., point 2), 72 Am. St. Rep. 838, it is held: “Conveyance made by a party of his entire property during the

pendency of a suit brought to recover judgments against him on a debt is a badge of fraud." The transfer of a debtor's property during the pendency of a suit, or when he is expecting to be sued and pressed on his debts, is a badge of fraud. As stated in section 50, Bump, on Fraud, Con.: "Because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. If an attorney who holds a claim for collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud, the same as after the suit were actually pending." And cases cited. Several days prior to the sale by Faulconer, attorneys for plaintiff the Owens-Minor Drug Company had been pressing Faulconer for a settlement and payment, and he had been putting them off from day to day, and asking them to delay proceedings, which they did at his instance, and, taking advantage of their leniency, conveyed his property before they brought their suit. "The circumstance of looseness in determining the value of the property conveyed, as when a purchaser buys a stock of merchandise without taking an inventory of its value, though it does not render the sale void per se, is a badge of fraud." 14 A. & E. E. L. (2d Ed.) 516; Moore v. Roe, 35 N. J. Eq. 90. It seems that Jordan purchased without knowing anything about the accounts due to Faulconer—did not even look into them. Being well acquainted with the people of Hinton and vicinity, and occupying a position (cashier of the bank) which made it his business to know the financial condition of the people, he could have arrived at a fair estimate of their value by an examination of them; but he contented himself with a very cursory examination of the stock of drugs, about which he knew nothing, never having had any experience in the business, and was unable to speak of the value of the accounts purchased by him—only he said Faulconer estimated them at from \$1,000 to \$2,000. In *Livesay's Ex'r v. Beard*, 22 W. Va. 585 (Syl., point 5), it is held: "Where the facts and circumstances in any case are such as to make a prima facie case of fraudulent intent, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case." And Syl., point 7: "Where a debtor in failing circumstances conveys property for a grossly inadequate consideration, that is evidence of fraudulent intent." It is clear that Jordan purchased at much less than the value of the property purchased; that he knew Faulconer's failing financial condition; and that he knew that he was not paying an adequate price, and that he was getting all the property Faulconer had, and that Faulconer was selling to keep his property from being taken to pay his debts, which were pressing him by the plaintiffs—especially the Owens-

Minor Drug Company. The evidence as to the actual value of the property so sold and conveyed is not very clear. H. Gwinn testified he thinks that they told him that the invoice was something over \$2,000; then says the stock was estimated at \$2,500, which included all the old accounts due Faulconer, good and bad. Faulconer put a much lower estimate upon it, but gives no definite figures, but thought it would not bring \$1,200 at forced sale. The evidence does not show clearly what the stock invoiced when an inventory was made by Jordan, some days after his purchase from Faulconer, for the purpose of his sale to Gwinn, when he sold one-half interest to Gwinn for \$1,250, and retained a half interest himself. The presumption is that Jordan sold by the invoice. The price he sold for is not material, except as it may tend to prove the value of the stock which he purchased from Faulconer. Jordan said he asked Faulconer what estimate he put on his stock, and he said he thought he had sixteen or eighteen hundred dollars in the store. This, augmented by the value of the accounts, estimated at from \$1,000 to \$1,500 or \$2,000, would run it up to fully \$2,500.

The fourth assignment of error, that the court erred in holding said sale and transfer to Jordan as made with intent to hinder, delay, and defraud the creditors of Faulconer, and at the same time decreeing that the sale was for the benefit of all the creditors of Faulconer, and referring the cause to a commissioner; and the fifth assignment, as follows: "The court erred in holding J. H. Jordan, the purchaser, liable to the creditors of E. N. Faulconer for the sum of \$2,500, when the proof shows that the stock of goods, fixtures, etc., only sold for \$1,876. The court, in fixing the value of the same, arbitrarily and wrongfully adopted this valuation. The only proof in evidence of the value of said stock, etc., is the sworn deposition of E. N. Faulconer that the sum paid by Jordan was more than the stock would have brought at a forced sale. Because Jordan, in subsequently selling at an advance to Gwinn, made a profit on his transaction, is no reason why the court should arbitrarily fix the value of the stock at this figure"—may be treated together. The court having adjudged the sale and transfer to be fraudulent, it was error to refer the cause to a commissioner to ascertain the various creditors of defendant E. N. Faulconer, and the amount due each at the date of the sale; no other creditors other than the plaintiffs having appeared to set up their claims and assume their proportion of the costs in the proceeding to set aside the sale as fraudulent. As we have hereinbefore shown, it was not necessary to convene the other creditors of the debtor. The sworn deposition of E. N. Faulconer, as we have seen, is not by any means "the only proof in evidence of the value of said stock," etc. In *Vance Shoe*

Co. v. Haight, 41 W. Va. 275, 23 S. E. 553 (Syl. point 4), it is held: "Where a fraudulent purchaser yet owns the property, the creditor must subject it, and cannot take a personal money decree for his debt, or the value of the property, against the purchaser; but if the fraudulent purchaser has sold the property to a bona fide purchaser, so that it cannot be reached, the creditor may have a money decree against the fraudulent purchaser for the amount he received for the property, or, if that be less than its actual value, then for such value; and, if the bona fide purchaser yet owes for the property, the money in his hands may be followed, and subjected in his hands." *Hinton v. Ellis*, 27 W. Va. 422. The decree in favor of the plaintiff for the full amount found due them, respectively, was proper, but the money decree for \$2,500 against Jordan was error. He could be held liable in such suit only for the debts represented.

The sixth, seventh, and eighth assignments are to the same effect; that is, that the court erred in holding said sale to be a preference operating for the benefit of all the creditors of Faulconer, without allowing Jordan preference for the cash payments made by him for the stock, and refusing to substitute Jordan, the purchaser, to the prior liens by execution which he had paid off, and which were listed in the deposition of Faulconer, and according Jordan the priority thereof, and in not giving him a preference over the general creditors for the bank debt of \$750 and the other debts paid by him. In *Bank v. Wilson*, 25 W. Va. 243, it is held that if a deed be set aside as fraudulent and void as to creditors, because made with intent to hinder, delay, and defraud such creditors, and a part of the consideration of such deed was the satisfaction of a bona fide debt due from the grantor to the grantee, such fraudulent grantee is not entitled to charge the land thereby attempted to be conveyed with the amount of such debt. *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816; *Livesay's Ex'r v. Beard*, 22 W. Va. 585; *Hogg's Eq. Pr.* § 198; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255. And as to the substitution, see *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Sheld. on Subs.* § 44; *Railroad Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543.

The ninth assignment is that the court erred in not sustaining the exceptions of defendants to the deposition of R. F. Dunlap. It does not appear from the record that these exceptions were either called to the attention of, or passed upon by, the court. In *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927 (Syl., point 2): "Exceptions to a deposition (except upon the ground of incompetency, when no exception is necessary), if not brought to the notice of the court below, or passed upon by that court, should be considered by the appellate court as having been

waived, and a general decree against the party making the exception cannot be considered as involving a decision upon the exception." *Fant v. Miller*, 17 Grat. 187; *Hill v. Proctor*, 10 W. Va. 59.

The tenth assignment of error, in decreeing against Jordan personally for the entire debts due the plaintiffs, without ascertaining what amount would be distributable on said debts pro rata between them, after allowing Jordan preference for the money paid out by him on the liens, debts, etc., is not well taken, for the reasons stated on former assignments.

The eleventh assignment is that the court erred in entering any decree whatever in the cause after learning of Faulconer's adjudication in bankruptcy, and because Faulconer's trustee in bankruptcy was not before the court, and because, from Faulconer's petition filed before final decree, it was shown that the plaintiff's debts were included in the said bankrupt schedule in the bankruptcy proceedings. There is nothing in the record to show the bankruptcy proceedings claimed by defendant Faulconer, except the petition itself, which is not sworn to, and is not accompanied by any evidence of the filing of the petition in bankruptcy, nor of the adjudication of the bankruptcy of petitioner. The allegations of the petition are denied by the general replication of the plaintiff, and there is nothing to support the petition. In *Howes v. Holmes*, 2 Mo. App. 81 (Syl., point 2), it is held: "An adjudication of bankruptcy will not compel a stay of proceedings, in a suit against the bankrupt in a state court, upon motion and production of a certificate of adjudication." And in which case it is said in the opinion of the court: "Nothing in the bankrupt law operates to oust this court of its jurisdiction already acquired, in the absence of a restraining order from the bankrupt court."

For the foregoing reasons, the decree of February 14, 1901, should be reversed in so far as it decrees Jordan liable for \$2,500 to the creditors of E. N. Faulconer, and refers the cause to a commissioner for report, and in all other respects it should be affirmed.

DENT, J. (dissenting). Faulconer was bound to sell his property, or permit it to be sold by the officers of the law. There were judgments against him, creditors were pressing, and without a moment's warning he could have been closed up. To let it be sold would have entailed great loss. Jordan was the only buyer. He offered a fair price—more than it would bring at forced sale, and without expense. So he made the sale, which is held entirely free from actual fraud. A large portion of the purchase money had to be applied on liens, leaving a balance of little more than sufficient to pay off the bank debt. Jordan could not pay this over to Faulconer without laying himself open to the charge of aiding him to delay, hinder, and

defraud his creditors. So he asked Faulconer what he should do with this money, and he told him to pay off the bank debt. This was perfectly natural, as the bank debt was a debt of honor, while the other debts were owed to parties who had been making a profit out of his business. The common law permitted him to make this application. The amount applied was simply a claim he held against Jordan for a balance, and which the statute exempts from the provisions thereof, and permits him to apply to the payment of pre-existing debts. As to this sum, he had the right to prefer one creditor to another. To bring such preference within the meaning of the statute, the court must hold that it was the inducement that brought about the sale. That is, that the sale would not have been made if it had not been for the purpose of securing such preference; that Jordan purchased and Faulconer sold with this end in view. Faulconer and Jordan both swear positively that they neither had such end in view. To hold to the contrary, we must reject their sworn testimony, and regard them guilty of false swearing, simply from the fact that Faulconer had the balance so applied, instead of dividing it pro rata among all his creditors, none of whom would have been greatly benefited thereby. It seems to me the facts and circumstances, in so far as adverse thereto, are wholly insufficient to overcome their positive testimony, sustained by the numerous facts and circumstances supporting the same, among which is the most potent fact that Faulconer was bound to make this sale, or permit his property to be sacrificed at public sale. It may be that they testified falsely, but the facts and circumstances are not sufficiently adverse to them to justify one in so holding. If their testimony is rejected, the fraud charged in the bill is fully established. If the sale had been perfectly voluntary on Faulconer's part, and he had not been pressed to the wall and forced to make it as a last resort, I might reach a different conclusion. His purpose in selling was to save himself as far as possible, and it was therefore meritorious. Having made a lawful sale, he had the right to apply the surplus proceeds to any of his debts he saw fit, without subjecting any of his creditors to the charge of obtaining or securing an unlawful preference.

(53 W. Va. 359)

#### STATE v. BELCHER et al.

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

#### TAX SALE—TITLE OF PURCHASER—REDEMPTION.

1. No title is acquired by one who purchases, at a tax sale, land which, at a former delinquency, has been previously sold and purchased for the state; and, in a suit brought by the commissioner of school lands to have the land sold, such subsequent purchaser, upon his petition setting up his purchase under the sale for

the subsequent delinquency and a deed made to him thereunder, is not entitled to redeem the land.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County: J. M. Sanders, Judge.

Bill by the state, for the use of Joel H. Cutchin, against Annie M. Belcher and others. From an adverse decree, said Cutchin appeals. Affirmed.

Johnston & Hale, for appellant. D. W. McClagherty, for appellees.

POFFENBARGER, J. Joel H. Cutchin has appealed from a decree of the circuit court of Mercer county refusing to allow him to redeem, in a suit brought by the commissioner of school lands, certain lots of land. In December, 1897, they had been sold by the sheriff as delinquent for nonpayment of the taxes thereon for the year 1896, and purchased by the sheriff for the state. Under this purchase, the lots were certified by the auditor to the commissioner of school lands for sale in the manner prescribed by the statute. The commissioner of school lands brought a suit in equity to sell them with numerous other tracts of land. In this suit one of the former owners of the lots in whose names they had been sold, D. W. McClagherty, filed his petition, asking to be permitted to redeem said lots. The appellant, Joel H. Cutchin, also filed a petition claiming that he was entitled to redeem, on the ground that the same lots had been returned as delinquent for the nonpayment of taxes due the city of Bluefield for the year 1897, sold for such delinquency in the year 1899, and purchased by appellant, who, by virtue of said sale, afterwards obtained a deed for the lots. The court held that McClagherty was entitled to redeem, and that Cutchin was not so entitled.

This question has been settled in *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, in which it was held that: "Where land has been sold for taxes, and purchased for the state, and the clerk of the court illegally places such land on the land books for succeeding years in the former owner's name, and such land is again delinquent, and sold, by direction of the auditor, for the taxes of such succeeding years, such sale is illegal and void, and the purchaser acquires no title by reason thereof; and the clerk's deed made in pursuance of such sale is wholly void, and will be set aside." Point 4 of the syllabus. In view of this decision, which seems to be clearly right, it is useless to spend time in reiterating the reasons given for it. One point relied upon, however, will be mentioned, lest it may be taken to have been overlooked. McClagherty did not file with his petition evidence of his title. But the report of the commissioner, setting out extensively, if not fully, the record evidence of title, had been filed in the cause before McClagherty asked to be permitted to redeem. Whether there was sufficient evidence of McClagh-

erty's right to redeem before the court is practically immaterial, however, for the plain reason that, if he has no right to redeem, it does not argue that Cutchin has such right. To be permitted to redeem, he must show that he has some title to, or interest in, the land, as former owner, or an heir, personal representative, or assignee of the former owner. Having presented nothing but a clearly void deed as evidence of title and of his right to redeem, the court rightly refused the prayer of his petition, and the decree of which he complains should be affirmed.

(53 W. Va. 386)

### STEPHENSON v. SALISBURY.

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

#### SHERIFFS—SALE OF DEPUTYSHIP—VALIDITY.

1. A contract for the sale by a sheriff of a deputyship under him for a sum payable at all events is void and not enforceable, being contrary to section 5, c. 7, of the Code of 1899; but a sale for part of the commissions or for the allowance made the jailer by the county for his services is valid.

(Syllabus by the Court.)

Error from Circuit Court, Clay County;  
Warren Miller, Judge.

Action by Albert Stephenson against W. H. Salisbury. Judgment for plaintiff, and defendant brings error. Affirmed.

Linn & Byrne, for plaintiff in error. Horan & Horan, for defendant in error.

BRANNON, J. Albert Stephenson was sheriff of Clay county, and W. H. Salisbury jailer. After Salisbury had acted some time as jailer, Stephenson demanded that Salisbury, for being allowed to continue as jailer, should allow Stephenson to have the allowance made by the county to the jailer, else he would remove Salisbury; and then a contract in writing was made by which Stephenson was to have the allowance, and was to lift the orders made by the county court for the same. Afterwards Salisbury refused to carry out the contract, refused to allow Stephenson to get possession from the county clerk of said orders on the county treasury, but himself got and either retained or collected them—it does not appear which. Stephenson sued Salisbury for \$125 before a justice, and on appeal to the circuit court judgment was rendered, upon defendant's demurrer to the evidence, in favor of Stephenson.

If, as far back as the reigns of Richard II and Edward VI, there was reason to brand as unlawful the sale of public office and its deputation, that reason continues stronger in our day. It has always been condemned by statute, English or Virginian, in Virginia, and always in this state. The subject was so fully discussed by Judge Poffenbarger in *White v. Cook*, 51 W. Va. 201, 41 S. E. 410, 57 L. R. A. 417, that I need say but little about

the subject. The Virginia Code of 1849, c. 12, § 5, condemned the sale of an office "or the deputation thereof either in whole or in part"; but section 6 excepted sheriffs, so far as to allow the deputation of his office. The sheriffalty had long before that Code been excepted from the prohibition. Our Code does not except a sheriff. Code 1899, c. 7, § 5, condemns the selling or letting to farm of any office, "either in whole or part." This includes the deputation of the sheriffalty. If it did not, I think common law would. *Hawkins, Pleas Crown*, c. 67; *Throop, Pub. Off.* § 49. *White v. Cook*, cited, settles that a deputy sheriff falls under the statute. That case holds that a sale for a fixed sum payable in any event of a deputyship in the sheriffalty, and any contract for it, is unlawful and cannot be enforced; but that where, for the appointment, the sheriff is to receive a part of the commissions earned in the office, the contract is valid. As the allowance by the county to the jailer is for service in the office—an emolument of it—I see no reason why it does not fall under that rule. The books speak in this connection of commissions, profits, emoluments, indifferently. 9 Am. & Eng. Ency. L. 376.

It is contended that the contract is without consideration because a sheriff has no power to remove a deputy without the consent of the county court. Chapter 7, § 12, Code 1899, in words vests this power in the sheriff. The common law does. He can remove without cause. 9 Am. & Eng. Ency. L. 383.

It is suggested that there was no evidence that Salisbury collected the county orders. If collected, assumpsit would lie for money had and received. But Salisbury broke the contract in refusing to allow Stephenson to get the orders or collect them, and has either collected them or converted them to his use. If we say it was tortious to take and convert to his use by detention the orders, Stephenson could sue for conversion, perhaps in detinue, or waive the tort and sue in assumpsit for the value of the orders. *Maloney v. Barr*, 27 W. Va. 381; 17 Ency. Pl. & Prac. 368.

Therefore we affirm the judgment.

#### Amendment.

It is contended that a jailer is a public officer within himself, and that the sheriff has no power to remove him, but he can be removed only by the joint action of the county court and sheriff under section 10, c. 7, Code 1899, and only for causes therein referred to, and not being a mere deputy, cannot be removed by the sheriff. By common law the sheriff was ex officio jailer, and the jailer his mere servant (*Dabney v. Tallaferrro*, 4 Rand. 256; 1 Black, Com. 346; *Crocker on Sheriffs*, 314); therefore the sheriff could remove the jailer at will. Is this altered by Code, c. 41, p. 329? "The sheriff of every county shall be the keeper of the jail thereof. But he may, with the assent of the county court, appoint a jailor of said county, who shall take the same oaths as are prescribed for other officers.

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 583.

He may also take from such jailor bond with security conditioned for the faithful performance of the duties of his office." I think this makes no change as to the matter in hand. It still makes the sheriff jailor. That is the opening keynote of the section. But lest it be thought that he must personally keep the jail, as he cannot be, night and day, on guard at the jail, it gives him power to appoint a jailor. Is not that jailor a mere agent or servant of the sheriff? When he gives bond he gives it to the sheriff for his indemnity, not payable to the state, as public officers' bonds are. It does not make the jailor a distinct, independent public officer from the sheriff. It would be disastrous to put him thus beyond control of the sheriff, and make him removable only for cause upon trial. What tenure has he? We often, for convenience, as does this statute, call one an officer when in law he is not. When a jailor is appointed, is the power of the sheriff over the jail gone?

As to who is an officer, much authority is collected in the two opinions in *Hartigan v. Board*, 49 W. Va. 14, 38 S. E. 698. I called a jailor a deputy above. A deputy is only an agent of the sheriff. *Poling v. Maddox*, 41 W. Va. 781, 24 S. E. 999. A jailor is either a mere servant or deputy. What is the difference? For present purposes, none. Whether he is a special deputy, with power only over the jail, or a general deputy, with full powers as such to serve process, civil and criminal, we need not now say. In either case he is not a public officer. 9 Am. & Eng. Ency. L. 369, 379. If not a deputy he is simply a servant and removable at will. "The jailor is but a servant of the sheriff, and is not an officer." *Crocker on Duties of Sheriffs*, 314.

We are cited to *Jackson v. Anderson*, 4 Wend. 474. Property was sold by the sheriff under execution. A statute provided that a sheriff or his deputies should not buy at execution sales. The purchaser was an assistant to the jailor. It was held that this under-jailor was not a deputy. It does not decide that the jailor could buy. Our statute merely adds an oath of a jailor, not required by common law, and gave express validity to his bond to the sheriff-wise provision. I do not see that it had other purpose. The oath does not make him an officer, for all deputies must take it.

(53 W. Va. 324)

#### ENSMINGER et al. v. PETERSON.

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

#### SPECIFIC PERFORMANCE—INDEFINITE CONTRACT.

1. In a suit in equity to enforce the specific performance of the following agreement: "March 19, 1884. This article of agreement made this day by and between Thomas Tucker, agent of W. F. Peterson the agent of George Fox of Philadelphia, Witnesseth: That the said Tucker sold a tract of land to Asbury Ensminger on the 12th day of September, 1883, situated on the south side of the South fork

near Owen Talkington. Now it is agreed that said Ensminger has the right to take any other land owned by said Fox or to make his own location on said land owned by said Fox to transfer his former article and said Ensminger has to make location and report the same Isaac Morgan and said Ensminger has the rights on this or these lands as the former contract.

"Given under our hands and seals the day and year 'riten.'

"Thomas Tucker, Agent [Seal.]

"of G. Fox and W. F. Peterson.

"N. A. Ensminger. [Seal.]"

—The contract mentioned of September 12, 1883, not being produced, nor the terms thereof sufficiently proven, the agreement of March 19, 1884, standing alone, is too vague, indefinite, and uncertain to be specifically enforced in a court of equity.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by N. A. Ensminger and another against B. W. Peterson. Decree for defendant, and plaintiffs appeal. Affirmed.

Jackson V. Blair, for appellants. Henry M. Russell, for appellee.

McWHORTER, J. This is a suit in equity by N. A. Ensminger and H. L. Smith against B. Walker Peterson, vendee of Samuel M. Fox and George Fox, executors of the last will and testament of George Fox, M. D., to enforce the specific performance of a contract in writing claimed to have been made by Thomas Tucker, agent of George Fox, M. D., and W. F. Peterson, dated March 19, 1884. Dr. George Fox lived in Philadelphia, and was the owner of several large tracts of land in Wetzel, Tyler, and Marion counties, now West Virginia. On the 20th of November, 1837, the said George Fox, M. D., executed to William F. Peterson, of Wheeling, a power of attorney "to grant, bargain and sell any parts or parcels of all those certain tracts of land situate in Tyler county in the state of Virginia, four of the said tracts containing 2,000 acres each, one tract containing 8,000 acres, and the other tract containing 7,000 acres, with the appurtenances, and all my estate, right, title, and interest therein, to such person or persons and for such price and prices as he shall deem proper," and to make and execute all necessary deeds of conveyance, etc., and generally to have full charge of all his said lands. The said Peterson, under said power of attorney, took charge of said lands, and had in his employ one Thomas Tucker, who acted as agent for said Peterson, showing the lands to purchasers, and in selling the same. Said Dr. Fox executed his will, dated May 20, 1878, and which was admitted to probate on January 8, 1883, by which he appointed his sons, Samuel M. and George Fox, executors, and in his will he authorized his executors and the survivor and successors of them to grant, sell, and convey in fee simple any portion or portions of his real estate, either at public or private sale, at their discretion. On the 1st

day of June, 1889, Samuel M. Fox and George Fox, executors of the last will of George Fox, M. D., in consideration of the sum of \$1,890.39 of taxes theretofore assessed against them and paid by B. Walker Peterson at their request, and the further sum of \$4,000, paid to them by said Peterson, conveyed to said Peterson all their lands then lying in the counties of Marion and Wetzel, or either of them, conveyed by Benjamin Wyncoop to Samuel Mickel Fox by deed dated the 10th of September, 1791, and recorded in Ohio county, together with all the right, title, and interest of said George Fox, deceased, in and to the same, and all their right, title, and interest therein as executors, and assigned and transferred to said B. Walker Peterson (without recourse to them) all contracts of every kind whatsoever in which they were interested relating to the lands, or any of them, with the right to sell and recover on the same; but there are excepted from said conveyance such portions of said lands as had already been granted or otherwise disposed of by them or by said George Fox, M. D., in his lifetime, or by the said Samuel Mickel Fox, the elder, in his lifetime, or by the executors of his will prior to their conveyance to the said George Fox, M. D., other than lands under contract, "and as to lands under contract they grant their interest in the same as aforesaid and assign the contracts, and the said party of the second part by accepting this conveyance assumes all the responsibilities of the said parties of the first part under the said contracts." The contract which the court was asked to require to be specifically performed in this case is as follows:

"March 19, 1884. This article of agreement made this day by and between Thomas Tucker, agent of W. F. Peterson the agent of George Fox of Philadelphia, Witnesseth: That the said Tucker sold a tract of land to Asbury Enslinger on the 12th day of September, 1883, situated on the south side of the South fork near Owen Talkington. Now it is agreed that said Enslinger has the right to take any other land owned by said Fox or to make his own location on said land owned by said Fox to transfer his former article and said Enslinger has to make location and report the same Isaac Morgan and said Enslinger has the rights on this or these lands as the former contract.

"Given under our hands and seals the day and year 'riten.'

"Thomas Tucker, Agent [Seal.]

"of G. Fox and W. F. Peterson.

"N. A. Enslinger. [Seal.]"

The bill alleges that Thomas Tucker, on or about the 12th day of September, 1883, by a writing of that date, duly signed by him and the plaintiff N. A. Enslinger, agreed to and did sell to the plaintiff Enslinger a certain boundary of said land situate, lying, and being on the south side of the South Fork of Fishing creek, in the county of Wet-

zel, near to and joining land of Owen Talkington, supposed to contain about 125 acres, at the sum and price of \$5 per acre, of which about \$50 was paid cash, and the residue was to be paid in four annual payments of about \$143.75 per year, with interest; that on the day the sale and purchase of said land was made the boundaries of said land were marked and designated and shown to Enslinger by Tucker, and Enslinger entered into actual possession and control of the same, and immediately thereafter cleared a portion of the land, and erected a dwelling house and other permanent and valuable improvements thereon, and so remained in actual possession and control until the time of the said purchase contract of March 19, 1884; that on the 12th of June, 1883, Enslinger paid Tucker, agent for W. F. Peterson, \$10 on account of said land, and filed said Tucker's receipt for the same with his bill, and that all this was done with the full knowledge, consent, and approval of the owner of said land and of said B. Walker Peterson, who was at that time in charge of his father's business, and was acting in the place of his father as the representative of the owner of said land, and the said Tucker acting for him turned over to the defendant B. Walker Peterson all the said purchase money paid by said Enslinger to Tucker for said land, and alleging that Tucker kept and held the said written contract and turned over and delivered the same to said B. Walker Peterson, and that the same was then in the custody and control of said Peterson; that on the 19th of March, 1884, Enslinger surrendered the possession of the land to Tucker, who thereupon sold the same to Owen Talkington, and that afterwards defendant B. Walker Peterson made a deed therefor to Talkington, carrying out and executing the contract between Tucker and Talkington, thus ratifying, conveying, and approving Tucker's action in the premises; that immediately after Enslinger surrendered possession of the land, and in pursuance of the agreement of March 19, 1884, Enslinger did, with the knowledge and consent of said Tucker and the owner of said land, select and locate a certain other tract or boundary from within the lands then owned by the said George Fox or those holding under him, and marked and designated the boundaries thereof, and reported the same to Isaac Morgan, and entered into the actual possession and control of the land so selected, located, and taken in exchange, and has continued in the possession thereof ever since, and was still in the actual possession as a tenant of and under Henry L. Smith, to whom plaintiff Enslinger had sold the same; that plaintiff Enslinger, relying upon his right to have said agreement between him and Tucker, agent, specifically executed, executed an oil lease upon said lands to the plaintiff Henry L. Smith, bearing date the — day of —, 1892, for the term of five

years; that said Smith afterwards assigned the lease to the South Penn Oil Company, and afterwards, by agreement in writing bearing date the 22d day of December, 1892, plaintiff Ensminger assigned, set over, and delivered to plaintiff H. L. Smith all his right, title, and interest in said land under the agreement of the 19th day of March, 1884, with all the benefits of said lease for oil and gas purposes; that as part of the consideration for said transfer plaintiff Smith was to pay the balance of the purchase money due to defendant B. Walker Peterson under the contract of Tucker; that said purchase money and interest included then amounted to \$575; that tender was made in the bill of the said purchase money, and it was alleged that it had been made to B. Walker Peterson, who declined to accept the money, but promised and assured Smith that he would make the matter all right in a few days, and afterwards promised to make and deliver to said Smith a deed for said parcel of land, but that said Peterson now refused to so make and deliver such deed; that he never refused to perform said agreements, or refused to make and deliver the deed, until after it was discovered that the said land was likely to prove valuable for oil and gas purposes, and then said Peterson offered to make a deed for said land if plaintiff would allow him to reserve a portion of the oil that might be produced and saved from said land.

It was also alleged that the deed from the executors to Peterson had the effect to vest the legal title to the said 125 acres in said Peterson, but that he holds the same as trustee for plaintiffs, and should be required to convey the same to plaintiffs; that it would work a fraud on the plaintiffs, and each of them, and cause each of them irreparable injury, damage, and loss, not to be able to have said agreement of March 19th, made by Tucker specifically executed; that immediately after Smith purchased said land from Ensminger he entered into the actual possession and control thereof, and erected thereon a frame dwelling house, and made other permanent and valuable improvements thereon, and fenced and inclosed a portion of said land, all of which was done with the full knowledge, consent, and approval of the said B. Walker Peterson, and prayed for specific execution of said agreement; that B. Walker Peterson be required to accept the purchase money due therefor, which was then paid into court, and be required to execute and deliver to Ensminger, or his vendee, Smith, a deed for said 125 acres of land; that the defendant South Penn Oil Company be required to deliver the one-eighth of the oil produced and to be produced from said land to the credit of plaintiff Smith; that a receiver be appointed to take charge of the royalty, and that the South Penn Oil Company be restrained from delivering the royalty from the lease on the said land to said

defendant Peterson; and for general relief. The bill was sworn to, and injunction was granted as prayed for.

Defendant Peterson tendered his answer, denying the agency of Tucker after the death of George Fox, M. D., which occurred about the last of the year 1882, and the death of the elder William F. Peterson, who had been the attorney in fact for said George Fox, and denying that Tucker had made the agreement of September 12, 1883, and in fact denying all the material allegations of the bill. The South Penn Oil Company filed its answer, averring that it had no interest in the litigation between plaintiffs and Peterson and was ready to pay the royalty of oil from the production on said lands to either of the parties that the court might ascertain to be entitled to receive it.

On the 15th of September, 1896, the cause came on to be heard on motion of defendant to dissolve the injunction, when the answer of the defendant was filed, and general replication thereto, and the motion to dissolve was continued for the taking of depositions. At the October rules, 1897, plaintiffs filed an amended bill, making new parties defendant, alleging that since filing their original bill they had learned that B. Walker Peterson purchased the land from the executors for himself and William F. Peterson, his brother, and that under the said purchase B. Walker Peterson held one-half thereof in trust for his said brother; that on the 18th of May, 1895, said B. Walker Peterson executed to his said brother a deed in the nature of a declaration of trust acknowledging the joint interest of his brother in the land and in the contracts in the original purchase; that plaintiffs were not aware of the execution of said deed at the time of the filing of said bill; that said W. F. Peterson died intestate, leaving his brother, B. W. Peterson, his sole heir at law, and that, as stated in said original bill, said William F. Peterson, in his lifetime, acted as the agent of said George Fox, M. D., in his lifetime, and for his executor after his death, and that much of the business as shown in the original bill was done by Thomas Tucker, acting for the said George Fox, M. D., deceased, and said executors, through their said agent, William F. Peterson; that said Tucker made many sales of the Fox lands in said Wetzel county as representative of said George Fox and the executors after his death, through said agent, William F. Peterson; that William F. Peterson knew of every transaction about said land made by said Tucker, and every sale made by him for any portion of said Fox lands, and that settlements were frequently made with said Thomas Tucker by both William F. Peterson and B. Walker Peterson; that after said B. Walker Peterson obtained the said deed of June 1, 1889, final settlement was made by and between said Thomas Tucker and the said William F. Peterson and B. Walker Peterson, and claimed to file as



an exhibit with their said amended bill a copy of such settlements; and alleged that both William F. and B. Walker Peterson knew of said Tucker sale to plaintiff Ensminger, and acquiesced therein, and agreed thereto; and plaintiffs adopted all the allegations contained in the original bill.

Defendant B. Walker Peterson filed his answer to said amended bill, admitting the interest of his brother in the purchase of the lands from the executors, and the execution by him of the deed of May 18, 1895, therefor to his brother, W. F. Peterson; denied that his said brother had acted as agent for George Fox, M. D., in his lifetime, or for his executors after his death, in respect to any of the said lands, or that said executors made sales through his said brother as agent, or that said Thomas Tucker made sales for him, or that his brother or himself knew of the transactions of said Tucker, or that settlements were made frequently with said Tucker in respect to any portions of the said Fox land with respondent and his brother, or either of them, and that the exhibit professed to have been filed with the amended bill showing such settlement was not so filed nor was such settlement made.

The cause came on to be heard on the 26th day of May, 1898, on the bill and exhibits, the answers and replications and the depositions, and upon the exceptions of defendant Peterson to depositions and certain questions propounded, and upon motion to dissolve the injunction. The court overruled the exceptions of the defendant to plaintiff's depositions, and held that the plaintiffs were not entitled to the relief prayed for, and dissolved the injunction and dismissed the bill, and decreed costs for defendant Peterson against the plaintiffs. The plaintiffs Ensminger and Smith appealed from said decree, and say that the court erred in dissolving plaintiff's injunction and denying the relief asked for and dismissing their bill.

The principal question involved is whether the writing, the specific execution of which is sought to be enforced in this cause, is sufficient to take it out of the statute of frauds. In *White v. Core*, 20 W. Va. 272 (Syl., point 2), it is held: "Every agreement required by the statute of frauds to be in writing must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable certainty. And in contracts for the sale of lands the court may go outside of the writing for the purpose of identifying and ascertaining the land sold, where general words of description capable of being made certain are used in the writing." And in *Shelton v. Church's Adm'rs*, 10 Mo. 774, it is held that: "A contract for the conveyance of so much of any lands the obligor might own will not be enforced in equity. A specific performance will only be decreed when a specific thing is agreed to be conveyed." And in *Dobson v. Litton*, 5 Cold. 616, it is

held: "Courts of equity will not decree a specific performance of a written contract unless its terms can be clearly made out in its essential particulars from the writing itself, or by a reference contained in it to some other writing." And in *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649: "Every agreement which is required by the statute of frauds to be in writing must be certain, or capable of being made certain, by reference to something else, whereby the terms and subject-matter of the agreement can be ascertained with reasonable precision; otherwise it cannot be carried into effect;" and, further: "The specific performance of a contract respecting land will not be decreed unless the written instrument in reference thereto identifies the land or furnishes the means of identifying it with sufficient certainty;" and in this last case the court goes so far as to say that: "Part performance will not take a parol sale of lands out of the statute of frauds. The statute contains no exceptions in regard to such contracts, and it is not for us to create exceptions when none exist in the statute." *Holmes v. Evans*, 28 Miss. 247, 12 Am. Rep. 372; *Miller v. Campbell*, 52 Ind. 125; *Baldwin v. Kerlin*, 46 Ind. 426; *Johnson v. Craig*, 21 Ark. 533. The contract sought to be enforced in the case at bar fails to mention any specific land proposed to be sold, but refers to another contract, which purports to have been dated on the 12th day of September, 1883, by which Thomas Tucker, agent, sold a tract of land to the plaintiff Ensminger, "situated on the south side of the South Fork near Owen Talkington," and the contract or agreement here sued upon proposed to give Ensminger "the right to take any other land owned by said Fox or to make his own location on said land owned by said Fox to transfer his former article and said Ensminger has to make location and report the same Isaac Morgan and said Ensminger has the rights on this or these lands as the former contract." George Fox, who was then deceased, had been the owner of large boundaries of land containing in the aggregate nearly 20,000 acres, and this contract, made by the agent long after the death of his principal, proposes to give the purchaser the right to take any land owned by the said Fox, to be located where the purchaser might desire, without specifying in which of the various large tracts the same might be located, or on what waters, or any other designation as to where it should be located. There are no general words of description, capable of being made certain used in the contract sued upon, as required in *White v. Core*, supra. In *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494, it is held that: "A contract for the conveyance of lands which a court of equity will specifically enforce must be certain in its terms, and the certainty required has reference both to the description of the property and the estate to be conveyed. Accordingly, when

the property could not be identified, specific performance was denied." In *Westfall v. Cottrills*, 24 W. Va. 763, it is held: "A parol contract to 'sell and convey forty acres of the Spring Fork end of my tract of 147 acres on Beech Fork in Calhoun county' is too vague and indefinite to be specifically enforced." In *Blankenship v. Spencer*, 31 W. Va. 510, 7 S. E. 433, it is held that a parol contract for the sale of land, described as "a certain piece of land containing 67½ acres, being the lower end of a certain survey sold and conveyed to S. by W., and joining the lands of H. and of R., in the district of F., and county of G., and state of West Va.," and shown by extrinsic evidence to contain 117 acres, was too vague and indefinite to be enforced in a court of equity. It is there further held that a bill to enforce specific performance on the ground of part performance sufficient to take it out of the statute of frauds, "would only lie where the contract could be enforced without such part performance if the same or some memorandum or note thereof had been in writing, and signed by the party to be charged thereby, or his agent."

It is attempted on the part of the plaintiffs to cure the uncertainty in the contract of March 19, 1884, by its reference to the contract of September 12, 1883, made by the same agent for the sale of land on the south side of the South Fork near Owen Talkington, which latter contract is neither produced nor clearly proved. Plaintiff Ensminger says that contract was by him surrendered to Thomas Tucker at the time, of making the subsequent contract of March 19, 1884, and that he had not seen it since. Plaintiffs in their bill allege that by the contract of September 12, 1883, made with Tucker, and which contract was taken up by Tucker on the day the later contract of March 19, 1884, was entered into, the boundary of land purchased by him was supposed to contain about 125 acres at the sum and price of \$5 per acre, of which about \$50 was paid cash, and the residue was to be paid in four annual payments of about \$148.75 per year, with interest, while plaintiff Ensminger in his deposition says that under the contract of September 12, 1883, he was to pay for the land \$5 per acre, and pay it in four payments, and that he paid \$10 in advance on the day of the date of the contract and paid \$10 afterwards to William Reed on a written order, and afterward fed a cow three months in winter on his order, which amounted to \$10. It does not appear from his deposition when the payments were to be made, whether monthly, quarterly, annually, or otherwise, nor the amounts; and he further states that there were supposed to be 45 or 50 acres in the boundary, hence the price could not have exceeded \$250; so that the residue could not have exceeded four payments of some \$60 each. In *Mathews v. Jarrett*, 20 W. Va. 415, the court cites with approval the case of *Preston v. Preston*, *supra*, and says: "Ex-

trinsic evidence is only admissible to a very limited extent, and for purposes well defined and limited. It cannot be used to supply any defect or omission in the terms of the written contract, but is strictly confined, in cases where no fraud, mistake, or other equitable incident of a like character is alleged, to the function of explanation, and of exhibiting the surrounding circumstances in the manner and only to the same extent that such evidence is permissible in the interpretation of all other written instruments;" and cites *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Reed's Heirs v. Hornback*, 4 J. J. Marsh. 377; *Graham v. Hendren*, 5 Munf. 185. It is insisted by appellants that their location is more definite than that in the conveyance under which Peterson, the appellee, claims title. This cannot be, because no land is described in the contract of March 19, 1884, while the conveyance by the executors to Peterson of June 1, 1889, was of "all the lands now lying in the counties of Marion and Wetzel, or in either of them, in the state of West Va., which were conveyed by Benjamin Wyncoop to Samuel Mickel Fox, by deed dated September 19, 1791," giving the place of the recording of the same. Peterson's deed is based upon the old deed, which describes the lands, and the records show what portions thereof have been alienated. In support of their proposition appellants quote from *White v. Core*, cited, where it is said, "In contracts for the sale of lands the court may go outside of the writing for the purpose of identifying and ascertaining the land sold." This is qualified by the further statement in that connection, "And a contract to sell 'my farm' or 'the mill' is sufficiently certain if it appears that the vendor has but one such building or tract of land," so that the contract must be specific enough to identify the property intended to be sold. Appellants also cite *Donnally v. Parker*, 5 W. Va. 301; *Bentley v. McKibben*, 6 W. Va. 283; *Nash v. Jones*, 41 W. Va. 709, 24 S. E. 592; *Coal & Coke Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201—all of which were for the enforcement of specific performance of contracts which were definite and certain. No such questions arose as are involved in case at bar. In *Blair v. Snodgrass*, 1 Sneed, 1, it is held: "It is a well-settled rule under the statute of frauds that, where divers writings are relied upon to elucidate a contract for the sale of land, parol proof is not admissible to connect or explain them, or to show that the several writings relate to the same transaction;" and it is there said: "It is plainly the law that the precise meaning of the parties must be clearly ascertained from the instruments themselves, to the exclusion of extrinsic evidence; and the decisions upon this point are substantially the same both at law and in equity;" citing *Brettel v. Williams*, 4 Excheq. 623; *Saunderson v. Jackson*, 2 B. & P. 338; *Western v. Russell*, 8 Bea. & P. 138; *Foster v. Hale*, 8

Sumn. 606; Allen v. Bennett, 3 Taunt. 169; Ide v. Stanborn, 15 Vern. 685.

There is a large mass of testimony taken and filed in the case touching the possession of the plaintiff of land under the said contract, which is very conflicting. There are many exceptions taken to the depositions of plaintiffs by the defendant's counsel, and to certain questions and answers specifically called to the attention of the court; but the exceptions were all overruled by the court, which would give plaintiffs the benefit of all their testimony in the consideration of the case by the court, and, if the court erred in any of its rulings on said exceptions, the error was in favor of plaintiffs. The evidence relating to the agency of the said Tucker for the defendant Peterson was also contradictory, but I deem the question of agency as immaterial, even though it were well established by the evidence, as the contract sought to be enforced specifically is too vague and uncertain to be enforced by a court of equity, and the court did not err in refusing the relief prayed for.

The decree is therefore affirmed.

(52 W. Va. 559)

STEWART v. TENNANT et al.

(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

**INFANT-BILL TO SET ASIDE DECREE-COLLATERAL ATTACK-ALLEGATIONS OF BILL-DECREE-LACHES-PARTITION-SALE-RIGHTS OF INFANTS-LIMITATION OF ACTIONS-CONSTITUTIONAL LAW.**

1. An infant, under the statute allowing him to show cause against a decree, may do so by original bill, although the cause alleged is error of law apparent on the face of the decree.

2. When such bill seeks relief, by way of cancellation of a deed, and an accounting for waste, rents, issues, and profits consequent upon the reversal of the decree, and fully sets forth the defects in the decree, and incorporates the pleadings, decrees, and orders as exhibits, the suit is not collateral, but directly attacks the erroneous decree, and the record of the cause in which it was pronounced may be introduced upon the hearing as evidence.

3. Where the allegations of a bill are sufficient to support a decree, and there is a prayer for general relief, and such decree is pronounced, it will stand, although not specifically prayed for in the bill.

4. Where an infant proceeds promptly, upon attaining his majority, to show cause against a decree, the defense of laches cannot be made.

5. Before there can be a sale of land in a partition suit, it must be ascertained and determined that partition thereof cannot conveniently be made, and the usual and preferable mode of establishing such fact is by a report of commissioners, so stating, and setting forth the facts from which it appears.

6. Where in a partition suit there is an allotment of part of the land and sale of the residue, the allotted part and the proceeds of the part sold must each be divided among all the co-tenants of the entire subject, in the absence of a consent decree, when adults only are interested, and it is error to sell the undivided interests of infants in such suit when there is no proceeding therein by their guardian for such sale in the manner prescribed therefor by law.

7. A party to a suit, moving the sale therein of an infant's real estate, and purchasing the same under a decree therein made, is not protected by section 8 of chapter 132 of the Code of 1899, and, on reversal of the decree, his title falls.

8. A decree entered in a cause in which all interested parties are before the court, and upon a bill upon which such decree would have been proper under certain conditions which might have been shown by proof, upon the allegations of the bill, to exist, is not void for want of jurisdiction, however erroneous it may be.

9. The act passed by the Legislature March 25, 1873, entitled "An act concerning the limitation of actions in certain cases," is void for want of expression of its object in the title thereof, as required by the first clause of section 30 of article 6 of the Constitution, providing that, "No act hereafter passed, shall embrace more than one object, and that shall be expressed in its title."

10. If said act could be held free from the fatal defect of unconstitutionality, it would be within the repealing clause of the act of March 18, 1882, constituting chapter 104 of the Code of 1899, and not available as a defense to any action or suit.

11. Tenants in common committing waste against a co-tenant are wrongdoers, and may be sued on account thereof jointly or separately, and, when sued jointly, it is not error to dismiss the cause as to one of them, on motion of the plaintiff, and over the objection of the other.

12. Where, before assignment of dower, one claiming by purchase from certain heirs and the widow drills oil wells upon the land and extracts large quantities of oil therefrom, without having obtained the consent of his co-tenant to such development, and such nonconsenting co-tenant brings his suit for an accounting, it is error to decree to him his entire interest in the oil produced and thereafter to be produced, free from any charge on account of the dower interest.

13. In such case the holder of the dower interest is entitled to the interest on one-third of the proceeds of the oil going to the nonconsenting co-tenant until the death of the dowress, and until that date the fund upon which such interest is paid remains under the control of the court through its general receiver.

14. An infant, whose land has been sold under an erroneous decree, and the purchase money paid to his guardian, and who sues for reversal of the decree and cancellation of the deed, must tender with his bill the purchase money, or offer therein to repay it.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County;  
M. H. Willis, Judge.

Bill by Louis Stewart against J. S. Tennant and others. Decree for plaintiff, and defendants appeal. Reversed.

Fleming & Fleming, J. V. Blair, T. P. Jacobs, and Riggle & Engle, for appellants. Pugh & Pugh and J. H. Strickling, for appellee.

POFFENBARGER, J. The South Penn Oil Company and Jacob S. Tennant complain, on appeal, of certain decrees made by the circuit court of Tyler county upon a bill filed against them and others by Louis Stewart for relief from certain alleged erroneous decrees pronounced by the same court in a former chancery suit, under which Tennant and one Cassie A. Tennant, by judicial sale,

¶ 1. See Equity, vol. 19, Cent. Dig. § 1009.

acquired the title, as they claim, to a certain tract of land, and afterwards leased the same for oil and gas purposes to said South Penn Oil Company, and for an accounting, on the part of said defendant, for one-twelfth of the oil taken from said land. The case is substantially as follows: James Stewart, being the owner of said tract of land, which contains 176 acres, died in the year 1889, intestate, and leaving surviving him a widow and 12 children. Afterwards, and prior to July 1, 1890, Jacob S. Tennant and Cassie A. Tennant purchased the undivided interest of six of said children. They then brought a partition suit, praying for an assignment of the dower and division of the land, in which a decree was entered, adjudicating the right to partition and appointing commissioners to make it and assign the dower. Before this decree was executed, at the August term, 1891, Jacob S. Tennant, by leave of the court, filed in the cause deeds, executed by the widow and four others of the children, conveying to him the dower interest and an additional four-twelfths of the land, making ten-twelfths of the entire tract, owned by him and Cassie A. Tennant. The other two interests were owned by the plaintiff, Louis Stewart, and Emma Stewart, both infants. Then evidence was introduced at the bar of the court tending to show that the interest of said infants would be promoted by a sale of their interest in the land and payment of the proceeds thereof to their guardian, and a decree was entered setting aside so much of the former decree as ordered a partition of the land, decreeing a sale of the undivided interest of said infants, which decree was, on the 8th day of December, 1891, executed, Jacob S. Tennant becoming the purchaser for the sum of \$200. This sale was confirmed, and on August 31, 1895, the commissioner who sold the land under the decree executed a deed therefor to Tennant. Immediately afterwards the Tennants took possession of the land, and by two leases, dated, respectively, June 28, 1894, and May 1, 1897, leased it to the South Penn Oil Company for oil purposes, and on or about the 9th day of April, 1897, said company entered upon the land and commenced drilling for oil and gas, and ever since has been in the exclusive and uninterrupted possession of the same for oil and gas purposes, and has drilled 11 wells on the land, all of which produced and are producing considerable quantities of oil.

On the 29th day of June, 1900, the plaintiff, who had been under age, as has been stated, when said decrees, sale, and leases were made, commenced this suit, by an original bill which was filed at July rules, 1900, alleging his infancy as aforesaid, setting up all of said proceedings and transactions, alleging that the decrees and proceedings in said former suit, whereby the Tennants claimed to have acquired title to his interest in the land, were erroneous, illegal, and void, showing that he had attained the

age of 21 years on the 11th day of May, 1900, and praying that the said Tennants, South Penn Oil Company, and Eureka Pipe Line Company be required to answer the bill under oath, and show the quantity of oil taken by them, and each of them, from said land, the amount held by said pipe line company, and disposed of by it or any of the defendants; that an injunction be awarded restraining the Tennants and South Penn Oil Company from taking and removing any timber, oil, or other material from the lands, and from selling or otherwise disposing of the same or the proceeds thereof; that if the court should permit them to operate on the land it should appoint a receiver to take charge and control of one-twelfth of the oil then on hand or that might be thereafter produced; and that general relief in the premises, as to equity might seem right, should be granted.

To this bill, the appellants and others of the defendants demurred; and, the demurrers having been overruled, they filed their separate answers. Depositions were taken and filed, and on the 29th day of August, 1901, the decrees complained of were pronounced. The objection to one of these is that it sustained exceptions to parts of the answers of the South Penn Oil Company and the Eureka Pipe Line Company; and to the other that it permitted the plaintiff to file in this cause the record of said former chancery suit, dismissed from the case Cassie A. Tennant on motion of the complainant, set aside and annulled the decrees made in said former chancery cause at the August and December terms, 1891, set aside, annulled, and canceled the said deed to Jacob S. Tennant made under said decrees, and the lease dated May 1, 1897, in so far as they relate to, and purport to convey, the interest of the plaintiff in said land, as clouds upon his title; required Jacob S. Tennant to account to the plaintiff, or to him and his assigns, for one-twelfth of the royalties, bonuses, and rentals received by him from the land, and the South Penn Oil Company to account to the plaintiff, or to him and his assigns, for one-twelfth of seven-eighths of the oil and gas taken from the land, on the basis of a charge against said company of the whole of one-twelfth of said seven-eighths, to be credited with one-twelfth of the actual cost and expense of production, and the difference to be paid over to the complainant, or to him and his assigns. The oil company and Jacob S. Tennant were required also to account to the plaintiff for one-twelfth of all the timber taken by them from the land within the five years next prior to the commencement of the suit, and the cause was referred to a commissioner to state and report an account in accordance with directions given in the decree.

Although there are two branches to the case, one represented by the South Penn Oil Company and the other by Jacob S. Tennant, whose interests, in some of the questions

raised, are common, while in others they are not, and although several questions are raised by the demurrers, all of which are carried into the decree, it is unnecessary, in the discussion and disposition of the errors assigned, to separate and subdivide them with reference to parties and the stages at which the alleged causes of complaint arose.

One contention is that this suit is not a direct proceeding to uproot the decrees and proceedings in the former chancery cause, but is separate, distinct, and collateral thereto, and, for that reason, the demurrer should have been sustained, and the decree setting aside said decrees pronounced in the former suit, and the deed and lease made thereunder, is erroneous. No argument is submitted in support of this contention, from which fact it may be inferred that it, as well as some others which stand in the same condition, is not regarded by counsel for appellants as being very well founded. The bill makes a direct attack upon all those decrees and proceedings, setting them out in detail, making them exhibits, and alleging their infirmity, erroneousness, and illegality; but it does not specifically pray that they be set aside, annulled, and reversed. However, it asks specific relief, which can be granted in no way other than by the destruction of these decrees, the deed, and lease; and the prayer for this relief is based upon the allegation of the defects in said decrees. Besides the specific prayer, there is a prayer for general relief, preceded by allegations upon which a prayer for the reversal of the decrees and cancellation of the deed and lease might properly have been predicated. It is well settled that when the bill contains allegations to support a decree and a prayer for general relief, a decree may be predicated thereon, although not specifically prayed for. *Furbree v. Furbree*, 49 W. Va. 191, 202, 38 S. E. 511; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Bart. Ohy. Pr.* 281. This, therefore, is an untenable objection to the bill and the decree. Moreover, in order to reach these decrees to obtain relief, the plaintiff, proceeding under the statute saving to infants the right to show cause against a decree within six months after attaining majority, was not required to proceed by petition or bill of review in the same cause. This is settled law in this state. He may proceed by petition, bill of review, supplemental bill in the nature of a bill of review, or by original bill, for defects consisting of error of law only, as in this case. *Lafferty v. Lafferty*, 42 W. Va. 783, 785, 26 S. E. 262; *Ewing v. Winters*, 39 W. Va. 490, 20 S. E. 572; 1 *Dan. Ch. Pr.* (6th Ed.) 174.

Laches is also relied upon. The suit having been brought promptly after the plaintiff became of age, it is not open to the defense of laches. *Knight v. Watts*, 26 W. Va. 176.

In view of what has been said on the subject of plaintiff's choice of remedy and the

sufficiency of the bill, it is hardly necessary to remark that the court did not err in permitting the plaintiff to file in this cause the record of said former chancery cause in which the erroneous decrees attacked by this bill were made. That record constituted the evidence conclusively proving the allegations of the bill.

Having disposed of the preliminary questions, the next inquiry is as to the propriety of the action of the court below in its disposition of the matters which constitute the principal reliance of the defendants. That the decrees under which they claim are erroneous is absolutely beyond question. Before a sale of land can be made in a suit for partition, it must appear that partition thereof in kind cannot be conveniently made. That is the language of the statute, and the court has decided that the statute means exactly what it says. *Casto v. Kintzel*, 27 W. Va. 750; *Zirkle v. McCue*, 26 *Grat.* 517. The mode and manner of establishing this fact is also well settled. The court, after deciding that the plaintiffs are entitled to have partition, and adjudicating the rights and interests of the parties in the land, appoints commissioners to go upon the land and make partition thereof, if they find it is susceptible of partition without detriment to the interests of the parties. If these commissioners find that such partition cannot be conveniently made, they so report to the court, and thereby sufficiently establish the fact, if the report sets forth sufficient facts and is confirmed, to enable the court to decree a sale instead of partition, if it further appears that the interest of those who are entitled to the subject or the proceeds thereof will be promoted thereby. *Freeman on Coten. & Par.* § 543; *Bart. Chy. Pr.* 308; 4 *Min. Ins.* 1464. No such report was ever made in this cause, nor does it appear that it was in any manner shown to the court that partition could not be made. The decree ordering the sale does not so recite. It says that it appears from "evidence adduced at the bar of the court that it will be to the interest of the said two infants, Emma Stewart and Louis Stewart, that their estate will each be promoted by a sale of their said one-twelfth interest in and to said tract," etc.; but there is no recital to the effect that partition cannot be conveniently made. The evidence adduced at the bar, and upon which the court proceeded, is not in the record, was probably oral and never reduced to writing, and there is no intimation in the decree that it showed partition could not be made, even if such fact could be made to appear in that way. The absence of any showing that the land could not be partitioned is fatal to the decree of sale, as one made under the statute providing for sale in partition suits. *Casto v. Kintzel*, supra; *Zirkle v. McCue*, supra. The statute further provides that, when partition cannot be conveniently made, the court may decree an allotment of part and sale of the

residue, if the interests of those entitled would be thereby promoted; but it is insisted in the brief of counsel for the appellee that this does not mean that the undivided interest of some of the parties may be sold, nor that part of the land may be sold as belonging to some of the parties, and the residue divided among the others as land belonging to them. It is claimed that what is allotted must go as the property of all the parties interested in the entire subject and be divided among them, and that what is sold must be sold as the property of all the interested parties and the proceeds thereof divided among them all. In support of this, the following is quoted from Hogg's Eq. Pr. § 373: "And where the court does determine upon the sale of the land, it should be sold as a whole (in the absence of the consent of the parties in interest to the contrary), as it would not be just to sell as to some, and decree a partition as to others." This view seems to be reasonable, just, and sound. Whether it would be unjust in any given case would depend upon the facts and circumstances thereof. But the soundness of the proposition stated by Mr. Hogg may be rested upon the language of the statute, the only authority which the court has for making a sale, and which does not authorize the court to convert the property or the interest therein of any co-tenant into money and deprive him of his land, unless it appears that he cannot have land because the subject is not susceptible of partition. If the owner can have his land or part of it, the court shall give it to him, and not compel him to give it up and take money in lieu thereof. That part of the statute which authorizes an allotment of part and sale of the residue does not say that an undivided interest may be sold, but that part of the land may be sold and the residue partitioned. If this statute meant that an undivided interest might be sold, the partition suit in which such sale is made would prove to be abortive, and defeat the end sought by the bill, in case the purchase should be made by a stranger. In that event, such suit would but lay the foundation for another partition suit, as the purchaser would have the right immediately to demand partition again. This shows conclusively that the proposition laid down by Mr. Hogg rests, not only upon the strict letter of the statute, but is also a clear expression of its essence and spirit. This departure from the statute is another reason for holding the decree of sale bad.

It is insisted, upon the authority of *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014, that the decree of sale is not erroneous, but void for want of jurisdiction. A comparison of the two cases shows great dissimilarity. In the *Hoback-Miller Case*, the plaintiff had no right to file any sort of a bill upon which a sale of the infant's real estate could be enforced. It was held that she had no cause, and brought before the court no cause, for sale, and that no such cause was brought

within the jurisdiction of the court, and that therefore the decree of sale was pronounced without jurisdiction, and was void. Here, the plaintiffs were tenants in common with the infant and entitled to partition, and, upon their right to partition, they could enforce a sale upon its appearing that partition in kind could not be made. They thereby brought before the court, not only the necessary parties, but the subject-matter, cause of sale of the infant's land, and invested the court with jurisdiction for the purpose of sale. After that, in the exercise of its jurisdiction, the court departed from the rules of law governing the proceeding, which amounts to an error in the exercise of jurisdiction, but not to an act without jurisdiction. Whether the decree is erroneous and therefore voidable, or actually void, having no force or virtue for any purpose, is not very material or important, but it seems to be voidable only.

The main defense, both upon demurrer and in the answer of the South Penn Oil Company, is rested upon what is known as the "three-year statute of limitations," an act of the Legislature passed on the 25th day of March, 1873, entitled "An act concerning the limitation of actions in certain cases," which provides "that any person or persons, in peaceable possession of land claiming title under a lease of the same for the purpose of operating for oil or minerals, and who may have continuously remained in such possession for the space of three years, and have bored for, and in good faith expended money in such boring and operating, shall be entitled to plead said facts in bar, and said facts shall be a bar to any action at law, or in equity, instituted to establish title to recover possession of said lease, or to recover the profits received therefrom." It was the defense of this statute, set up in the answers of the South Penn Oil Company and the Eureka Pipe Line Company, which was eliminated by the court in sustaining the exception of the plaintiff to said answers. In sustaining the exception the court did not err. There are two reasons for so holding. One is that said act is void, and the other that, if it ever had any life, it has been killed by repeal.

On the question of the constitutionality of this statute, counsel for the appellee invoke the fourteenth amendment to the Constitution of the United States, section 1 of the Bill of Rights in the Constitution of this state, and section 39 of article 6 of the Constitution of the state of West Virginia. It is unnecessary to give all the reasons that can be assigned for a conclusion by the court. The relation of this statute to the constitutional provisions relied upon is discussed at great length by counsel, but the argument is not entirely satisfactory, to say the least. But the act plainly violates the first clause of section 30 of article 6 of the Constitution, which says that "no act hereafter passed, shall embrace more than one

object and that shall be expressed in the title." All the courts, except those of California and Ohio, hold such constitutional provision to be mandatory, and, where it has been materially departed from in the passage of any act, the act is held to be unconstitutional and void. *Suth. Stat. Con. § 79*. "It is as fatal to an act to be framed contrary to the Constitution in its title and by embracing a plurality of subjects, as it would be to insert provisions to operate contrary to its other limitations." *Id. § 81; Davis v. State, 7 Md. 151, 61 Am. Dec. 331.*

The purpose of this provision, as declared by the courts, is to prevent the enactment of laws, in a clandestine and stealthy manner, by compelling a statement, in the title of the act, of its aim and purpose, to the end that the public, as well as members of the Legislature, may conveniently and certainly know the character of pending legislation. But for this provision, omnibus bills could be put through the Legislature, carrying all kinds of measures, concealed in all forms, and neither legislator nor the public could, with any degree of certainty, fully know their contents. Divers interests would be combined in order to unite members of the Legislature who favor one measure incorporated in the bill to vote for it on that account, although containing numerous other measures of which they do not approve. This was a great evil in legislation, for the suppression of which this clause or similar clauses have been inserted in the constitutions of many of the states. *Suth. Stat. Con. § 78*, says: "And not only were legislators thus misled, but the public also; so that legislative provisions were stealthily pushed through in the closing hours of a session, which, having no merit to commend them, would have been made odious by popular discussion and remonstrance if their pendency had been seasonably announced." This statement is accompanied by the citation of numerous decided cases.

Although the courts construe this provision, in cases not within the mischiefs sought to be remedied by it, so as to sustain legislation, they rigidly enforce it in all cases falling within those mischiefs, and it makes no difference how meritorious the act may be. If the constitutional provision has been disregarded in the passage of it, it cannot be sustained. *Suth. Stat. Con. §§ 82, 92*. But it is further said, in section 82, that "the departure, however, must be plain and manifest, and all doubts will be resolved in favor of the law. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one subject, or, when it contains but one subject, on the ground that it is not sufficiently expressed in the title."

It will be observed that the statute requires two things: First, that the act shall

have but one object; and, second, that that object shall be expressed in its title. An examination of the act in question shows that it has but one object, purpose, or aim, namely, to bar actions against persons holding real estate under leases for oil and mineral purposes, upon their showing that they have been for three years in the exclusive and continuous possession of the land, and have bored for oil and expended money on the property in seeking for or producing oil or other minerals. It is not therefore open to the objection that it has more than one object. The only inquiry, therefore, is whether that object is sufficiently expressed in the title. That title has been quoted, and an examination of the title alone, without consulting the body of the act, leaves it uncertain whether it imports by its terms a general statute of limitations, or a statute of limitation available only to all persons standing in a particular situation, and is, therefore, special in its nature. A title might be so framed as to cover the whole Code. It may be so framed as to cover any particular branch or subdivision of the statute law, but anything incorporated into the act written under the title, which is not included in the title, cannot be upheld. Hence, if the title is not as broad as the act, only such parts of the act as fall within it can be sustained. It cannot be said here that the act is broader than its title, if the title be regarded as indicating a statute of limitations generally. Upon that assumption, it is much narrower than its title, and is fully covered by it. But is it not so narrow as to be contradictory of its title? If so, is that objectionable and fatal to it? The authorities answer this question in the affirmative, holding that a special act, written under a title which is general, operates a concealment of the real nature of the act and a misleading of the public. *Suth. Stat. Con. § 90*. It must be admitted that most, if not all, of the cases cited by way of illustration of this proposition, deal with acts, special in the sense of limitation as to locality and subject, concealed under titles more or less general; but the test is not the nature of the special act. It is whether the title, by reason of its generality, operates a concealment of the aim and purpose of the act. This necessarily occurs in every instance in which the act itself flatly contradicts what its title imports. In the sense of application and operation in every part of the state, and as to all persons who stand in the peculiar situation set forth in this act, it is general. But, in its effect upon the general subject of limitation of actions stated in the title, it is limited and special, for it covers only a very limited portion of the field. Therefore it is as clearly open to the objection of being represented by its title to be something different from what, in truth and in fact, it is, as if it were special in the sense of locality or subject.

Upon the assumption that the title is not



general, but limited and special, as the act itself is, the inquiry is whether its purpose is sufficiently indicated by the title. Looking into the act, it is found that it is an act of limitation of actions against persons in possession of land, holding under leases for oil and mineral purposes. The title says it concerns the limitation of actions in certain cases. There are numerous cases in which the right of action is limited in time. Whether this act is to apply to actions for damages for wrongs, for the recovery of money on contracts, or for the recovery of lands, is not indicated. There is no specification, indication, or even suggestion, to be found in the title of the class of cases to which the act is to apply. There is an utter failure of expression in the title of the object and purpose disclosed by the body of the act, in the sense that no person can tell from reading the title that the object is what the act itself discloses, or that it has any object, unless it be the limitation of actions generally. The words "in certain cases" are not inconsistent with this view, for the general statute only applies to certain cases, all of which are specifically set forth in it.

It is true that the substance of the act is germane to the general subject of limitation of actions mentioned in the title, and that it is generally held by the courts that the generality of the title is no objection so long as it is not made the cover for legislation incongruous in itself, and which by no fair intentment can be considered as having a necessary or proper connection. *Cooley, Con. Lim.* 172. But the cases in which this has been asserted are such as pass upon acts having broad purposes or objects stated in their titles; the execution of which require, or may be facilitated by, the performance of numerous other subsidiary acts provided for in the legislative act, and which subsidiary provisions, designed and inserted as the instrumentalities or agencies for the execution of the main purpose, were resisted on the ground of unconstitutionality, as not being included in the title, or as vitiating the whole act by incorporating into it two or more objects. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; *School District v. Hall*, 113 U. S. 135, 5 Sup. Ct. 371, 28 L. Ed. 954; *Jonesboro v. Railroad Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. Ed. 116; *Carter Co. v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701; *Annapolis v. State*, 30 Md. 112; *State v. Union*, 33 N. J. Law, 350; *Burke v. Monroe Co.*, 77 Ill. 610; *Blood v. Mercellott*, 53 Pa. 391; *Com. v. Green*, 58 Pa. 226. This case does not fall within that principle. A large number of cases hold also that the degree of particularity which must be used in the title of an act rests in legislative discretion, not being defined by the Constitution. *State v. Union*, 33 N. J. Law, 354. But that is asserted in connection with the principle above referred to, and does not conflict with the well-nigh universal holding

that the title must not work a concealment of the real object of the act, nor relieve from the necessity of expressing the object, in both of which respects this act is within the constitutional inhibition.

That the act of March 25, 1873, is repealed by the act of March 16, 1882, constituting chapter 104 of the Code of 1899, admits of no doubt. It falls clearly within the repealing clause of the latter act, reading as follows: "All acts and parts of acts inconsistent with the provisions of this act, and coming within the purview thereof, are hereby repealed." All acts within the purview of another act are all acts that relate to the cases that are provided for by such other act. The act of 1873 relates to limitation of actions for the recovery of land. Section 1 of chapter 104 of the Code of 1899, the act of March 16, 1882, relates to the same thing, and differs from it in this only that it covers all actions for such recovery, while the other relates to actions against oil and mineral lessees. The act of 1873 is therefore clearly within the purview of the later act. But it is not cut down by the repealing clause of the act of 1882, unless it is inconsistent with that act as well as within its purview. How can it be otherwise than inconsistent? It prescribes a limitation of three years, and the later act gives ten years, in which to bring the action.

It is urged that this is a special act, and is not repealed by a later general act revising the statutes relating to the general subject, as no reference is made to it in the revising statute. In *Suth. Stat. Con.* § 157, it is said that: "When the legislator frames a statute in general terms, or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation, to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the general act shows a plain intention to do so." This is law in this state. *Railroad Co. v. Hoard*, 16 W. Va. 270. The argument to be made under it is that in 1873 the Legislature introduced into the law of limitations an entirely new element, by providing that a lessee in possession under an oil lease, and having operated and expended money under it, might plead that fact in bar of an action against him, and that, as the revising act of 1882 made no reference to this new subject and special act of limitations, the presumption is that it was not the intention of the Legislature to repeal it. But this is only an answer to the claim that there has been a repeal by implication only. See head-note to section 157, *Suth. Stat. Con.*, and the section itself. *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627. Here the repeal is express, not merely implied; and the repealing clause would sufficiently show the intention to repeal, if it did not actually repeal.

The decree under which Jacob S. Tennant purchased being erroneous, and he being a



party to the suit, moving the sale at which he purchased, his title as such purchaser is not protected by section 8 of chapter 132 of the Code of 1899. *Martin v. Smith*, 25 W. Va. 535; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Buchanan v. Clark*, 10 Grat. 164; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. When such failure of title results, the parties are to be placed in statu quo. *Hull v. Hull*, 26 W. Va. 1; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. For this the decree complained of here provides. It gives to the plaintiff his undivided one-twelfth of the land, and one-twelfth of all the value of the timber and oil taken from the land, on the theory of the commission of waste by his co-tenants, and allows the South Penn Oil Company to set off against the oil taken by it one-twelfth of the cost of the production of all the oil produced on the premises. The principle announced in the similar case of *Williamson v. Jones*, cited, has thus been applied.

The dismissal of the suit as to the defendant Cassie A. Tennant is assigned as error, but without any argument in support of it. No reason is perceived why that was not proper. Jacob S. and Cassie A. Tennant must be treated as wrongdoers, each liable to the plaintiff for the whole amount of the damage wrought by them. Their extraction of the oil from the land, under the rule declared in *Williamson v. Jones*, makes them guilty of waste, which is in the nature of a trespass. As each is liable to their co-tenant for the full amount of the damage done by them jointly, he could sue them jointly or separately, and, having sued both, he might dismiss as to one. Why there was a dismissal as to Cassie A. Tennant does not appear, but, if the plaintiff compromised with or released her, such action is no bar to the suit against Jacob S. Tennant, her joint trespasser. Code 1899, c. 136, § 7. That she, jointly with Jacob S. Tennant, executed the oil lease, is referred to in the suggestion of error in this connection, but nothing is said as to why, or how, that affects the question of the propriety of the decree. The plaintiff was not a party to the lease, nor in any way interested in the rights or liabilities created by it between the lessors and lessee, nor in the settlement of any equities among them that may grow out of the failure of title.

Although neither Jacob S. Tennant nor the South Penn Oil Company asked in their answers for the dower interest in plaintiff's one-twelfth of the oil, each predicates an assignment of error on the failure of the court to so provide in the decree. This seems, however, to be well taken. The bill shows on its face that they hold the dower interest, thereby admitting that the plaintiff is not entitled to it, and yet the decree gives it to him. That interest, as settled by the decisions of this court, is the interest on the fund constituting the subject of the life es-

tate, to be paid until the expiration of the life tenancy. That, in this case, would be the one-third of the one-twelfth of all the oil produced, less the cost of production. As to who shall have the custody of this fund during the life estate, under the circumstances of this case, there is no precedent, but the principles enunciated in *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490, and *Eakin v. Hawkins* (decided at the fall special term, 1902), 43 S. E. 211, afford a sufficient guide. The plaintiff is not entitled to the corpus of the fund until the expiration of the life tenancy, and the life tenant is not entitled to it at any time, but is entitled to the interest on it. It has been virtually brought into court, and there is no person to whom the court can order it paid. Of all the funds in court subject to its order, and which cannot be disposed of for the time being or pendente lite, the law provides a custodian in the person of the general receiver of the court, who is authorized by the statute to keep it invested and collect the interest. In giving to the plaintiff the entire one-twelfth interest, without providing, as aforesaid, for the dower interest belonging to the appellants, the circuit court plainly erred.

In the conference it has been suggested that this case is to be distinguished from those of *Wilson v. Youst*, *Ammons v. Ammons*, and *Eakin v. Hawkins*, upon the ground that here dower has not been assigned, in consequence of which there has been no invasion by the heir of the widow's right to possession, while in the other cases the life tenant had right of possession against the remainderman. In making this distinction, oil and gas are likened unto timber taken from the land by the heir. But it must be remembered that oil differs widely from timber, and that the widow has always had the right to dower in mines opened by the husband in his lifetime, and she might work an open mine to the full extent of the stratum in which the opening was made, and by some courts it has been held that she may work a mine to exhaustion. 10 Am. & Eng. Enc. Law (2d Ed.) 158. Petroleum oil is comparatively a new subject in the law, as well as a substance peculiar in its nature, and both of these features must be considered, and, if necessary to do justice and right, the law governing relative rights of dower and heir may be varied to some extent. "The law of waste, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country." *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733. In that case it was so varied as to allow the doweress to use large amounts of timber necessary to the operating of salt furnaces. Judge Roane dissented, but not from this proposition, for he said: "The claims of the remainderman and particular tenant should both be attended to,

and be adjusted by a scale which consults the interests of both. The latter should be permitted to receive the golden egg, but not to destroy the goose which lays it." In *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, the court said of the dowress: "As we have seen, it is not waste in her to work mines opened by her husband, and, by a parity of reasoning, we reach the conclusion it is not waste for her to work mines opened by the heir before assignment of dower. At all events, she would be entitled to dower in the profits in case the mines should be worked by the heir or owner of the fee before assignment of dower." The same reasoning applies here. The statute gives her the right to demand of the heir one-third of the rents, issues, and profits until her dower is assigned, and this court has decided that such rents, issues, and profits arising from oil are measured by the interest on the fund arising from its production called "royalty." *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292. Here we must further consider the fact that Jacob S. Tennant had purchased the interests of heirs and the dower right, and under these claims of title caused the mines to be opened. Except as to the outstanding interest of the plaintiff, he did this rightfully, being in possession under the dower right, as well as reverser. As to future production, there can be no question about the right of the assignees of the dowress to share in its profits. As to that, the heir now here demands partition, which he cannot have without assigning the dower, and thereby doing away with the technical distinction, resting on want of right of possession. This shows the technical and unsubstantial character of the distinction, which should yield to the plain dictates of equity and justice.

It is argued against this decree that it has been set aside for cause nonexistent at the time the sale which it sets aside was made. When the question is whether the infant's interests were promoted by the sale, it must be determined by the conditions and circumstances as they were when the sale was made; but, if there is substantial error in the decree of sale, it will be reversed, without regard to whether, at the time of sale, it appeared to be beneficial to the infant. Error is cause of reversal existing at the time. The cases cited by counsel for Jacob S. Tennant are to this effect. *Walker v. Page*, 21 Grat. 636; *Zirkle v. McCue*, 26 Grat. 517. In point 7 of the syllabus of the latter it is held that the matter for inquiry is, did the court have jurisdiction of the subject-matter? Were the proper parties before it? Were the proceedings regular? Was the sale proper, under all the circumstances then surrounding the parties?

A further objection to the bill and decree is that the purchase money of the plaintiff's interest paid by Jacob S. Tennant is not tendered by the bill, nor required to be paid

by the decree as a condition precedent to the setting aside of the sale. It is a general rule that a party who seeks equitable relief must offer in his bill to do equity, and this case is no exception to that rule. Had the land been sold to satisfy a lien, the purchaser would be entitled to stand in the place of the lien creditor, and have the benefit of the lien, to the extent of his purchase money paid on the debt, thereby secured. As we have seen, the parties are to be put in statu quo on setting aside a judicial sale as the result of the reversal of a decree. See 21 Ency. Pl. & Pr. 548; *Hull v. Hull*, 26 W. Va. 1; *Charleston L. & M. Co. v. Brockmeyer*, 23 W. Va. 685. When the defendant is equitably entitled to be reimbursed for anything paid by him, there should be an offer to do equity in a bill to remove a cloud or quiet a title. 17 Ency. Pl. & Pr. 348. Here the bill itself shows that Jacob S. Tennant paid the purchase money, and that puts upon the plaintiff the duty of tendering it, or offering to pay it. Hence the demurrer should have been sustained, and, though it was not, the decree should have required its repayment as a condition precedent to the cancellation of the deed.

For the errors specified herein, the second decree, entered on the 29th day of August, 1901, must be reversed, the demurrer to the bill sustained, and the cause remanded, with leave to the plaintiff to amend his bill, and then to be proceeded in according to the principles herein announced, and, further, according to the rules and principles governing courts of equity.

BRANNON, J. (concurring). In the above strong opinion by Judge POFFENBARGER I fully agree, except in one matter. In that I do not see my way at present to concur, and write this note to reserve the question, if it should ever hereafter be reconsidered. This matter is the position that a widow has an interest in oil taken from land, for the first time, by the heir before assignment of dower. Oil is a part of the very soil, real estate, and its unlawful extraction is waste, or irreparable injury. It is old law that a widow has no vested estate in even the surface until dower actually assigned. Cases cited in *George v. Hess*, 48 W. Va. 535, 37 S. E. 564; *Ballard*, Real Prop. §§ 106, 108; *McMahon v. Gray* (Mass.) 22 N. E. 923, 5 L. R. A. 748, 15 Am. St. Rep. 202; *Carnall v. Wilson*, 76 Am. Dec. 351. It is otherwise with curtesy, as that vests as a present estate before the wife's death, except in separate estate, though to be enjoyed only after her death. *Wyatt v. Smith*, 25 W. Va. 816. Even after dower assigned, though the widow could keep the heir from developing oil on dower land, yet she could not herself take oil from it, for the life tenant commits enjoined waste if he does so. 8 Am. & Eng. Dec. in Eq. 660, note 7, p. 671; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R.

A. 222; *Id.*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, 4 Am. & Eng. Dec. in Eq. 222; *University v. Tucker*, 31 W. Va. 622, 8 S. E. 410. In the *Williamson-Jones Case* last cited, it is held that a life tenant may work oil wells opened before the beginning of the life estate, but cannot open wells for the first time. Such has been held generally to be the law. *Crouch v. Puryear*, 1 Rand. 258, 10 Am. Dec. 528; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884; *Marshall v. Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601. These cases squarely hold that a life tenant cannot open new mines. But when, after the life estate begins, the mine or well is opened by the remainderman or reversioner, it is by many cases regarded as an "open mine" at the beginning of the life estate, and the life tenant has, during life, the income of the output, that is, interest on its value, the principal going to the remainderman or the reversioner on the cessation of the life estate. *Koen v. Bartlett*, cited; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490; *Eakins v. Hawkins*, 48 W. Va. 364, 37 S. E. 622. Though this rule as to life tenants is well settled of late, the reason is not very apparent. Why cannot a life tenant mine? Because he has no interest in the minerals. Then how does he become entitled to an interest in the output? In *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564, it is stated that a lease of oil is a sale of part of the land, and therefore the life tenant should have the interest. But how can this be when nothing belonging to him has been sold? In *Koen v. Bartlett*, cited, Judge Holt says that the life tenant holds possession to the center of the earth, and, if the oil is lawfully severed, he ought to get its interest. Judge English, in the *Wilson-Youst Case*, gives a better reason in saying that the life tenant could prevent any one from boring for oil, and therefore should have interest on the product. Whatever the reason, this is established law as to life tenants having a vested estate in possession; but how does that apply to a widow before assignment of dower? After assignment she would be like other life tenants. Whilst I think that my position as to dower right is in accord with old law, I see that there is a tendency of late to veer away from it. Take the case of *Seager v. McCabe* (Mich.) 52 N. W. 299, 16 L. R. A. 247. After saying that old law settles that a dowress cannot open mines, yet it holds that she is entitled to interest on iron ore taken from land, worthless for other purposes and not yielding anything for her support, though the mines were opened after her husband's death. So, in *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, it is held that "a widow is entitled to dower in mines opened and worked by her husband or by the heirs before dower is assigned." By

Code 1899, c. 65, § 8, the widow may hold the mansion and curtilage until assignment of dower, and in the meantime may demand of the heir "one-third of the issues and profits of the other land." I do not see that this gives her profits to which she would not be entitled after assignment of dower. Does it intend to enlarge her rights, or only to give equivalent? After assignment she could only get an interest in oil from wells on her dower land, not from the whole tract. Does not the statute mean only agricultural issues and profits?

#### On Rehearing.

POFFENBARGER, J. Complaint is made in the petition for rehearing that no authority is cited for holding that the title of the purchaser in this case falls with the reversal of the decree, notwithstanding section 8, c. 132, of the Code of 1899. It is so well settled, and has been so often decided, that citation of authority was thought to be useless. See *Martin v. Smith*, 25 W. Va. 579; *Buchanan v. Clark*, 10 Grat. 164; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Galpin v. Page*, 18 Wall. 374, 21 L. Ed. 959. *Bart. Chy. Pr.* 1095; *Dan. Chy. Pr.* 1276. *Jacob S. Tenant* was the mover of the sale at which he purchased. At his instance, the decree of partition was set aside and the decree of sale made. He, more than anybody else, was interested and benefited by these proceedings. Owning  $\frac{2}{24}$  of the land, he joined in bringing the suit. Having acquired an additional  $\frac{1}{24}$ , he procured a sale, instead of partition, to be made, and purchased the interest sold, still being a party to the suit. He is clearly excepted from the saving made by the statute.

(53 W. Va. 473)

#### • STATE v. TAPIT.

(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

#### CARRYING WEAPONS.

1. If a person, on request of the owner, carry a revolver from his, the carrier's, boarding house to a shop to be repaired, he is technically guilty under section 7, c. 148, Code, although such revolver was broken at the time, and would not explode a cartridge.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Clay County; Warren Miller, Judge.

Charles Tapit was convicted of carrying a weapon, and brings error. Affirmed.

Henry B. Davenport, for plaintiff in error.  
The Attorney General, for the State.

DENT, J. In the case of the state against Charles Tapit the defendant was found guilty by the circuit court of Clay county, a jury having been waived, of carrying a revolver, and judgment was entered against him imposing a fine of \$25. Here he relies

on two assignments of error. The first is that the demurrer to the indictment was not sustained. The indictment was found under section 7, c. 148, Code, which is as follows: "If any person carry about his person a revolver or other pistol, dirk, bowie knife, razor, or slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor and fined not less than \$25 nor more than \$200, and may at the discretion of the court, be confined in jail not less than one nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to any person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinbefore provided; but nothing hereinbefore contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises, any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good standing and character in the community in which he lives, and that at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment, he had good cause to believe, and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was in good faith carrying such weapon for self-defense, and for no other purpose, the jury shall find him not guilty. But nothing in this section shall be so construed as to prevent any officer, charged with the execution of the laws of the state, from carrying a revolver, or other pistol, dirk, or bowie knife." The grounds of demurrer relied on are as follows, to wit: That the indictment does not aver that the pistol was a dangerous or deadly weapon, nor that the place where the defendant had the revolver was not about his dwelling house, etc., nor that he was not carrying it from the place of purchase to his dwelling house, nor that he was not carrying it from his dwelling house to a place where repairing was done to have it repaired, nor that the said defendant was not then and there an officer charged with the execution of the laws of the state, etc. Presumptively, a revolver or pistol is a dangerous and deadly weapon, and it is unnecessary to so allege in the indictment. The other matters are exceptions contained in separate clauses of the statute from that defining the offense, and it is unnecessary to negative them, as they are strictly matters of defense. The true rule is that only those exceptions need be nega-

tived in an indictment under a statute which are a part of the description of the offense. Where the description of the offense is in general terms, and the exceptions are such as permit certain persons, under certain circumstances, to do the thing forbidden, such exceptions need not be set out negatively, but the defendant on the trial may excuse himself from the charge by showing himself within the provisions of one or more of the exceptions. *State v. B. & O. R. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 808; *Commonwealth v. Hill*, 5 Grat. 682; 10 En. Plead. & Prac. 495. The demurrer was properly overruled.

The second assignment is that the finding of the court was contrary to the law and evidence. The proof, which is wholly undisputed, is that the defendant, who is a peddler, was seen with a broken revolver in his possession, which the owner at the peddler's boarding house had given him to take to a shop for repair. The circuit court found the defendant guilty for the reason that the statute did not except broken revolvers, and that it did not permit any one to carry such to a shop for repairs except the real owners. The court holds the defendant guilty of a violation of the statute. That the fact that the revolver was out of repair furnishes him no justification, as he was carrying the revolver of another person, not his own, from his, and not the owner's dwelling place, to the place of repair. *Bishop on Statutory Crimes*, § 491; *Williams v. State*, 61 Ga. 417, 84 Am. Rep. 102; *Atwood v. State*, 53 Ala. 508. In this conclusion I do not concur, first, because I am of the opinion that the revolver at the time was not a deadly weapon within the meaning of our statute; and, second, because the defendant was technically the legal owner of the revolver at the time he was seen carrying it from his dwelling place to the shop for repair.

In accord with the will of the majority, the judgment is affirmed.

BRANNON, J. (concurring). I have two reasons for affirmance: The law allows a man, for defense of his person and home, to keep a pistol on his premises, and to take it to a shop for repair, and bring it back; but it does not allow him to carry pistols of other people to a shop. For his defense it is not necessary thus to multiply the instances of his carriage and the danger therefrom. The law does tolerate one instance of carriage, but not a carriage for others. "By what appears to be the better opinion, if it has no mainspring, or only a broken one, and if it cannot be discharged in the ordinary way, yet can be by a match, it is still a pistol within the statute, though the contrary was once held." This statement of *Bishop's Stat. Crimes*, § 791, I find, on examination of the cases, to be a fair exposition of the law. And I will add the question cannot a disabled pistol inspire fear in the act of robbery as well as one in perfect condition?

MCWHORTER and POFFENBARGER, JJ., concur herein. MILLER, J., decided the case in the circuit court, and did not sit in this court.

(52 W. Va. 610)

**RUHL & CO. v. NESTOR et al.**

(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

**APPEAL—REVIEW—PREJUDICIAL ERROR.**

1. An appellant must rely on error prejudicial to himself, and he cannot take advantage of errors apparently prejudicial to others, but not injurious to him.

2. To require a person to pay a just debt is not legally prejudicial.

3. If a debt is improperly decreed a preference, and the persons losing such preference do not complain, the debtor has no right to do so, unless he can show himself personally—in a legal sense—injured thereby.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by Ruhl & Co. against M. L. Nestor and others. Decree for plaintiffs, and defendant Nestor appeals. Affirmed.

W. B. Maxwell and Strader & Stradet, for appellant. J. A. Bent, for appellee.

DENT, P. M. L. Nestor appeals from a decree of the circuit court of Randolph county setting aside a certain deed made by him to his daughter J. B. Phillips on the 18th of March, 1897, as fraudulent and void as to the debt of the appellees, Ruhl & Co., amounting to the sum of \$287.76. The following is the statement of the case from appellant's brief: "On the 6th of February, 1894, Jacob J. Nestor and wife conveyed to their son M. L. Nestor 143 acres of land in Barbour county, and on the same day took from the said M. L. Nestor, with Helen M. Nestor as his surety, a contract and bond, in the penalty of \$2,000, conditioned that said M. L. Nestor should provide for them a proper maintenance during their lives. On the 18th day of March, 1897, said M. L. Nestor and wife conveyed this 143 acres of land to their daughter Julia B. Phillips, who afterwards, as a matter of fact, was divorced from her husband, and took the name of Julia B. Nestor, and is recognized by both names in the proceedings had in the cause; and in that deed to her a vendor's lien is expressly reserved to secure from her a support for said Jacob J. Nestor and wife. Said Jacob J. Nestor, becoming dissatisfied (as is quite usual with old people in such cases) with the support which was provided for him by his son and granddaughter Julia, instituted a suit in equity in the circuit court of Barbour county, seeking to annul and cancel the deed he had made to his son, and the deed of his son to Julia, and in that suit the court ascertained that \$306.66 per annum was

the value of the support of said old man and his wife, and it having been made to appear that there was due to said Jacob J. Nestor from said M. L. Nestor the additional sum of \$125.92, which was for a debt, incurred in another way, by said M. L. Nestor to his father, and which was a lien on the said land, the court decreed said land to be sold to satisfy said last-mentioned debt. At the December rules, 1897, the plaintiffs, Ruhl & Co., filed their bill in the circuit court of Randolph county against said M. L. Nestor, seeking to sell his real estate to satisfy two judgments they had recovered against him, one of which was for the sum of \$164.67, and the other for the sum of \$161.80 and costs, recovered on the 23th day of the same month, and which said two judgments were recovered on notes which had been executed to said plaintiffs by said M. L. Nestor on the 4th day of March, 1897, for an indebtedness then contracted by him to them. The plaintiffs, in their bill, assail the deed of M. L. Nestor made to his daughter Julia on the 18th day of March, 1897, as fraudulent, and as made for the purpose of hindering, delaying, and defrauding the plaintiffs in the collection of their said judgments. Said M. L. Nestor was the owner of a number of parcels of real estate, and, among the others, had reserved one-half of the oil and minerals under the said 143-acre tract when he conveyed that parcel to his daughter Julia as aforesaid, all of which said parcels of land and said undivided one-half of the oil and mineral under said 143 acres of land were ascertained by proceedings had in the cause and all of said lands sold, but as to these proceedings no error is assigned by the appellant. Said Jacob J. Nestor and wife were made defendants to this suit, and file what they name their 'joint answer,' but which is, in effect, a cross-bill seeking affirmative relief; reciting certain decrees of the circuit court of Barbour county, and seeking to have the same enforced by a sale of said 143 acres of land. On the 29th of January, 1901, and pendente lite, said Jacob J. Nestor and wife and M. L. Nestor and wife and daughter Julia entered into a contract and agreement among each other whereby they settled all their controversies relative to said 143 acres of land, and the said M. L. Nestor, wife and daughter, conveyed all their right, title, and interest in the same to M. A. Nestor, as directed by H. L. Nestor, and said M. L. Nestor, wife and daughter, agreed to pay certain stipulated sums per annum as long as said Jacob and wife lived, and the said Jacob J. Nestor agreed to dismiss all suits and release all claims he held against said M. L. Nestor, wife and daughter, and in fact did do so. This compromise was brought to the attention of the court in this cause, and given effect by the court by its decree of May 7, 1901. On the 30th day of January, 1902, a decree was entered in this cause utterly ignoring said settlement of their differences

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 362.

made between said Jacob J. Nestor and wife and M. L. Nestor, wife and daughter Julia, and utterly ignoring the rights of said Jacob J. Nestor and wife under the deed of March 18, 1897, of M. L. Nestor and wife to their daughter Julia, and annulled, canceled, and set aside the said deed, and held that the said 143 acres of land was liable to sale to satisfy the plaintiffs' said judgments, and directing the said land to be sold."

Appellant relies on the following assignment of errors: "First. The court erred in setting aside the deed of M. L. Nestor to J. B. Phillips, dated the 24th day of April, 1894, as being voluntary and fraudulent, in law, as to the debt of the plaintiffs. Second. The court erred, in any event, in utterly disregarding the contract between M. L. Nestor and Jacob J. Nestor of February 6, 1894, which, under any view of the case, was an obligation or liability under which the circuit court of Barbour county had given to said Jacob J. Nestor a large personal decree for money which that court found to be due by reason of the alleged breach of said contract; and, in any event, the conveyance of said land to said J. B. Nestor must be regarded as an effort to prefer one creditor over another, and in no event can the plaintiffs ask more than that said deed be treated as an assignment for the equal benefit of all creditors. Third. The amount decreed to the plaintiffs by said decree of January 30, 1902, is largely more than the plaintiffs are entitled to recover from said M. L. Nestor."

The third assignment, being a question of calculation, appears to have been abandoned. If there is any mistake with regard to the proper amount of the decree, it could be corrected in the circuit court, but none is shown here.

The second assignment relates to the rights of Jacob J. Nestor, and, as he does not appeal or complain, the appellant has no right to complain for him. The error complained of, to sustain an appeal in this court, must be one prejudicial to the rights of the appellant. He cannot take advantage of errors committed against others not prejudicial to him. *Reed v. Nixon*, 36 W. Va. 681, 15 S. E. 416; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644.

In the first assignment of error, M. L. Nestor complains because his deed to his daughter J. B. Phillips is held to be voluntary and fraudulent as to his (M. L. Nestor's) debt to the appellees. How is he prejudiced by such decree? J. B. Phillips, his daughter, does not complain. He, by general warranty deed, parted with all his interest in the land to his sister-in-law M. A. Nestor, wife of his brother H. L. Nestor. Neither of them is here complaining of the decree. All M. L. Nestor is interested in is in making his general warranty good. This he can do by paying the debt decreed against him. It is not legally prejudicial to a person to render a judgment or decree against him, or compel

him to pay an honest debt. This is all the decree amounts to, in so far as he is concerned. The land is not his, and he has no interest therein, except to make his warranty good. The easiest way to do this is to pay his just debts, and not waste his substance in useless litigation, which may well be considered a species of riotous living. On the question as to whether the deed was voluntary and fraudulent, the pleadings and proofs favor the contention of the appellees. Cash payment of \$300 recited in the deed as part consideration, which is larger in amount than appellee's debt, is not shown to have been paid. The agreements entered into and filed by the Nestors show that M. L. Nestor is still recognized as the true owner of the land, and that he is required to, and does, join in a general warranty deed therefor to his sister-in-law M. A. Nestor, and received in exchange therefor certain land in Cumberland county, Tenn. Others may be prejudiced by this decree, but certainly M. L. Nestor is not, unless to require a person to pay a just debt may be deemed prejudicial. Such is not the law.

The decree, therefore, must be affirmed.

(33 W. Va. 517)

WOODS, Special Com'r, v. DOUGLASS et al.  
(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

**PURCHASER PENDENTE LITE—LIMITATIONS—JUDGMENT.**

1. B. and S., for use of McC., obtained a judgment at law in November, 1850, against G. and O'B. et al., his sureties. A suit in equity was instituted by his lien creditors for the purpose of subjecting the real estate of said O'B. to the payment of their liens against it. G. was the owner of a tract of 24½ acres of land, and was a party defendant to the suit, but no proceedings were taken therein against said 24½ acres. G. died pending the suit, which was revived in the name of C., his only heir, who conveyed the 24½ acres to D. *Held*, that said suit being for the purpose of enforcing the liens against the real estate of O'B., and not in any way involving or affecting the 24½ acres, D. was not a pendente lite purchaser thereof.

2. The fact that G. was a party defendant to a suit for the enforcement of liens against the realty of O'B. would not prevent the running of the statute of limitations as to a judgment against G.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by S. V. Woods, special commissioner, against S. O. Douglass and others. Decree for plaintiff. Defendants appeal. Reversed in part and dismissed.

F. O. Blue and A. G. Dayton, for appellants. C. M. Murphey and D. O'Brien, for appellee.

McWHORTER, P. On the 22d day of June, 1850, Samuel O'Neal and wife conveyed to Samuel George a tract of 24½ acres of land in Barbour county. The vendee, Samuel George, died, leaving surviving him his wife,

Eveline, his sole heir. On the 21st day of November, 1883, Eveline—having intermarried with John S. Cooper—together with her husband, in consideration of \$45, conveyed said 24½ acres of land, with general warranty, to S. C. Douglass. On the 1st day of February, 1893, S. C. Douglass and wife conveyed to Alston G. Dayton, trustee, the said tract of land, together with several other tracts, to secure to H. F. Brohard the payment of a note of \$3,000, with interest, payable in five years. At the November term, 1859, of the county court of Barbour county, Brady and Swindler, for the use of Benjamin McCoy, obtained judgment against Samuel George and E. J. O'Brien and Daniel O'Brien, his securities in a forthcoming bond, for the penalty of the bond, to be discharged by the payment of \$52.50, with interest from August 20, 1859, and costs. At the April rules, 1894, Samuel V. Woods, special commissioner, filed his bill in equity in the clerk's office of the circuit court of Barbour county against S. C. Douglass, J. N. B. Crim, S. J. Heatherly, J. E. Heatherly, H. F. Brohard, A. G. Dayton, trustee, Case Manufacturing Company, Samuel Woods, and Columbus Kelly, for the purpose of enforcing his vendor's lien and his judgment liens against the lands of said Douglass, in which suit plaintiff obtained a decree for the sale of said land, under which decree a sale was made of the Douglass lands, including the 24½ acres. On the 3d day of March, 1898, Daniel O'Brien tendered his petition in said cause, and asked leave to file the same, to the filing of which defendant H. F. Brohard and J. N. B. Crim, by counsel, objected, of which objection the court took time to consider, and made an order setting aside so much of the decree which it had entered as confirmed the sale of the 24½ acres to said Brohard, and a resale of the same was ordered. The said petition of O'Brien alleged the fact of the said judgment of Brady and Swindler, use of McCoy, against Samuel George and E. J. O'Brien and the petitioner for \$52, and that McClaskey and Crim in the year 1859 instituted their suit against petitioner and all other parties holding liens against the petitioner by judgment or otherwise, to which suit said Samuel George was made a party and duly served with process, and, after George's death, revived against said Eveline; that on the 19th of July, 1883, a decree was rendered therein for the sale of petitioner's real estate for the payment of the judgments and other liens against it, including the Brady and Swindler judgment against George. A sale was had under such decree, and the debts paid, which judgment of Brady and Swindler against Samuel George was paid out of the proceeds of sale of petitioner's property, and which debt, the petition alleged, was paid in the year 1898; alleging that the said suit or McClaskey and Crim was still pending and undetermined in the circuit court of Barbour county, and that Douglass was a pendente lite purchaser of the said 24½ acres of land from

said Eveline Cooper, and that he purchased said 24½ acres with full knowledge of all rights of petitioner; that a decree was entered at the October term, 1897, appointing Samuel V. Woods special commissioner to sell the real estate of Douglass, including the 24½ acres; and alleging that petitioner had a right to come into a court of equity and be substituted to all the rights of Brady and Swindler, use of Benjamin McCoy, and that the debts, interest, and costs so paid by him should be decreed a prior lien upon said 24½ acres of land; and prayed that he be admitted as a defendant in said cause of Woods, special commissioner, against Douglass; that his petition be ordered to be taken as his answer thereto; and that said debts, interest, and costs be decreed to him out of the sale of the 24½ acres of land; and for general relief. And on the 27th day of February, 1901, the court overruled the objections to the filing of the petition and filed the same, and the said Brohard appeared to said petition and waived further process thereon, and was given leave to file an answer within 60 days from the adjournment of court. On the 6th day of June, 1901, the defendant Brohard filed his written demurrer to the said petition, which demurrer the court overruled; and, the defendant not desiring to file any other pleading to said petition, the court decreed that the judgment in favor of Benjamin McCoy, assignee of Brady and Swindler, against Samuel George and his said securities, is a good and valid lien upon the 24½ acres of land, and first in order of priority thereon, and that said Daniel O'Brien, surety, having paid off and discharged said judgment, was entitled to be substituted to the rights of Benjamin McCoy in said judgment, and to have the same enforced out of the proceeds of the sale of the 24½ acres of land in petition mentioned; and decreed that the said Brohard pay to the said Daniel O'Brien the sum of \$181.65, with interest from June 6, 1901, and costs; the said commissioner, Woods, having prior thereto paid over to said Brohard \$445.50, the proceeds of the sale of said 24½ acres of land; from which decree Brohard appealed to this court, and says that the court erred in overruling the exceptions of appellant to the filing of the petition of Daniel O'Brien, and permitting the same to be filed, and also in overruling the demurrer of appellant, and each ground thereof, interposed by him, and in entering the decree of June 6, 1901. It will be observed that the petitioner, Daniel O'Brien, sets up an alleged right to be substituted to the rights of a judgment creditor, and prays that he may be admitted as a defendant, and his petition taken as an answer to plaintiff's bill. This O'Brien had a right to do, setting up matter upon which he relies for relief—that is, that he had paid the judgment of Brady and Swindler against George, and was entitled to subrogation thereby—and making parties of those who had rights to contest the fact of such payment and sub-

rogation, although no allegation was contained in the bill against the said O'Brien. The petition is defective, in that it fails to make proper parties and ask process against them. Before he could have relief to the prejudice of other codefendants, he should give them notice of what he demands against them, and without this he could have no relief against them. From the allegations of the petition, it appears that the suit of McClaskey and Crim against O'Brien et al. was only for the purpose of enforcing the liens against the real estate of O'Brien, and in no way affected the 24½ acres of land or other realty of George, who was evidently made a party defendant to the suit simply because he was a cojudgment debtor with O'Brien; the said 24½ acres of land being in no way involved in said suit. Douglass could not be a pendente lite purchaser thereof, said tract of land not being proceeded against for the enforcement of the lien against it. The judgments affecting it would be subject to the statute of limitations. It does not appear from the allegations of the petition or otherwise that the judgment was kept alive, as provided by statute, by the suing out of execution thereon; nor does it appear that execution had ever issued on said judgment of Bradley and Swindler against Samuel George. In *Werdenbaugh v. Reid*, 20 W. Va. 588, it is held: "The lien of judgment upon which no execution has ever issued will not be enforced in a court of equity in a suit brought after the lapse of ten years from the date of the judgment." "The defenses of the statute of limitations and laches and stale demands may be made by demurrer." *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795. Appellant Brohard, as cestui que trust, had the right to make the defense. "The plea of the statute of limitations is generally personal to the party, and not available to strangers; but privies in estate, as heirs, devisees, vendors, or mortgagees of the property, may use it to defend their property." *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246 (Syl., pt. 5). Section 5, c. 86, Code 1899, provides: "Any heir or devisee who shall sell and convey any real estate which by this chapter is made assets, shall be liable to those entitled to be paid out of the said assets for the value thereof with interest; in such cases the estate conveyed shall not be liable, if at the time of the conveyance the purchaser shall have no notice of the fraudulent intent on the part of the grantor, and no suit shall have been commenced for the administration of the said assets, nor any report have been filed, as aforesaid, of the debts and demands of those entitled." It does not appear from the petition or otherwise that any suit had ever been commenced for the administration of said estate, nor is it alleged or shown that there was any fraud or fraudulent intention on the part of Mrs. Cooper, the heir of Samuel George, in conveying the

said 24½ acres of land to Douglass, or that Douglass had any notice of any fraud. *Easley v. Barksdale*, 75 Va. 274.

It does not appear that the judgment was docketed in pursuance of the statute, which provides, among other things, that the record shall show the date of docketing said judgment. There was simply an abstract of such judgment from the record, but nothing to show that it was ever docketed in the judgment lien docket; and, if it was actually entered in the judgment lien docket, of which there is no evidence, the date of docketing does not appear, which is one of the essentials to the docketing. However, as the judgment was permitted to die for want of issuing execution thereon, the docketing the same was immaterial, as that could have nothing to do with keeping it alive.

The exception to the commissioner's report taken by Daniel O'Brien because the commissioner failed to report said judgment in his favor should have been overruled by the court. The final judgment of the court, while it does not mention the exception taken by O'Brien, in effect sustains the exception. It appears from the showing made by O'Brien that he is not entitled to any relief to the prejudice of other parties, and the petition, though so defective, can be made the subject of decree against him, and disallowing his judgment and dismissal of the petition because of such defect would not prejudice him.

For the reasons here given, the decree of the circuit court must be reversed only in so far as it requires Brohard to pay said sum of money to O'Brien, and the petition dismissed.

(52 W. Va. 547)

**NORFOLK & W. R. CO. v. McGARRY et al.**  
(Supreme Court of Appeals of West Virginia,  
March 28, 1903.)

**SPECIFIC PERFORMANCE—CONTRACT—ENFORCEMENT—EVIDENCE.**

1. Plaintiff, in its bill, alleges an agreement, and demands specific performance. Defendant sets up in his answer a reservation in the contract, and proves that the contract alleged, together with the reservation, is the original and true agreement made by the parties. *Held*, the court will compel specific performance of the contract as thus established by defendant.

2. Plaintiff's predecessor, the S. V. R. R. Co., made a verbal contract with J. B. McG. for a right of way for its railroad through the land of the latter. J. B. McG. died intestate, without executing a deed for the right of way. His land, by descent and purchase, was acquired by J. W. McG. Plaintiff afterwards filed its bill against J. W. McG. and others, the then owners of the land, alleging the contract of its predecessor for the right of way, its full compliance with all of the terms thereof, its ownership of the right of way, and demanded the specific performance of said contract, and a deed for said right of way, without reservation. Defendant set up in his answer that J. B. McG. had executed and delivered to the plaintiff's predecessor company a deed for the right of way, but with a reservation therein of an undergrade crossing across



said right of way. Defendant failed to establish the execution and delivery of said deed as claimed by him, but the facts and circumstances of the case satisfactorily prove the said reservation to be a part of the original and true agreement between the parties for the right of way. *Held*, the contract alleged in the bill, subject to the reservation as established by the proof, will be specifically enforced.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by the Norfolk & Western Railroad Company against James W. McGarry and others. Decree for plaintiff, and defendants appeal. Reversed.

Cleon Moore, Marshal McCormick, and Jos. I. Doran, for appellants. Forrest W. Brown, for appellee.

MILLER, J. By the record in this cause it appears that the appellee, the Norfolk & Western Railroad Company, is the immediate successor of the Shenandoah Valley Railroad Company, to whose rights of property and franchises appellee, by purchase in the year 1890, succeeded; that the Baltimore & Ohio Railroad runs east and west, and the said Norfolk & Western Railroad crosses it at Shenandoah Junction, in Jefferson county, running north and south; that in the year 1878 one James B. McGarry, the uncle of appellant James W. McGarry, owned in fee about 103 acres of the Neill farm, lying immediately south of the line of the Baltimore & Ohio Railroad, and on both sides of the line of the Norfolk & Western Railroad; that in the year 1878 the Shenandoah Valley Railroad Company purchased of said James B. McGarry, in fee simple, by verbal contract, a parcel of said Neill land for a right of way, commencing at the south side of the Baltimore & Ohio Railroad and extending southward 1,988 feet in length and 66 feet in width, being 33 feet on each side of the center line of the said right of way; that the said purchaser took possession of the said strip or right of way, and built its railroad thereon; that it and its said successor have operated said railroad on and over said right of way continuously since 1889; that the purchase money (\$600) for said right of way had all been paid to said James B. McGarry; that he died intestate in 1889; and that the appellant James W. McGarry has since become the owner in fee, by descent and purchase, of said Neill land, subject to the ownership and rights of appellee therein. It further appears that the said Shenandoah Railroad Company, in order to effect its crossing over the Baltimore & Ohio Railroad track, built trestling with bents high enough and of sufficient width, next to the south side of the Baltimore & Ohio Railroad, to make a wagonway undergrade crossing over said right of way and between the said bents; that one of those spaces adjoining the side of the Baltimore & Ohio Railroad was used by said James B. McGarry and others for a

long time as a wagonway undergrade crossing from one part of his said land to the other; and that afterwards the appellee filled in this undergrade crossing, and obstructed appellant in his use of the same. Thereupon said James W. McGarry brought an action of trespass against said Norfolk & Western Railroad Company, claiming the private right of way of such undergrade crossing, and demanding \$10,000 damages for the filling and obstruction of the same. The said Norfolk & Western Railroad Company then filed its bill in the circuit court of Jefferson county against said James W. McGarry and others, alleging the full compliance by it and its predecessor with the terms of said contract for the purchase of said right of way; that its predecessor purchased the said land of said James B. McGarry in fee simple, without condition or reservation of any description; and praying that said suit at law might be enjoined, and that said James W. McGarry and others, the then owners of said land, might be required to specifically perform said contract of sale of said land by conveying the legal title thereto to plaintiff. The injunction was granted to the said suit at law. Said James W. McGarry and other defendants answered the bill. Certain depositions were taken and filed in the cause, and sundry proceedings were had therein, and on the 12th day of March, 1895, the said circuit court entered its decree refusing specific performance as prayed for, and dissolving said injunction. From this decree the plaintiff appealed, and this court reversed said decree, and remanded the cause to said circuit court. 42 W. Va. 402, 26 S. E. 297.

In order to have a correct understanding of the cause as now presented, it is deemed proper to refer at some length to the reasons of the court, as stated by Judge Holt, for its reversal of said decree. The court, says: "James W. McGarry appeared and answered, admitting that the sale had been made for the sum of six hundred dollars, reduced to that amount in consideration of the reserving by the grantor and the making by the grantee of said undergrade right of way across the track; that the six hundred dollars had been paid, and the crossing, under a certain bent of the trestle had been made, and that the ancestor, James B. McGarry, deceased, had executed and delivered to the Shenandoah Valley Railway Company a deed for the said strip of land, excepting from said conveyance and expressly reserving therein the right of way mentioned above forever. And the defendant alleged that James B. McGarry had specifically performed his contract of sale, and that neither he nor his heirs at law set up any claim to or in any way disputed the right of the railroad company to said tract of land now occupied by them, save only the right of way expressly reserved in the deed. And by way of crossbill defendant alleged that Col. U. L. Boyce, a resident of Clarke county, Virginia, was

then, and still is, vice president of the Shenandoah Railway Company, and is also a director in the Norfolk & Western Railroad Company, and, acting for the Shenandoah Valley Company, made the contract of purchase of the strip of land in question; that he was fully authorized to complete the transaction, and on behalf of his company, the Shenandoah Valley Railway Company, accepted said deed; and adds: 'Inasmuch as the said U. L. Boyce received said deed for and on behalf of the said Shenandoah Valley Railway Company, and inasmuch as the said U. L. Boyce is an officer in and one of the company designated by the corporate name of the Norfolk & Western Railroad Company, the plaintiff in this suit, and therefore in antagonistic relations to respondent so far as this record is concerned, respondent asks this court to require the plaintiff to produce this deed thus traced into the possession of one of its officers, or to require said officer to account for it,' with the added prayer that the injunction be dissolved, and the bill dismissed. A general replication was entered, and many depositions were taken. On the 28th day of November, 1894, the plaintiff tendered its special replication to defendant's answer by way of cross-bill, and asked leave to file the same, but the court declined to permit the said replication to be filed." The court, on page 398, 42 W. Va., page 298, 26 S. E., further says: "This decree, as far as it goes, seems to be right, because, there being only a general replication to the answer, and no special reply in writing to the allegation that defendant had executed a deed reserving the right of way, constituting a claim for the affirmative relief prayed for, viz., the production of the deed, such allegation the statute imperatively required should be taken as true, and no proof thereof could be required. This showed that the contract mentioned in the bill had already been specifically performed with such reservation, and therefore the bill was properly dismissed. But the error, if any, was in refusing to permit the plaintiff to file such special reply tendered by him. \* \* \* Section 35 of chapter 125 of the Code of 1899 gives the defendant the right to allege in his answer any new matter constituting a claim for affirmative relief in the same manner and with like effect as if the same had been alleged in a cross-bill; and in such case, if the plaintiff or defendant against whom such relief is claimed desire to controvert the relief prayed for in the answer, he shall file a special reply in writing, denying such allegations of the answer as he does not admit to be true, and stating any facts constituting a defense. See *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287. This part of this answer was for discovery and production of the deed in aid of defendant's defense, and for its preservation as a muniment of title to the right of way. It alleged the existence of the deed, and that it was in the possession of design-

nated officer of the plaintiff corporation, and prayed that the plaintiff might be compelled to produce it or account for it. See *Yates v. Stuart's Adm'r*, 39 W. Va. 124, 19 S. E. 423. And the question in dispute, affirmed on the one side and denied on the other, was, had such a deed, or any deed, been executed. The special reply in writing denied that John B. McGarry had executed and delivered to the Shenandoah Valley Railway Company, or to any one for it, a deed for the said land, and called for full proof of said allegation. \* \* \* " In speaking of the evidence in the cause, the court, on page 400, 42 W. Va., page 299, 26 S. E., says: "The deed is not proved, and, not being proved, never did, and does not now, exist. The sale is a verbal one, but different from what the plaintiff claims. There was a condition or reservation of the right of way, with that important qualification, made out by testimony of what was said just about the time of the sale. Plaintiff's case is made out, for defendant admits that the purchase money was paid and possession taken by the plaintiff's vendor. The theory is that he (defendant) has successfully met the case made in the bill by refusing to examine Col. Boyce, the one to whom he says it was delivered, and by refusing to let plaintiff answer that it has no such deed. \* \* \* " Then the court, referring to the decree appealed from, says: "Is it right to decree for the defendant on the theory that there is no such deed, when he stops short in his testimony at that point, and refuses to examine Col. Boyce? What becomes of the legal, as well as the natural, presumption as against the defendant that the deed burned was the deed in question, but that it contained no such reservation? If such deed could have been proved, and its contents, then plaintiff, by proper amendment of its bill, by paying the costs, etc., could have obtained the execution of a new deed, in substitution of the one destroyed, as a memorial and muniment of its title to this important strip of land. Defendant saw fit to put a formal cross-bill in its answer, expressly praying relief therein. He permitted it to remain, and still refused to permit the plaintiff to file a special written reply thereto; and yet, when it comes to a final hearing, takes a decree that has no justification except the application of the imperative statute that on the pleadings thus put into that condition no proof of the existence and contents of the deed with its reservation should be required, but the same shall be taken as true as alleged in the cross-bill, notwithstanding the general replication, which was not at all inconsistent with the special reply, and, of course, could not have the same effect. Our conclusion is, that such new matter constituted a claim for affirmative relief in this suit, because the production of the deed is relief necessary in aid of defendant's defense to the original bill. It is his only muniment of title to his private right of

way. There was no other plain and adequate remedy for doing complete justice and settling all these matters of litigation raised by the pleadings between the parties. If the plaintiff had failed or refused to file a special reply in writing to such part of the answer thus made a cross-bill, the statute imperatively required the allegations to be taken as true, and that no proof thereof should be required. But plaintiff tendered and offered to file such special reply, and the court refused to permit it to be filed."

In that state of the pleadings the circuit court was imperatively required to take the allegations of the answer to be true as to the execution and delivery of the deed; notwithstanding, in the language of the opinion, "the deed is not proved, and, not being proved, never did, and does not now, exist." This court, passing upon the case as then presented, held that the circuit court erred in refusing to permit said special reply in writing to be filed, and that, therefore, the decree dissolving the injunction, in the absence of the said special reply, should be reversed, and the cause remanded. If the decree had been affirmed, its legal effect would have been and would be to establish the fact, by taking as true the allegations of said answer, of the execution and delivery of the deed by James B. McGarry to the railroad company with the reservation therein of the wagonway undergrade crossing over the said right of way, conveyed by said deed, without proof of such execution and delivery of said deed, and without giving the railroad company an opportunity to controvert that allegation in the only legal mode prescribed by law. In that status of the case parol evidence could not have been received to show the character of the contract of sale.

On the 25th day of May, 1897, the plaintiff, by leave of the court, filed its special reply in writing theretofore tendered to the answers of the defendants in the nature of a cross-bill; and on the 11th day of December, 1899, the defendant James W. McGarry filed an amendment to his said answer and cross-bill, making U. L. Boyce, who had been vice president of the Shenandoah Valley Railway Company, and, as claimed, was then a director in the plaintiff company, a party defendant, and propounded to him therein this interrogatory, "Was there not a deed executed and delivered from James B. McGarry to the Shenandoah Valley Railroad Company?" On February 18, 1901, said Boyce filed his answer to said amended cross-bill and interrogatory, to which answer the said James W. McGarry excepted because said Boyce failed to answer the said interrogatory propounded in the bill of discovery filed, and because said answer contained matter as to a crossing not asked for in the cross-bill; whereupon the court overruled the first, but sustained the second, exception. The part of said answer to which an exception was overruled is, in substance, as follows: "This

defendant was vice president of the Shenandoah Valley Railroad Company when the said company acquired its right of way through the land of James B. McGarry, situated near Shenandoah Junction, in the county of Jefferson, West Virginia, but the said Shenandoah Valley Railroad Company and all of its rights and privileges and franchises were sold at public sale to the Norfolk & Western Railroad Company in September, 1890, and since that time this defendant has had no connection with the said Shenandoah Valley Railroad Company. He was at one time a director in the Norfolk & Western Railroad Company, but has not been such director since the year 1894. And now proceeding to answer the said amended answer and cross-bill and the interrogatories therein propounded, this defendant says that he does not recollect the minutes of the proceedings of the said Shenandoah Valley Railroad Company, but he does recollect, and now says, that the said company acquired a right of way for the building of its road through the lands of the said James B. McGarry, and paid him for the said right of way from the proceeds of the sale of bonds put up by said company in the hands of W. H. Travers and Cleon Moore. He does not recollect whether a deed was made for the said right of way or not, nor does he recollect whether said deed was executed and delivered to this defendant by James B. McGarry, but he has been under the impression that such deed was executed; but this impression is because of the fact that this defendant was not in the habit of paying out money without taking proper vouchers, or paying for property without taking deeds; and therefore he says that, if such a deed was ever taken by him, it was delivered to the secretary of the Shenandoah Valley Railroad Company, who was the custodian of the papers of said company, or it may have been delivered to the finance committee of said company, which was likewise custodian of some of its papers. This defendant does not know what has become of said deed, if it was ever made, nor can he say whether it was a deed or a contract showing that a deed would be made, if any such deed or contract was ever made." The appellant also took and filed in the cause his own and the deposition of J. F. Lancaster, which depositions prove admissions by Boyce, as vice president of the Shenandoah Valley Railroad Company, after he had ceased to be such officer, that the deed hereinbefore mentioned had been executed by James B. McGarry, and delivered to him, and that it contained the reservation of the said undergrade crossing. These depositions were excepted to by the railroad company, which exceptions, on the final hearing of the cause, were, by the court, sustained, so far as the questions therein call for and the answers thereto give alleged declarations of Boyce as to that matter. This was not error, because the evidence of Boyce could have been taken

and read, if material. These were the only additions to the record after the reversal of the decree. As then made up, the cause was again submitted to the court for final determination on the 27th day of May, 1902. Thereupon a decree was made and entered finding, among other things, "that the evidence is not sufficient to establish the claim of the defendants; that a deed was made by James B. McGarry to the Shenandoah Valley Railroad Company to the right of way mentioned in the bill, and therefore the evidence is not sufficient to establish the further claim that there was a reservation in said alleged deed of an underhead crossing over the right of way of said Shenandoah Valley Railroad Company; and that the evidence established the purchase by the Shenandoah Valley Railroad Company of a right of way through the land of James B. McGarry, now owned by James W. McGarry, for a length of 1,988 feet and a width of 66 feet—33 feet from the center of the line on either side of said right of way; and that the said railroad company paid the agreed price for said right of way, took and has held continued possession thereof, and has otherwise executed the contract on its part. For these reasons the Shenandoah Valley Railroad Company was entitled to a deed of conveyance for said right of way without any reservation." From this decree said James W. McGarry was allowed an appeal, and assigns various errors, all of which will be considered together.

Appellee contends that every question now raised by appellant upon this appeal has been fully adjudicated by this court on the former appeal; that, therefore, there is nothing to be determined upon this appeal; and that this appeal is, in effect, a rehearing of the decree of this court pronounced on the 21st day of November, 1896. This proposition is untenable. Parts of the opinion of Judge Holt are incorporated herein to show his reasons for reversing the former decree, which the court did, without any saving or reservation, because the pleadings in the cause as then made up were insufficient, the circuit court having refused to permit the plaintiff to file a special reply in writing to the answers and cross-bill of defendants. But appellants insist that upon the former hearing said special reply was in the record, and cite as evidence of that fact, the recital in the decree entered on the 28th day of February, 1894: "This cause came on to be heard on this 28th day of February, 1894, upon process duly served on all of the defendants, upon the bill and exhibits therewith filed, upon the demurrer to the bill and joinder therein, upon the separate answer of James W. McGarry and the exhibits therewith filed, upon the joint and several answer of Jacob R. McGarry, John D. McGarry, Edmond D. McGarry, Anna E. Shaeffer, Emma Snyder, Esther Duke, and Nancy McGarry, and general replication thereto, and also upon special replication thereto, deny-

ing the affirmative allegations of the said answer upon which relief is sought." No such reply in writing prior to the former appeal appears in the record. As will be observed, Judge Holt, in his opinion, speaks of the absence of the special reply from the record. On the 28th day of November, 1894, the record states that "the plaintiff tendered its special replication to the defendants' answers, and asked leave to file the same. On consideration whereof the court declined to permit the said special replication to be filed." The only special reply found in the record is sworn to and subscribed by F. J. Kimball, president of plaintiff company, before Charles H. Bennare, notary public, on the 13th day of November, 1894, which was, on the 28th day of November, 1894, by the plaintiff, tendered in court, as aforesaid, but permission to file the same was refused by the court. Therefore this contention of the appellee is refuted by the record.

The conclusion of the circuit court "that the evidence is not sufficient to establish the claim of the defendants that a deed was made by James B. McGarry to the Shenandoah Valley Railroad Company to the right of way mentioned in the bill, and therefore that said evidence is not sufficient to establish the further claim that there was a reservation in said alleged deed of an underhead crossing over the right of way of said Shenandoah Valley Railroad Company," is justified by the record. Using the language of Judge Holt: "The sale is a verbal one, but different from what the plaintiff claims. That there was a condition or reservation of the right of way for the undergrade crossing, with that important qualification made out by the testimony of what was said just about the time of the sale, is fully proved. Plaintiff's case is made out, for defendant admits that the purchase money was paid, and the possession taken by plaintiff's vendor." But the answer of defendant James W. McGarry alleges that "the said James B. McGarry has specifically performed his contract of sale with the Shenandoah Valley Railroad Company, and that neither he nor his heirs at law have set up any claim, or in any way disputed the right of the railroad company to said tract of land now occupied by it, save only the right of way reserved expressly in the deed from the said McGarry to said railroad company, to which said railroad company has never had title or possession, either actual or constructive, and which has been used and enjoyed by said James B. McGarry for a period of more than ten years continuously; and that from the time, to wit, 1878, up to the date of his death, in 1889, the said James B. McGarry was in the complete, continuous, notorious, adverse, and uninterrupted possession of said right of way; and since his death his heirs at law, and especially the respondents, have enjoyed the same in the same manner, until disturbed in said enjoyment by the Norfolk & Western

Railroad Company within the last year." It is clearly shown by the evidence that Boyce, vice president of the Shenandoah Valley Railroad Company during the time of the construction of the said railroad through the land in controversy, admitted that James B. McGarry was to have the undergrade crossing, and that the matter had been "fixed"; that Boyce said to McGarry that the undergrade crossing should be put in by Cameron, the contractor, where McGarry wanted it; that afterwards Cameron and McGarry located the crossing, and it was put in as McGarry wanted it; that no condemnation proceedings against McGarry to condemn said right of way were ever instituted by the railroad company, but that the compensation to McGarry for the right of way was ascertained and fixed by two arbitrators, chosen by the company and McGarry, at \$800; that afterwards this sum was reduced to \$600 in consideration that the company would put in the undergrade crossing; that McGarry afterwards received only \$600 for the right of way; that a span of the trestling near the Baltimore & Ohio Railroad was built by the plaintiff company 16 feet wide from bent to bent, 11 feet high, and without any braces in the space thus left open; that this space was sufficiently large for the passage of wagons with high loads thereon; that there were no other spans in said trestlework through which wagons could pass; that all of the other spans were so braced that a passage could not be made through the same; that McGarry, his tenants, and others used and enjoyed this undergrade crossing at will, without interruption or interference from the railroad company, from the time the trestlework was made until the crossing was filled up by the company; that streets had been laid out near the said crossing; that building lots had been sold and conveyed by McGarry with certain reservations in the deeds, and buildings erected thereon, with reference to the continued use and enjoyment by the occupants of said lots of the undergrade crossing, without which they could not and cannot reach the county road or the railroad depot at that point. The plaintiff sets up in its bill a contract clear and definite in terms, alleges full compliance therewith on its part, and demands specific execution thereof. The defendant asserts in his answer a reservation in said contract of the right to the undergrade crossing, and also that James B. McGarry executed and delivered to the railroad company a deed for the right of way, but expressly reserving on the face of said deed the undergrade crossing forever. The defendant has failed to establish the execution and delivery of the deed as claimed by him, but the reservation as to the wagonway undergrade crossing is satisfactorily proved by the facts and circumstances of the case to be a part of the contract for the sale of said land made by James B. McGarry with plaintiff's predecessor company. The reservation,

as shown by the testimony, is clear, definite, and unequivocal in all of its terms. The contract alleged by plaintiff, thus varied and modified by the said reservation, which is a part thereof, constitutes the original and true agreement made by James B. McGarry and the Shenandoah Valley Railroad Company, and must be specifically performed by the parties bound thereby, as thus ascertained and established. 1 *Fost. Fed. Prac.* (2d Ed.) § 171; 2 *Beach, Mod. Eq. Jur.* § 632; *Story's Eq. Pl.* (10th Ed.) § 394; *Redfield v. Gleason*, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889; *Waterman on Spec. Per. of Con.* § 291. Therefore the plaintiff is entitled to have the contract made by its predecessor company with James B. McGarry for the purchase of the said land specifically performed by James W. McGarry, the present owner thereof, subject to the said reservation proved and found to be a part of said contract, and to have a deed from said James W. McGarry conveying to it said land in fee, but reserving upon the face of said deed to said James W. McGarry, his heirs and assigns, forever, the said private right of way undergrade crossing over and across the said railroad's right of way at the point where said undergrade crossing has been used and enjoyed by said James B. McGarry and those who claim and hold under him.

For the reasons stated, the circuit court erred in its said decree pronounced on the 27th day of May, 1902. The decree is therefore reversed, and the cause is remanded to the circuit court for further proceedings to be had therein in accordance with this opinion and the rules and principles governing courts of equity.

(53 W. Va. 192)

MERTENS v. CASSINI MOSAIC & TILE CO. et al.

(Supreme Court of Appeals of West Virginia. April 18, 1903.)

MECHANIC'S LIEN—ACCOUNTS FILED—SPECIFICATION OF BUILDINGS.

1. A three-story building on a corner, at the intersection of an avenue and street, and another building, two stories high, built at a different time, but adjoining the first mentioned, constitute a block called the "Harvey Building," in the city of Huntington. P. contracted with H., the executor of the deceased owner of the property, to alter and repair each of said buildings, but by separate agreements in writing respectively relating to each of said houses, executed on different dates, and for different sums, to be paid to the contractor. Said contracts were duly recorded before any labor was performed upon, or materials furnished for, either of said buildings. The defendants performed labor upon, and furnished materials under contracts with P. for, the alteration and repair of said buildings, provided for in said contracts between P. and H. The subcontractors assert in this suit their demands against P. for said labor and materials, as liens upon said property; but their accounts filed therefor do not specify upon which of said buildings or parts of said Harvey building or block the said labor was performed, or for which said materials were furnished. *Held*, the said accounts

are insufficient, and cannot be enforced as liens on said property.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County; E. S. Doolittle, Judge.

Bill by W. M. Mertens against the Cassini Mosaic & Tile Company and others. Decree for plaintiff, and certain defendants appeal. Reversed.

T. H. Harvey, Peyton & Perkinson, R. L. Blackwood, and Mr. Fitch, for appellants. Simms & Enslow and Northcott, Perry & McComas, for appellees.

MILLER, J. On the 13th day of April, 1899, W. W. Peyton entered into and signed and sealed an agreement with H. C. Harvey, as executor of R. T. Harvey, deceased, whereby he covenanted and agreed to remodel and repair the front half of the Harvey Building, situated on the northwest corner of Third avenue and Tenth street, in the city of Huntington, Cabell county, W. Va., as provided for and in accordance with certain plans and specifications referred to and made part of the contract. Peyton further agreed to do all the work and furnish all the materials for the completion of said work, and that the same should be done and performed in first-class style, and to the full satisfaction of Harvey, or such architect or superintendent as he might designate, and to fully complete the work on or before the 30th day of June, 1899, and, failing to complete said work on said last-mentioned date, Peyton agreed to forfeit unto the said Harvey the sum of \$10 for each and every day after the said 30th day of June, 1899, until said work should be fully completed. There are other provisions of the contract, not necessary to be mentioned, as they are not in controversy in this suit. Harvey, who also signed and sealed said contract, agreed and covenanted to pay Peyton, as full compensation for the performance of the contract as set out, \$3,940, to be paid as the work might progress; that is to say, from time to time, as certain estimates might be furnished, 80 per cent. of the amount of said estimates, and the balance of \$3,940 to be paid when said building should be fully completed. The said contract was acknowledged by both of said parties thereto, and was on the 15th day of April, 1899, duly admitted to record and recorded in the office of the clerk of the county court of Cabell county. On the 3d day of May, 1899, said Peyton and Harvey made, signed, and sealed another agreement, bearing the date last aforesaid, whereby, and in consideration of \$3,400 to be paid by said Harvey, the said Peyton agreed and covenanted to remodel and repair the north half of the said Harvey Building, fronting on Tenth street, between Second and Third avenues, in accordance with certain plans and specifications, which were made a part of said last-mentioned contract. The said Peyton agreed to fully complete the first

floor of the last-mentioned building, or part of the Harvey Building to be occupied as the post office, on or before July 1, 1899, and to fully complete the balance of said work on or before the 20th day of July, 1899; and, failing to complete said work as above set forth, Peyton further agreed to forfeit to Harvey \$10 for each and every day said work should not be completed as aforesaid. The other stipulations contained in the last are substantially as those in the first-mentioned contract. The latter contract was also acknowledged by the parties thereto, and duly recorded in said clerk's office on the 3d day of May, 1899. Said Peyton entered upon the work agreed to be done by him under said contracts, but failed to complete the same within the time specified in said contracts; and on the 18th day of August, 1899, he abandoned the work in an unfinished condition. During the time he was doing the work on the said building or buildings under his contracts aforesaid, various persons and firms, as it is alleged, performed work and labor upon, and furnished material for altering and remodeling, said buildings, under contracts with him, and were not paid for said work, labor, or materials.

At January rules, 1900, W. M. Mertens filed his bill in equity in the circuit court of Cabell county against the Cassini Mosaic & Tile Company, Samuel Beswick, P. Henson, A. C. Howell, B. F. Lacock, H. C. Harvey, executor of the last will and testament of R. T. Harvey, deceased, H. C. Harvey, Thomas H. Harvey, C. H. Harvey, Fannie L. Harvey, Charlotte E. Harvey, the Union Savings Bank & Trust Company, Corporation, H. C. Simms, trustee, and W. W. Peyton. In the bill it is alleged that in the early part of the year 1899 defendant H. C. Harvey, executor as aforesaid, contracted with the above-named defendant W. W. Peyton for the altering, remodeling, and repairing of a building to be used as a business house on the lots owned by the above-named H. C. Harvey, Thomas H. Harvey, C. H. Harvey, W. H. Harvey, Fannie L. Harvey, and Charlotte E. Harvey, and that said H. C. Harvey was duly authorized, as agent of the owners thereof, to make said contract; that, in pursuance of said contract, said W. W. Peyton bought of plaintiff material to be used in altering, remodeling, and repairing said building, and that under said contract with said Peyton, principal contractor for such altering, remodeling, and repairing said building, as was provided for in the contract between H. C. Harvey and Peyton, plaintiff furnished material as aforesaid to the amount of \$554.37, and that said material was used for that purpose, and that plaintiff, within 35 days after the same was furnished as aforesaid, filed with said H. C. Harvey an itemized account of the material furnished, verified by affidavit, and also filed an itemized account with the clerk of the county court (a copy of said account, and affidavit thereto appended, is filed with the bill as part thereof);

and that the following mechanics' liens, in favor of said defendants, appear of record in the clerk's office, to wit: The Cassini Mosaic & Tile Company, for \$299.85; Samuel Beswick, \$24.43; P. Henson, \$317; A. C. Howell, \$798.12; and B. F. Lacock, \$211.80. Certified copies thereof are also made parts of the bill, which prays that plaintiff's said demand may be declared a lien on said property; that said property be sold to satisfy said claims; that the sufficiency and validity of the other alleged liens be determined; that all liens on said property be marshaled; and for general relief.

Said W. W. Peyton filed his answer to said bill, in which he says that he did contract with his codefendant H. C. Harvey, executor, to alter, remodel, and repair a building to be used as a business house; that the said contract was not single, but consisted of three several contracts, as follows: The first contract is dated April 13, 1899, whereby he, for the sum of \$3,940, agreed to remodel and repair the front half of the Harvey Building, situate on the northwest corner of Third avenue and Tenth street, in the city of Huntington; the second contract is dated May 3, 1899, whereby he, for the sum of \$3,400, agreed to remodel and repair the north half of said Harvey Building; and the third contract is dated May 22, 1899, whereby he, for the sum of \$850, agreed to do certain additional work on the Tenth street side of the main or three-story building; that he had fully completed said third contract, and that the same had been fully paid for; that, under the said first and second contracts, he was compelled to, and did, quit work on the 18th day of August, 1899. He also denies that he owes the plaintiff any part of his said alleged demand. The defendants Sam Beswick, P. Henson, B. F. Lacock, A. C. Howell, and Cassini Mosaic & Tile Company also filed their several and respective answers to the bill, to which answers, and each of them, defendant H. C. Harvey, executor, excepted in writing, and also demurred. Said H. C. Harvey, executor, also filed his replication and answer to said answers of his codefendants Sam Beswick and the Cassini Mosaic & Tile Company, theretofore filed to the bill in said cause, in which replication and answer said Harvey says that there are two buildings on the lots mentioned in the papers of the cause, and the same were erected at different times; the front building, being 60 feet front on Third avenue, and extending back 70 feet, is 3 stories in height, while the other one fronts 70 feet on Tenth street, extends back upon both lots, and is 2 stories in height; that the said buildings were to be repaired and remodeled under two separate contracts. He denies that the material or work mentioned in either of said answers was furnished or done in pursuance of either of said contracts, and alleges that each of said defendants has failed to show by their accounts what part of the alleged work was

performed upon, or what material was furnished for, each or either of said buildings.

On the 17th day of July, 1900, the said cause was heard upon the bill; the separate and respective answers of Sam Beswick, P. Henson, B. F. Lacock, the Cassini Mosaic & Tile Company; the demurrer and exceptions of H. C. Harvey, executor, to the bill and to each of said answers; the separate answer of W. W. Peyton, with general replication thereto; and upon the several and respective petitions and answers of Hagen & Co., Peyton & Parkinson, L. Schreiber & Sons Co., Emmons, Hawkins & Co., and Turley Bros., who had been made parties to the suit; whereupon, the court being of opinion that the exhibits filed with the bill, purporting to be the mechanics' liens of Sam Beswick (Exhibit No. 4a), P. Henson (Exhibit No. 5), A. C. Howell (Exhibit No. 6), and B. F. Lacock (Exhibit No. 7), and referred to and made exhibits with their said respective answers, were wholly insufficient to create liens on the real estate mentioned in the cause, the said demurrer to the bill was sustained so far as the same relates to the said exhibits, and the demurrer and exceptions to the answers of P. Henson, A. C. Howell, and B. F. Lacock, and the answer of Sam Beswick as far as it relates to the lien claimed by virtue of Exhibit No. 4a; and the said alleged liens of P. Henson, A. C. Howell, B. F. Lacock, and Sam Beswick (Exhibit No. 4a), and each of them, were held invalid and of no effect. As to all other matters, said demurrer and exceptions were overruled. Thereupon the said cause was referred to D. E. Matthews, one of the commissioners of the court, to take, state, and report an account showing the amount, if anything, due from said W. W. Peyton to plaintiff and defendant Sam Beswick, on Exhibit 4, not including the items thereof excluded as aforesaid; and the Cassini Mosaic & Tile Company, the amount, if any, due from H. C. Harvey, executor, to W. W. Peyton on the two contracts set out in said Harvey's answer, after allowing to said Harvey credit for payments made thereon; the liquidated and unliquidated damages to which he was entitled, and the amount, if any, to which he was entitled, for money expended by him in completing the said buildings according to the terms of said contracts; and the liens on the amount which might be ascertained to be due from Harvey, executor, to Peyton; by whom held; the amount thereof; the nature and priority thereof; and the proportion and to whom the same should be paid in case such amount, if any, should not be sufficient to pay said liens in full. Said D. E. Matthews, commissioner, under said order of reference, made up and filed his report on the 26th day of December, 1900, wherein he says:

"Your commissioner finds that there is nothing due from the said W. W. Peyton to said W. M. Mertens on any mechanic's lien mentioned in the cause; that there is due from



W. W. Peyton to Sam Beswick on mechanic's lien (Exhibit No. 4), not including the items excluded by the court on demurrer and exceptions, including interest, the sum of \$110.41; that there is due from W. W. Peyton to the Cassini Mosaic & Tile Company, including interest, \$323.71; that your commissioner finds that after allowing to said Harvey, executor, credits for the payments made on the two contracts mentioned in his answer, and the liquidated and unliquidated damages to which he is entitled, he is not indebted to the said W. W. Peyton for any amount; that, according to your commissioner's finding, the said W. W. Peyton is indebted to said Harvey, executor, a balance of \$18.71. The account, as stated, is as follows:

To amount of contract made April 13, 1899 .....	\$3,940 04
To amount of contract made May 3, 1899 .....	3,400 00
By amount paid by executor on said contracts .....	5,409 23
By amount necessary to complete the work, as per Carr's calculations ...	511 23
By amount of damages due as per Maupin's deposition .....	500 00
By amount paid Hagen & Co. for repairs .....	34 74
By amount paid Murrell & Lee for repairs .....	8 00
By amount of liquidated damages per contracts .....	900 00

To amount overpaid, \$18.71.

"Your commissioner having found that there is no amount due from said Harvey, executor, to the said W. W. Peyton, he therefore finds that there are no liens against the property; but if the court should find there is anything due from said Harvey, executor, to the said W. W. Peyton on said contracts, then your commissioner is of the opinion and finds that the mechanic's lien of the said W. M. Mertens and the said the Cassini Mosaic & Tile Company are not sufficiently proven, and are not liens on said property; and as to the liens on any amount that the court might ascertain, if anything, to be due, he herewith reports them in the order of priorities, amounts, etc., as follows: Sam Beswick, \$110.41," etc.

Said W. M. Mertens, Sam Beswick, P. Henson, and the Cassini Mosaic & Tile Company excepted in writing to said report, and said Harvey, executor, also excepted to the said conditional finding of the commissioner in favor of said Beswick, and for other reasons stated by him and filed in the record.

The cause was finally heard by the court upon all the papers, proceedings and evidence therein, and upon the exceptions to said report; and on the 5th day of August, 1901, the court entered a decree in which it is recited that there is due and owing from W. W. Peyton to the plaintiff, Mertens, \$439.60; that the statement between H. C. Harvey, executor, and W. W. Peyton, and the finding by the commissioner that Harvey, executor, has overpaid the said Peyton the sum of

\$18.20, is correct, between said Harvey and said W. W. Peyton, but as to the claims of the mechanic's lienors, including interest to the date of said report, aggregating the sum of \$873.72, the same should not be affected by the item of \$900 allowed as liquidated damages, and that as to said item, or so much thereof as is required to pay said mechanics' liens, the said Harvey, executor, should look to said W. W. Peyton and his bondsmen to indemnify him or his estate as to such damages, or such part thereof as will be required to pay the mechanics' liens on said property therein provided for, with costs. The decree finds that the demands in favor of the plaintiff, W. M. Mertens, for \$382, the Cassini Mosaic & Tile Company for \$323.71, and Sam Beswick for \$110.41, are valid and subsisting liens on the lots and buildings described in the cause. The court decreed that the said report of the commissioner be modified in the foregoing particulars, and, as modified, it was approved and confirmed; that the said Peyton should pay to said Mertens, Cassini Mosaic & Tile Company, and said Sam Beswick said sums found due to them, respectively, with interest and costs; that said sums be and were liens on said lots and buildings; and that unless said Peyton or Harvey, executor, should pay said sums, with interest and costs, to the parties entitled to the same, within 60 days, said property should be sold by special commissioners, who were then named and appointed. From this decree said H. C. Harvey, executor, appeals, and the said P. Henson was also allowed an appeal from that part of the decree sustaining the demurrer to his petitions and answer.

All of the assignments of error can be considered and disposed of together. The appellant Harvey contends, in substance, that all of said alleged mechanics' liens are fatally defective; that, if sufficient in form, they are not liens on the property, because there were and are two separate contracts between Harvey, executor, and Peyton, for remodeling and repairing two separate and distinct buildings, called the "Harvey Building," and that none of the alleged liens specify under which particular contract between appellant and Peyton said work and labor were performed or materials furnished, or upon which particular building said work and labor were performed, or for which said materials were furnished; that all of said parties claiming liens as aforesaid were and are subcontractors under contracts with Peyton; and that, it being found and determined by the commissioner and the court that appellant owed Peyton nothing, the said subcontractors with Peyton cannot have satisfaction of their said demands from Harvey, or from the proceeds of a sale of said property. It is unnecessary now to pass upon the action of the court in sustaining said demurrer. One claim filed with the bill will be hereafter referred to in connection with the demurrer.



The evidence taken by the commissioner, and used by him, in making up his report, is filed with, and as part of, said report, and proves that said R. T. Harvey, testator, mentioned in the papers of the cause, erected the original buildings on the two lots described in the bill—the one, a three-story building, facing on Third avenue, and running back 70 feet; that several years afterwards he removed some frame buildings off the Tenth street side, on the rear of said lots, and erected a two-story building, fronting on Tenth street 70 feet. The said buildings were built at different times, and had no connection with each other, except that the Tenth street building abutted against the Third avenue or three-story building. It is further shown that, when the contract was made for the repair of the said three-story building, there was no arrangement between Harvey and Peyton contemplating the repair of the two-story building. Harvey swears that they are two separate and distinct buildings. It is made clear that part of the Harvey Building or Block mentioned in the record is a three-story building, fronting 60 feet on Third avenue, and extending back 70 feet along Tenth street; that the contract made by Harvey and Peyton on the 13th day of April, 1899, was and is for the remodeling and repair of this building; and that the other part of said Harvey Building or Block is a two-story building, fronting 70 feet on Tenth street, and extending back in the rear of the three-story or corner building. The contract of May 3, 1899, is for the remodel and repair of the last-mentioned building. The parties asserting said liens are subcontractors, or contractors with Peyton. They have their remedy against the property, if any, by reason of the contracts between the owner and principal contractor.

The lien of mechanics and others, under chapter 75 of the Code, is exclusively the creature of the statute, deriving its existence only from positive enactment. There can be no lien of this character independent of the statute. It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialmen and laborers their liens under the statute. The statute does not give the mechanic the right to his debt, but furnishes a remedy for its collection. In order that a person who asserts such lien may enforce it, he must show a substantial compliance on his part with all of the essential requirements of the law. Phillips on Mechanics' Liens (3d Ed.) 15; 15 Am. & Eng. Ency. Law, pp. 5, 6. In Niswander & Co. v. Black, 50 W. Va. 188, 196, 40 S. E. 481, it is held: "A mechanic's lien is of statutory creation, and can be maintained only by a substantial observance of and compliance with the requirements of the

statute." McGugin v. O. R. R. Co., 33 W. Va. 66, 10 S. E. 36. The statute above cited requires the laborer, mechanic, or person furnishing material to file with the clerk of the county court a just and true account of the amount due, together with a description of the property intended to be covered by the lien; sufficiently accurate for identification, with the name of the owner or owners, if known. This court, in Niswander & Co. v. Black, supra, page 196, 50 W. Va., page 434, 40 S. E., says: "The intention was that the mere inspection of a record, to be found at a particular place, should disclose all the information necessary in order to enable those interested therein to determine as to the existence of liens on the property. The record should be sufficient to give in itself the information intended by the recordation, and should not be made to depend upon verbal explanations of its meaning, and the record cannot be supplemented by parol evidence after suit brought to enforce the lien."

Each of the alleged liens asserted in the bill, except that of Beswick, fail to show on which of said buildings the labor therein mentioned was performed, or for which building the materials were furnished. The account of said Beswick, and affidavit thereto, do show that the materials furnished by him were for repairing, and altering a certain two and three story brick business house, etc., but do not state that such repair or alteration was provided for in a contract between the owners of the property, or their authorized agent, and Peyton, the principal contractor. This defect was reached by the demurrer. Jones on Liens, vol. 2, § 1310, says: "The lien is specific; that is, it is confined to the particular building or structure upon which the labor was done, or for which the materials were furnished. Thus a single lien for materials furnished for repairing a house, and also for materials furnished for constructing a fence, cannot be enforced upon both the house and the fence. The claimant may have a lien upon the house for the materials furnished for the repairs upon the house, and he may have another lien for material used in the construction of the fence; but he has no lien upon the house for materials used in building the fence, and he has no lien upon the fence for materials used upon the house." Again, in section 1311, the same author says: "Labor and materials applied to one house cannot be a lien upon another;" and in section 1313: "When labor is performed or materials furnished, under one contract, upon several buildings, all situate upon one lot of land, belonging to the contracting owner, the lien attaches to all the land for the whole value of the labor performed, and it is immaterial whether the contract specifies one sum for all the work, or separate amounts for each building." In section 1314 it is stated: "Where separate buildings, though

in one block, are erected under separate and independent contracts, no lien can attach under such contracts to all the houses."

The object of the notice is to impart information to the owner of the amount and character of the claim intended to be fixed as a lien upon the property, so that he may protect himself in his future dealings with the contractor. 15 Am. & Eng. Ency. Law, 128. The contracts refer specifically to the respective buildings composing the Harvey Building or Block, which were to be remodeled and repaired. They were duly recorded before said labor was performed upon, or materials furnished for, said buildings, or either of them. Tested by the foregoing rules, the said accounts, and each of them, are insufficient, and constitute no lien upon said property.

It is not clearly apparent to us upon what principle the circuit court held that as between H. C. Harvey, executor, and said W. W. Peyton, principal contractor, Harvey had overpaid Peyton the sum of \$18.20 upon said contracts, and that, notwithstanding this, the said Harvey and the said property were liable to Mertens, Beswick, and the Cassini Mosaic & Tile Company in sums aggregating \$873.72. Under section 5 of chapter 75 of the Code, the said contracts between Harvey and Peyton had been recorded as prescribed therein. The parties asserting said demands against Peyton as liens on said property were bound by notice of the terms of said contracts. A subcontractor's remedy is limited in its extent by the terms of the original contract between the owner and contractor. And the amount which can be secured by a subcontractor is limited to that due from owner to contractor. 15 Am. & Eng. Ency. Law, 51. The court holds that as to the said \$900 allowed to Harvey as liquidated damages, or so much thereof as may be required to pay said mechanics' liens, said Harvey should look to Peyton and his bondsmen. If Harvey is entitled to said \$900, as found by the court, it is by reason of his stipulations therefor in his contracts with Peyton; and if, as is shown by the decree, he owes Peyton nothing on account of said contract, it follows that neither he nor his property is liable to said subcontractors, or either of them, who may have performed labor upon or furnished material for said buildings under their contracts with Peyton.

It might be urged that the said \$900 was and is a penalty, and cannot be legally enforced. Hammon on Contracts, § 471, states this rule: "If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, this sum may be recovered as liquidated damages, provided that it is not so grossly in excess of the prospective or actual loss as to shock the conscience of the court, and preclude the idea that it was intended otherwise than as a penalty. This rule is illustrated by a stipulation in a building con-

tract whereby the contractor promises to pay a fixed sum weekly or per diem for delay in performance beyond the time set for completion. Such a sum is ordinarily regarded as liquidated damages. Second. If a contract is for a matter of a certain value, or of a value readily ascertainable, and on breach of it a sum is to be paid in excess of that value, this is a penalty, and not liquidated damages. This rule finds illustration in a promise to pay a larger sum in case a smaller sum is not paid by a fixed day, as where a note provides for an increased rate of interest after maturity. The higher rate is a penalty, and the payee may recover interest after maturity only at the lower rate specified." This was one of the questions referred to the commissioner. He investigated and passed upon it, and found \$900 due from Peyton to Harvey for liquidated damages; and the court says that his finding is correct, as between the parties to the contract upon which this finding is predicated. There is evidence in the cause in support of this finding. "When questions of fact are passed upon by a commissioner, and his findings thereon are approved and confirmed by the circuit court, the appellate court will regard those findings in the nature of a verdict of a jury, and will not reverse them unless it plainly appears that they are not warranted by any reasonable view of the evidence." *Handy v. Scott*, 26 W. Va. 710; *Boyd v. Gunnison*, 14 W. Va. 1; *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927; *Carter v. Gill*, 47 W. Va. 504, 35 S. E. 828. The finding of the commissioner as to the \$900 is not plainly erroneous, and will not now be disturbed.

The court did not err in sustaining the demurrer aforesaid. It should have also sustained the demurrer of said Harvey to Exhibit No. 3, filed with the bill, and made part of the answer of defendant Beswick, and should not have held said demands of Mertens, Beswick, and the Cassini Mosaic & Tile Company, or either of them, liens upon said property.

For the foregoing reasons, there is error in said decree. It is therefore reversed, and the bill is dismissed, but without prejudice to the said creditors of said W. W. Peyton to institute any proper actions at law against him for their said demands, if they be advised so to do. Costs are awarded to appellant H. C. Harvey both in this and the circuit court, by him expended.

(53 W. Va. 432.)

**THOMPSON & LIVELY v. MANN et al.**  
(Supreme Court of Appeals of West Virginia.  
April 28, 1903.)

**EQUITY—JURISDICTION—SUIT ON ADMINISTRATOR'S BOND—JUDGMENT—EVIDENCE.**

1. Equity has no jurisdiction of a suit by a single creditor of a decedent, suing only for himself alone against the administrator and his surety in his administration bond, upon a legal demand, where the administrator has made settlements required by law, unless the

bill seeks to surcharge or falsify such account; but, where the bill seeks to surcharge or falsify, equity has jurisdiction.

2. A mere abstract, not being a copy, of a judgment, does not prove the existence of the judgment, if controverted.

3. A judgment against "T. G. Mann, administrator of Sherman Clarkson, deceased," as shown in the caption—it not appearing that the recovery was to be levied of goods and chattels of Clarkson in the hands of Mann to be administered—is not a judgment against the estate, but an individual judgment against Mann.

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County; J. M. McWhorter, Judge.

Bill by Thompson & Lively against T. G. Mann, administrator, and another. Decree for plaintiffs, and defendants appeal. Reversed.

Miller & Read, for appellants. Thompson & Lively, in pro. per.

BRANNON, J. Clarkson having been killed in a railroad wreck, Mann, as his administrator, brought an action to recover damages for his death against the Chesapeake & Ohio Railroad Company, and recovered \$2,000. Thompson & Lively, claiming that they had rendered services for the administrator as attorneys in the prosecution of the action, sued Mann, as administrator, in assumpsit, and recovered a judgment for \$250. An execution having been returned unsatisfied, Thompson & Lively brought a chancery suit in the circuit court of Summers county against Mann and Flanagan, the surety in his bond as administrator, charging that Mann, as administrator, had made a settlement before a commissioner of accounts, showing a balance of \$633.33, and that in the settlement he retained as attorney's fees \$950, which was improperly allowed him as a credit against the estate; that, if he had disposed of the \$633.33 by payment to distributees, it was diverted improperly from the payment of the plaintiffs' debt, and was a devastavit—and prayed that said settlement be falsified and his accounts be properly settled, and that the defendants be required to pay the debt of the plaintiffs. A reference was made to a commissioner to settle the administrator's accounts, and he reported the same balance which had been found by the former report at its date, but showed subsequent payment of that balance by Mann to the widow and a distributee, but that such payments had been made with notice of the plaintiffs' debt. A decree passed against Mann and his surety for the debt, and they both appeal.

Appellants claim that there is no jurisdiction of this suit in equity, because there is adequate remedy at law by action on the bond. It is enough to say in response to this that the bill seeks to falsify the settlement before the commissioner of the probate court, and this justified the overruling of the demurrer, as equity is given jurisdiction

to so surcharge and falsify. Hogg, Eq. Principles, § 119; Seabright v. Seabright, 28 W. Va. 412. The question which is intended to be raised is whether a creditor of a dead man, who has obtained judgment against his administrator, after execution returned unsatisfied, can at once sue alone the principal and surety on the bond in equity, or must sue at law. Equity in this state has jurisdiction of a bill by one creditor, for himself and other creditors, to compel an administrator, who has not made the settlement required by law to be made before a commissioner of the county court, to make a settlement, and to administer the assets and pay creditors out of them. This is but the administration or marshaling of assets for creditors—a jurisdiction well known. There may also be a bill to surcharge and falsify an ex parte settlement before a commissioner, and to have debts paid out of the assets. 2 Lomax, Exec. 472. A bill may also be filed for a discovery of assets, and, to avoid multiplicity of suits, a decree may be made for the creditor's debt, and the bondsmen may be parties. White v. Bannister's Ex'rs, 1 Wash. 186. I refer only to suits against the personal representative to get payment of a debt out of the personalty, not to that chancery suit expressly given to a creditor by section 7, c. 86, Code 1899, to subject realty. In that suit, as the statute allows the realty to be subjected to debts only in default of personal property, it is usual to make the personal representative a party, and also the heirs, and settle the account of the representative, unless it has been already settled by an uncontested settlement. I do not think that there is equity jurisdiction for a creditor upon a legal demand, though there is a judgment and abortive execution, to sue on the bond simply; that is, unless he surcharges and falsifies a settled account, or calls for a settlement for himself and others, where there has been no settlement. Bassett's Adm'r v. Cunningham's Adm'r, 7 Leigh, 402. In Hale v. White, 47 W. Va. 700, 35 S. E. 884, we held that a single creditor could not maintain for himself a suit in equity upon a legal demand against the executor, who had rendered an account, without surcharging or falsifying. Thompson v. Nowlin, 51 W. Va. 346, 41 S. E. 178, is cited to uphold jurisdiction in the case supposed. It holds that where the executor has made no settlement, squandered assets, and is insolvent, a chancery suit may be brought against him and his sureties; not the broad proposition asserted. Long ago the rule was that one must get judgment against an administrator, have an execution returned "No property," and then bring a second action to establish a devastavit by showing his judgment and execution, and proving assets once in the administrator's hands; and then he could bring a third action upon the bond. But long, long ago, the Virginia Legislature passed an act dispensing

with a second suit, and allowing action on the bond at once upon the return of "No property" on the execution. This provision lives in our day in section 23, c. 85, Code W. Va. 1899. This is common sense, for, when the administrator tells the sheriff that he has no assets applicable to an execution, why should not the creditor, if the administrator has wasted or misapplied the assets, have a right to sue on the bond? But the only effect of such judgment and execution is to dispense with the second suit to establish a devastavit, and does not operate on jurisdiction. *Hairston v. Hughes*, 3 Munf. 568; 2 Lomax, Ex'rs, 458. Both defendants demurred to the bill, and the demurrer was overruled. Inspecting the bill, it averred that "the said administrator refused to pay, \* \* \* and your orators instituted a suit against him, \* \* \* which suit resulted in a judgment in their favor for \$250, and \$67.10 costs, as of the 8th day of August, 1889, as will more fully appear from a certified copy of said judgment herewith filed, marked 'Ex. C,' and prayed to be read as part of this bill." That exhibit is not a copy of the judgment, but a simple abstract, reading, "*Thompson & Lively v. T. G. Mann, Administrator of Sherman Clark, Deceased.* [As a caption.] Judgment in favor of the plaintiffs and against the defendant for \$250, and \$67.10 costs." Signed by the clerk. This is only the clerk's construction of the entry in the record. It does not prove the judgment. *Dickinson v. Railroad*, 7 W. Va. 390. I do not think the bill shows a judgment. The exhibit appealed to does not show it. Then, again, the answer controverts it.

The appellants further say that the paper offered to prove the judgment does not show a judgment against Mann as administrator, and that it is one against Mann individually. If this is so, then (1) there is no jurisdiction, as the case does not proceed to enforce an individual judgment against Mann's estate; and (2) Flanagan cannot be sued at law or in equity on the judgment, since he did not engage for Mann's individual debt. A bill of exchange signed, "Chas. F. Hale, Prest.," was held an individual bill. *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761. A note signed, "James Bennett, Agent for Lewis County," held to bind Bennett, not the county. *Exchange Bank v. Lewis Co.*, 28 W. Va. 273. We said in *Fidelity Ins. Co. v. Railroad*, 33 W. Va. 784, 11 S. E. 58, that an attachment against "William Milnes, president of the Shenandoah Valley Railroad Company," was against Milnes, not the company. A note signed by an administrator, specifying the estate, is his individual note. *Schouler on Ex'rs*, § 258; 3 Rob. New Prac. 264. A writ, declaration, and judgment against A., administrator of B's estate, held to be against the administrator, not the estate. *Rich v. Sowles*, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850. See *State v. Hudkins*, 34 W. Va. 372, 12 S. E. 495; *Early v. Wilkinson*,

9 Grat. 71. If the full judgment were before us, we might see that it was to be levied of the goods of the deceased in the hands of his administrator, but it is not before us. The execution, if it could be looked to, does not better the case, as it makes the money leviable out of the goods of "F. G. Mann, administrator of Sherman Clark," and perhaps indicates not a representative judgment.

We must reverse the decree, but, as the plaintiffs may be able to file a good amended bill, we will remand the case, with leave to do so if they wish. *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. 44.

Appellant says it was error to decree without passing on exceptions made by plaintiffs to the commissioner's report. They were for allowance of the sums paid by Mann to the widow and child, and for allowing the \$950 attorney's fees. I do not see that the defendant is aggrieved by failure to hold that the \$950 was erroneous credit to Mann. The omission was in his favor. The decree is inferentially one sustaining the exception so far as to decree the debt of plaintiffs, regardless of the credits. But in fact the commissioner made no report as to these items of credit in the settlement, but submitted them to the court, and the exceptions are immaterial.

Decree reversed and case remanded.

(53 W. Va. 75)

#### McGRAW v. ROLLER.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### RES JUDICATA—JUDGMENT—CORRECTION OF ERRORS.

1. If this court take jurisdiction of a judgment, and affirm it, the plaintiff in error cannot afterwards in any proceeding question such jurisdiction, as it is *res adjudicata* as to him.

2. A motion by the defendant to correct a judgment for errors apparent on the face of the record comes too late after such judgment on writ of error obtained by him has been affirmed by this court without reservation or unconditionally.

(Syllabus by the Court.)

Error to Circuit Court, Webster County; W. G. Bennett, Judge.

Action by J. T. McGraw against J. E. Roller. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Laidley and John E. Roller, for plaintiff in error. Jake Fisher and John T. McGraw, for defendant in error.

DENT, J. For the second time John E. Roller seeks the aid of this court to avoid a judgment against him in favor of John T. McGraw, rendered by the circuit court of Webster county. The judgment formerly before this court is here repeated, to wit: "This day came the plaintiff, by Jake Fisher, his attorney and the defendant, by H. C. Thurmond, his attorney, appeared specially for the pur-

pose of having the writ quashed, and thereupon the defendant, by his said attorney, moved the court to quash the writ herein for reason stated in his special plea, and the said defendant tendered his special plea in writing, setting out the matters aforesaid, to the filing of which the plaintiff objected, which objection, being considered by the court, is sustained, and said special plea is refused, and the motion aforesaid overruled; to which ruling of the court the defendant, by his attorney, excepted. Whereupon the said defendant was solemnly called, but came not, and the court finds for the plaintiff. Thereupon it is considered by the court that the plaintiff recover of the defendant \$837.42, with interest from this date, and his costs." The judgment was affirmed. 47 W. Va. 650, 35 S. E. 822. Roller then made a motion in the circuit court to set aside the judgment for errors of law apparent on the face of the record. On the 5th day of August, 1901, the circuit court entered an order overruling his motion and dismissing his petition for the reason that the affirmance of the judgment of this court precluded any further investigation into errors of law committed prior thereto. Roller, now duly repentant that he obtained the former writ of error, insists that both the court and counsel on both sides overlooked the fact that this court was without jurisdiction to entertain such writ, but that the same should have been dismissed as improvidently awarded, and that, the court having assumed jurisdiction thereof in face of the statute forbidding it, the judgment of affirmation is a nullity, and not binding on this or the circuit court, and should be so treated. The statute referred to is section 6, c. 134, Code 1899, which provides that "no writ of error or supersedeas shall be allowed or entertained by an appellate court for any matter for which a judgment is liable to be reversed on motion by the court which rendered the judgment, until such motion be made and overruled in whole or in part." Roller insists further that the judgment was by default, and came under the provisions of this section. An inspection of the judgment, however, shows that it was not wholly by default, as the defendant appeared specially, and presented his motion to quash and plea in abatement, and obtained from the court an adjudication thereon, which was reviewable by this court whenever a final judgment was entered. As to this adjudication, the final judgment could never be treated as one by default, but must be regarded as one finally adjudicating the questions presented by the defendant by his special appearance. Such adjudication was reviewable by this court at the instance of the defendant. Nor was it necessary to make any further motion with regard thereto before obtaining his writ of error to this court. Hence the writ of error was proper as to such adjudication. The case, then, being properly before this court on finding that the circuit court had committed no error as to the matter adjudicated, it could not do otherwise than to affirm the judgment

at least to this extent, and it would have been improper to have dismissed the writ of error as improvidently awarded. The judgment of affirmation therefore cannot be treated as a nullity. It was my impression, however, that it could be regarded, except as to the matters adjudicated by the court below, as a mere affirmance of a judgment by default, and that it would not preclude the defendant from making a motion to set aside or correct for errors of law in the trial court, but that the parties were left in precisely the same position and with the same remedies as though no writ of error had ever been granted. 3 Cyc. 423. Our authorities lead to a different conclusion. The statute relied on was made for the protection of appellate courts by compelling litigants to first present their matters for adjudication to the lower courts without flooding the higher courts with unlitigated questions of fact and law. It applies strictly to judgments by default, and to all such questions and clerical errors as have not been matters of litigation and adjudication before the lower court. To any material question arising during the progress of litigation and adjudicated by the court the statute does not apply, although a writ of error does not lie until after final judgment, but as to such adjudication does lie, although such final judgment is entered up by default—as when a final judgment is entered up by default after demurrer to a declaration or bill has been overruled. *Watson v. Wigginton*, 28 W. Va. 533, 549. The defendant is not bound to apply for a writ of error as to such preliminary adjudications until he has made a motion to set aside such judgment by default for other errors. He may make such motion first, and have the advantage of both adjudications, and should do so if he wishes to avail himself thereof. *Steenrod's Adm'r v. Railroad Co.*, 25 W. Va. 133. If, however, he takes his writ of error without first making such motion, it is his duty, if he relies thereon, to present to the appellate court all errors apparent on the face of the record, whether litigated in the lower court or not, for the reason that the appellate court, having the whole record before it, may reverse for error apparent on the face thereof without regard to the assignments of error, that justice may be done between the parties and litigation be ended, or may reserve the right to litigate such questions in the lower court. Having jurisdiction to begin to review, the appellate court may continue to the end thereof, notwithstanding the statute, or the appellant may be deemed to have waived all legal errors by permitting the judgment to be affirmed without reservation or objection. This was settled in *Newman v. Mollohan*, 10 W. Va. 489, which was a much stronger case in favor of the appellant than the present one, for the reason the appellant in that case had not been summoned to appear in the lower court. *Newman v. Mollohan* has been cited and approved in these cases: *Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Ferguson v. Mil-*

lender, 32 W. Va. 32, 9 S. E. 38; Renick v. Ludington, 20 W. Va. 537. On page 537 of the last case Judge Green says: "It may be regarded as well settled that, if an appellate court has ever so erroneously decided that it has jurisdiction of a cause, and then proceeds to determine it on its merits, the parties to the cause are bound as res adjudicata by the decision of the court that it has jurisdiction, as well as by the decision of the court on its merits." Continuing, on page 538 he says: "It is true that in these cases the court of appeals had no jurisdiction of the causes, and took jurisdiction of them erroneously, not because the appellants were not proper parties to the cause, but because the court itself had no jurisdiction to make any decree in such a cause as was presented. But by taking the jurisdiction and rendering the decree, however thoughtlessly it might have been done, they necessarily decided that they had jurisdiction, and all the parties to the cause were bound, as well as the court itself, by this implied decision that the court had jurisdiction; it being held that this decision implying that the court had jurisdiction was res adjudicata." This language would seem to settle this case, even though, as the appellant insists, the court assumed, at his instance, a jurisdiction it did not possess. But, as we have seen, it did have jurisdiction at least to the extent of the litigation in the lower court, and, having such jurisdiction, without objection by the appellant it affirmed the judgment of the lower court without reservation. The question of its jurisdiction and the errors sought to be corrected by the appellant on motion have by such affirmation become res adjudicata, and can no longer be inquired into in this or the circuit court.

In the light of the authorities the judgment complained of is right, and is affirmed.

(52 W. Va. 655)

**SNYDER v. MIDDLE STATES LOAN,  
BUILDING & CONSTRUCTION CO.**

(Supreme Court of Appeals of West Virginia.  
Dec. 20, 1902.)

**DECREE—REVIEW AT SUBSEQUENT TERM—  
RES JUDICATA—USURY.**

1. A final decree upon the merits, after answer filed, cannot be reheard, reviewed, or otherwise disturbed in the court below, after the end of the term at which it was pronounced, except for such matter as constitutes ground for a bill of review for error apparent in the decree, bill of review for newly discovered evidence, or an original bill to impeach it for sufficient cause, such as fraud in its procurement.

2. A person owing a usurious debt, who is a party to a suit in equity and fails to claim, by any form of pleading, the benefit of the statute against usury before a final decree has been entered as to the amount of the debt, is thereafter barred by the principle of res judicata from setting up the defense of usury.

3. A deed of trust conveying all the property of a debtor to a trustee for the benefit of his creditors works an appropriation of the property so conveyed for that purpose; and, as the defense of usury is personal to the debtor while

he lives, the trustee in such deed of trust cannot interpose it.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by E. E. Snyder against the Middle States Loan, Building & Construction Company. Decree for plaintiff, and defendant appeals. Reversed.

Cunningham & Stallings, for appellant. C. O. Strieby, for appellee.

POFFENBARGER, J. As trustee in a deed of trust executed by E. E. Snyder, conveying all his property, real and personal, for the benefit of his creditors, A. R. Stallings, in April, 1898, brought a suit in equity in the circuit court of Tucker county to obtain an adjudication of all matters in difference between Snyder and his creditors and among the creditors themselves, and especially to enjoin a sale of Snyder's real estate under a deed of trust executed by him to secure a loan made to him by the Middle States Loan, Building & Construction Company, a Maryland corporation. The injunction having been awarded and process served upon the defendants, the bill was taken for confessed as to a part of them, Snyder and some others filed answers, and the building association and others demurred. On the 28th day of November, 1898, the demurrers were overruled and time given for answers, a motion to dissolve the injunction was continued, and an order of reference to a commissioner entered. The commissioner having ascertained and reported the amount due the building association at the sum of \$799.37, as well as numerous debts due other parties, the report was, on the 16th day of March, 1899, confirmed, a decree entered for the payment of the debts therein set forth, and the real estate ordered to be rented.

At September rules, 1900, a bill of review was filed in the cause by Snyder and Stallings, trustee, setting forth the former proceedings, alleging that the finding in favor of the building association was erroneous because it included usurious interest in the form of illegal dues and premiums allowed by the commissioner, and that an exception to the report on that ground had been filed by Snyder and overruled by the court, and praying that, for this error, the decree might be reversed and set aside, and the cause again referred to a commissioner with directions to restate the account, disallowing the illegal charges of the building association, and giving Snyder credit, on the debt for all amounts paid thereon by him. To this the building association demurred, and, its demurrer being overruled, it filed an answer. The court referred the cause to a commissioner, who restated the account and found a balance of \$20.95 due the building association, and, by a decree entered June 20, 1901, the exceptions to this report were overruled,

and it was confirmed, and from the decree the building association has appealed.

The brief of counsel for appellees argues that, if the bill is insufficient as a bill of review for error apparent in the decree, it must be entertained, and held good as a supplemental bill or a petition for rehearing. A sufficient answer to this contention is that it was filed long after the expiration of the term of court at which the decree sought to be reviewed and reopened was entered. That decree being a final adjudication of the amount due from Snyder to the building association, and the term having ended, it could be reheard in the court below only upon a bill of review. *Carper v. Hawkins*, 8 W. Va. 291; *Hodges v. Davis*, 4 Hen. & M. 400; *Laidley v. Merrifield*, 7 Leigh, 353; *Childers v. Loudin*, 51 W. Va. 559, 42 S. E. 637. If the decree were interlocutory, the bill might be treated as a petition or supplemental bill in the nature of a bill of review, it seems, but there is no occasion to so hold here. *Laidley v. Merrifield*, cited.

For the review of a final decree upon the hearing, after the end of the term, the methods are appeal, bill of review for error apparent, bill of review for newly discovered matter, original bill to set it aside for fraud in its procurement or other supervenient cause, or, if it be utterly void for want of jurisdiction, motion to vacate it, some of the authorities say; but in this last case, it is said in *Conrad v. County*, 10 W. Va. 784, that appeal is the better remedy. When the decree is not void, nor such as may be corrected in the lower court by bill of review or original bill, appeal is the only remedy. Subject to the right of review upon appeal in such case, everything decided expressly or by necessary implication is res judicata, and cannot be disturbed or altered by a subsequent decree. *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617; *Camden v. Werninger*, 7 W. Va. 528; *Campbell's Ex'rs v. Campbell's Ex'r*, 22 Grat. 649; *Bank v. Craig*, 6 Leigh, 399.

To the maintenance of a bill of review for newly discovered evidence it must appear, not only that the new evidence is material and such as would probably effect a result different from that embodied in the decree, but that it has been discovered since the entering of the decree. *Bart. Ch. Pr.* 337; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209. Such bill must allege and prove the discovery of new matter which could not have been used at the time of making the decree. *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Sewing Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237. As this bill sets up nothing which did not appear in the record at the time the decree complained of was entered, it cannot be treated as a bill for newly discovered matter, and no claim is made by counsel that it is such a bill. Is it available as a bill of review for error apparent? That the contract between the building

association and Snyder is illegal, under the ruling of this court in *Gray v. Building Association*, 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217, *Bank v. Handley*, 48 W. Va. 690, 37 S. E. 536, and *Floyd v. Investment Co.*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805, in respect to the premium charged against borrowers, there can be no doubt. If, before the decree was entered, illegality of this contract was pleaded by one who was entitled to interpose the defense of usury, there was error. Otherwise there was not. In this state, the defense of usury must always be pleaded, else it is waived. *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1; *Crenshaw's Adm'r v. Clark*, 5 Leigh, 68; *Spengler v. Snapp*, 5 Leigh, 478. While it is not permissible, on a bill of review for error apparent in the decree, to look into the evidence and pass upon controverted matters of fact (*Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886; *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66), the pleadings, exhibits filed with them, orders and decrees, and facts admitted in the pleadings or stated in the decree, may be considered. *Dunn's Ex'rs v. Renick*, cited; *Core v. Strickler*, 24 W. Va. 689, 697. As the building association exhibited with its answer the bond of Snyder, its by-laws, and a statement of its account against Snyder, the facts showing illegality were admitted, and, of course, open for consideration, if the benefit of the illegality had been claimed in the pleadings.

As stated, the overruling of the exception of Snyder to the report of the commissioner is relied upon as an error apparent upon the record. That exception reads as follows: "Because the commissioner allows the Building, Loan & Construction Company, by including fees, premiums, interest, and fines after the assignment of said Snyder to trustee Stallings, when in fact he should have reported the amount due said building and loan company at the time of the assignment, with interest at 6 per cent. from that date, said deed of assignment having been made for the benefit of all the creditors of said Snyder, the said building and loan company should not have more rights by collecting premiums and fines than the other creditors of the said Snyder." Inspection of this exception shows not only that illegality of the contract was not relied upon or claimed, but that, on the contrary, the defendant, Snyder, admitted the validity of the contract, and objected only to the charge of dues, premiums, interest, and fines after the date of the assignment made by him. It is so manifestly insufficient as a plea of usury that it is not insisted upon in the brief, and merits no further discussion here. In his answer, Snyder failed to set up the defense of usury, admitted that at the time of the assignment his indebtedness to the building association was \$696.86, and resisted nothing except a

charge of \$12.14, claimed as expenses paid for advertising the sale of his property under the deed of trust on a former occasion.

If the plea of usury by the trustee would have been available, matter is alleged by Stallings, trustee, in the original bill, which might be sufficient. In some jurisdictions it has been held that the right to recover back money paid as usury is a vested right, and passes to an assignee for the benefit of creditors. 27 Am. & Eng. Enc. Law, 692; *Corcoran v. Powers*, 6 Ohio St. 19; *Beach v. Bank*, 3 Wend. 573; *Gray v. Bennett*, 3 Metc. (Mass.) 522; *Tamplin v. Wentworth*, 99 Mass. 63; *Woolfolk v. Plant*, 46 Ga. 422. But the contrary is held in *Low v. Mussey's Estate*, 36 Vt. 183. Of the many cases decided by this court touching the subject of usury, it is believed that none directly involve this question. One of the leading cases is *Lee v. Feamster*, cited, establishing the rule that the defense of usury is personal to the debtor, and that during his lifetime his creditor cannot plead it to defeat the claim of another creditor. In the course of the opinion, Judge Johnson reviews a large number of cases, decided by the courts in many of the states, showing instances of exceptions to the rule. It is very generally held that, where a mortgagor conveys the mortgaged premises charged with an usurious debt, the grantee may plead usury against it. *Cole v. Bansemer*, 26 Ind. 94; *McAlister v. Jerman*, 32 Miss. 142; *Insurance Co. v. Bowen*, 47 Barb. 618; *Bank v. Warehouse Co.*, 49 N. Y. 642; *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381; *Gunnison v. Gregg*, 20 N. H. 100. It is believed to be uniformly held, however, that, where the grantee takes his assignment or conveyance from the borrower subject to the usurious lien thereon, he cannot avail himself of the defense of usury. If he simply buys the equity of redemption he may, for in such case he takes the whole interest which the grantor had in the property, and that carries the right to have the usury expunged from the debt. But if he purchases the property, and, as a part of the consideration therefor, assumes the payment of the usurious debt, he is precluded from the defense. *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283; *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381; *Post v. Dart*, 8 Paige, 639; *Sands v. Church*, 6 N. Y. 347; *Morris v. Floyd*, 5 Barb. 180. Akin to the proposition that the purchaser of an equity of redemption may claim the benefit of the usury statute, is the proposition that an execution creditor, in subjecting property charged with an usurious debt, may resist the usury in the prior debt. *Dix v. Van Wyck*, 2 Hill (N. Y.) 522; *Jackson v. Tuttle*, 9 Cow. 233. *Bank v. Warehouse Co.*, 49 N. Y. 642, quoted in *Lee v. Feamster*, decided that a borrower may appropriate property for the benefit of an usurious debt, and make such appropriation by assigning property in trust for the payment of such debt; and

that, if he does, neither the assignee nor any other person can claim that property so appropriated shall not be applied to its payment. The same doctrine is announced as a general proposition in *Tyler on Usury*, at page 403, in the following language: "He may also set apart and dedicate a certain fund or certain specified property to the payment of the usurious security, and his agent who has received the funds with which to pay it cannot withhold it on the ground of usury. It is in all these cases the party who owes the debt, and who devotes his property to pay it, that can alone set up the defense of usury. If for any reason—his desire to avoid litigation, his pride of character, or his conscientious sense of justice—he may be induced to waive his legal rights and to satisfy a demand, he is at liberty to do so, although it may be obnoxious to the defense of usury." As it appears to be very well settled that, where the debtor sets apart and appropriates property for the payment of an usurious debt, it must be so applied, the trustee in a deed of trust made for the benefit of creditors, although in some sense he represents the debtor, cannot plead the usury. Such conveyance to a trustee differs from a mortgage and the ordinary deed of trust executed to secure a debt, and is held to be an appropriation of property for the payment of the debts. *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563; *Woodruff v. Robb*, 19 Ohio, 210; *Briggs v. Davis*, 21 N. Y. 574; *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637; *Burrill on Assign.* 12; *Beach on Trusts and Trustees*, § 596; *Pom. Eq. Jur.* § 995. On this ground, as well as the exclusiveness of the plea of usury as a personal privilege of the debtor, it must be held that the trustee in such deed of trust cannot interpose that plea. In *Lee v. Feamster*, the fact that the debtor was living and capable of pleading himself is emphasized. In this, the court placed itself in line with the general trend of authorities. In *Billington v. Wagoner*, 33 N. Y. 31, *Davies, J.*, in delivering the opinion, said; "But this defense or objection to the contract, that it is void on account of usury, can only be alleged or set up by the party bound by the original contract to pay the sum borrowed, or his sureties, heirs, devisees, or personal representatives."

While it is not claimed in the brief, on the principle of relief in equity against judgments at law on the ground of usury, that the debtor may, notwithstanding the finality of the decree and expiration of the term, still set up the defense of usury as an exception to the general rule, it may be thought that such right exists. On the subject of such relief there is an apparent conflict in the Virginia cases. See *Rankin's Ex'r v. Rankin's Adm'r*, 1 Grat. 153; *Brown v. Toell's Adm'r*, 5 Rand. 543, 16 Am. Dec. 759. *Hope v. Smith*, 10 Grat. 221, later than any of the other cases cited, holds that "usury



in the bonds upon which the judgments were recovered cannot be set up to the judgments." But the question is not important here, and need not be decided. Snyder, the debtor, has had his day in a court of equity and failed to set up his defense before a decree was entered against him, and the principle of *res judicata* now bars his defense.

For the reasons given, the decrees of March 7, 1901, and June 20, 1901, made upon the bill of review, must be reversed, the demurrer to said bill of review sustained, and the bill of review dismissed.

(53 W. Va. 361)

**PHOENIX ASSUR. CO. v. FRISTOE.**

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

**PLEADING—AFFIDAVIT—JOINT ACTION—SINGLE PROMISE.**

1. If a plaintiff fail to file an affidavit with his declaration in assumpsit, after the defendant has appeared and filed a plea of non assumpsit, he cannot then file such affidavit, and have the defendant's plea stricken from the record because not accompanied with an affidavit.

2. Two persons, to whom or for whose benefit a third person has promised to pay a single amount, cannot maintain separate suits for their alleged shares of such amount, or the whole thereof. They must sue jointly.

3. Defendant promised to pay the sum of \$867.15 for the benefit of the Phoenix and Peabody Assurance Companies. The Phoenix Assurance Company instituted suit against defendant for the sum of \$495.15, its alleged share of such joint note. Such suit is not maintainable.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

Action by the Phoenix Assurance Company against L. J. Fristoe. Judgment for defendant, and plaintiff brings error. Affirmed.

W. Walter McClaugherty, for plaintiff in error. J. M. Anderson and A. W. Reynolds, for defendant in error.

DENT, J. The Phoenix Assurance Company asks the reversal of a judgment of the circuit court of Mercer county dismissing its action of assumpsit against L. J. Fristoe. The plaintiff relies on nineteen assignments of error, all of which become unimportant if the two principal assignments are determined in favor of the defendant. The first of these relates to the right of the defendant to file the plea of non assumpsit without affidavit, and the second to the action of the court in striking out the plaintiff's evidence and directing a verdict in favor of the defendant. The various other assignments refer to the rulings of the court in excluding certain matters of evidence, but as the court, in the end, excluded the whole evidence, all the other questions are necessarily included in the last; for if the court was right in determining the plaintiff had proved itself out of court, and was not entitled to recover, the

ruling out of evidence that could not materially change the result could not possibly injure the plaintiff.

1. The plaintiff did not file its affidavit with its declaration, nor at the first rules; but at the second rules, after defendant had filed his plea of non assumpsit and prevented the office judgment from being confirmed, plaintiff appeared and filed his affidavit, and then wanted the defendant's plea stricken out. The court ruled properly that the affidavit came too late after plea filed and refused to strike out the plea. In this holding the court was right. If plaintiff desires to prevent the defendant from filing a plea without affidavit, he must file his affidavit with the declaration or before the plea is filed. Filing afterwards, even at the same rules, will not compel the defendant to amend his plea. In this case, the principle, "First in time, first in right,"—must prevail.

2. The declaration contains three counts. The first is for money found due on settlement. The second charges an assumption by the defendant of a debt due the plaintiff from W. W. Anderson & Co., amounting to the sum of \$495.36, being a novation. The third charges the same thing, but that the assumpsit was in writing.

The account filed with the declaration is for the sum of \$495.36, debt of W. W. Anderson & Co., which the defendant agreed to pay in consideration, among other things, of the transfer of the local agency of the plaintiff. Plaintiff, to sustain this account, proves that the defendant purchased the interest of W. W. Anderson & Co. in the local agency of the company and others, and agreed, as part of the consideration, to assume and pay the sum of \$867.15, due the plaintiff and the Peabody Insurance Company from W. W. Anderson & Co., and for which said W. W. Anderson & Co. had executed their note, payable to J. F. Paull, Esq., agent, with Robert A. Anderson and B. Prince as sureties, and that the account sued for, \$495.36, was the plaintiff's share of this sum of \$867.15.

To sustain this contention, the plaintiff introduces the note, which reads as follows, to wit: "\$867.15. Bluefield, West Virginia, July 1, 1898. Three months after date, we promise to pay to the order of J. F. Paull, Esq., agent, eight hundred and sixty-seven dollars and fifteen cents, with interest at — per cent. per annum at —, value received. W. W. Anderson & Co. Robert A. Anderson. B. Prince."

Two letters written by plaintiff's general agent, J. F. Paull, as follows, to wit:

"Wheeling, West Virginia, Nov. 23, 1898. L. J. Fristoe, Esq., Bluefield, W. Va.—Dear Sir: A letter received today from our Mr. A. W. Neff brings me the gratifying intelligence that you have purchased the remaining ½ interest in the agency of Mess. W. W. Anderson & Co. and now have full control and that for this one-half you have assumed

the indebtedness of Anderson to the Peabody & Phoenix—\$867.15, which is to be paid as fast as possible each month, beginning with January, 1899. I am glad that you have succeeded in securing the business, as I believe you will make a success of it, as the field you have is a good one, and it will be my endeavor, as far as possible to help you out in every respect. Will you kindly write me a letter confirming the purchase of the balance of the Anderson interest, and that you have assumed the note of W. W. Anderson & Co. to me (\$867.15) and payable as stated. Yours very truly, J. F. Paull, Sec'y & Gen. Agt."

"Dec. 7th, 1898. L. J. Fristoe, Esq., Bluefield, W. Va.—Dear Sir: On Nov. 28th I wrote you in reference to the information Mr. Neff gave me in regard to you having purchased the interest of Mr. Anderson and assuming his indebtedness of \$867.15, and requesting that you write me confirming the purchase and the assuming of this debt to be paid as agreed with Mr. Neff, but so far I have not heard from you. Will you kindly let me have an answer to this letter and oblige, yours truly, J. F. Paull, Secretary."

And the answer thereto of the defendant: "Bluefield, West Virginia, Dec. 15, 1898. Mr. J. F. Paull, Wheeling, W. Va.—My Dear Sir: Replying to your favor of the 7th, I received yours of November 28th, and should have answered at once, but was waiting to hear from the L. L. & G. before writing you. I have purchased the entire business of W. W. Anderson & Co. and have full charge, and agreed with Mr. Neff to assume the amount due you by said Anderson & Co., \$867.15. Mr. Neff assured me I could pay this amount so as to not cramp me in the business, all of which I appreciate very much and will do my best to cut same down as fast as possible; I realize how lenient you have been with the agency and did not feel it right that you should suffer; this is why I agreed to this arrangement. I suppose Mr. Neff told you that it would be impossible to make anything out of the note. I wish to thank you very much for your kindness in this matter, and trust that the business may be conducted in such a manner that it may be of the most pleasant to each of us. With kindest regards, I beg to remain, Yours very truly, L. J. Fristoe."

These letters prove beyond question that the defendant agreed to assume and pay to J. F. Paull, general agent of the Peabody and Phoenix Companies, the sum of \$867.15, in consideration of the transfer to him of the interest of W. W. Anderson & Co. in the local agency. In short, this was a novation of this indebtedness in so far as defendant was concerned. Defendant appears never to have been informed how much was due to each of these companies, or he never assumed to pay them separately, and in taking the note from W. W. Anderson & Co. the amounts were consolidated. His contract was to pay to J. F. Paull, secretary and general agent, the

sum of \$867.15 for the two companies—the Peabody and Phoenix. The proof, written and oral, fully sustains this to be the contract. The question then presented on the motion to strike out the evidence was whether the plaintiff had the right to maintain a separate suit against the defendant for its share of this sum of money. The circuit court decided not, for the reason that the defendant had not made an assumption to pay to plaintiff its separate share of this sum, but had agreed to pay the whole sum to J. F. Paull, general agent, for the benefit of both. Therefore they could not sue him separately. There is no evidence that the defendant ever made a separate promise to the plaintiff, but the note and the letters show that the promise to them was joint. In 2 Tuck. Com. 257, the law is stated to be: "When the contract is made with several, whether it were under seal or by parol, if their legal interest were joint, they must all, if living, join in an action in form ex contractu for the breach of it, though the covenant or contract with them were in terms joint and several; the reason assigned is that when the interest is joint, if several were to be permitted to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment. Therefore, where A. declared upon an account stated with him, of moneys due to him and a third person, after verdict judgment was arrested on the ground that the promise, whether express or implied, must, in point of law, be considered as made to all the persons whose debt it was, and therefore they ought to have joined in the action." 15 En. Plead. & Pract. 529, 538. In this case the promise was made by the defendant to pay for the benefit of the two companies—the Peabody and the Phoenix—\$867.15, and the Phoenix brings a separate suit, claiming that its share of the promise is the sum of \$495.36. If its suit is maintained, the Peabody may in turn bring its suit for the full amount, and claim it is entitled to the whole. The defendant might answer that the Phoenix obtained a judgment for \$495.36 of the sum, to which the Peabody could reply, "I was not a party to the suit, and am not bound by that judgment, and hence you must pay me again." This places on the defendant an obligation he did not undertake, and that is the risk of losing to both parties, or the duty of making a settlement between them. He promised to pay the two together the sum of \$867.15, and it matters not to him what their separate interests may be. They must settle that between themselves. He is only safe in paying their joint agent or their joint judgment, and cannot deal with them separately. If they had rendered to him separate accounts, and he had accepted them, the case would have been different. They mixed their accounts, reduced them to the form of a note, and induced him to assume the mixture, and now they cannot un-

mix them without his assent, and make him pay them separately. Not only is this true, but his agreement to pay the joint sum is a novation, which as to him extinguishes their prior several accounts against W. W. Anderson & Co. 21 A. & E. En. Law (2d Ed.) 671. So, it is not a question as to whether the accounts were merged in the note and satisfied by it, but whether the novation or new promise of the defendant extinguished them. As to the old accounts, he made no promise, but only as to the joint amount determined by the note. They could not maintain separate suits against him. Their suit must be joint or in the name of their agent. Hence, the court was right in holding that the allegations of the declaration were not sustained by the evidence, and, on the refusal of the plaintiff to take a nonsuit, directing a verdict for the defendant.

The judgment is affirmed.

(53 W. Va. 426)

LYNCH v. SPICER et al.

(Supreme Court of Appeals of West Virginia.  
April 28, 1903.)

WILL — CONSTRUCTION — PAYMENT OF LEGACIES — ATTORNEY'S FEES — EQUITABLE CONVERSION.

1. A will gives pecuniary legacies, indicating no other fund for their payment, and there is no other personalty for their payment, and then directs a farm to be sold, "and, after paying all my debts, the balance to go to my daughter Ella Spicer, except" certain other after-named legacies. Ella Spicer takes as residuary legatee, and all the legacies are to be paid out of the proceeds of the farm.

2. When a will directs land to be sold, its proceeds are regarded as personalty at the death of the testator.

3. If manifest from the will that legacies are to be paid in any event, the implication is that the residuary legatee gets only after payment of such legacies.

4. The court disapproves the allowance by courts of exorbitant fees to attorneys out of dead men's estates.

5. Realty is chargeable with legacies, if the will discloses such intent.

(Syllabus by the Court.)

Appeal from Circuit Court, Monroe County; J. M. McWhorter, Judge.

Bill by C. E. Lynch, administrator, against Ellen Spicer and others. Decree for plaintiff, and defendants appeal. Reversed.

Miller & Read, for appellants. John Osborne and R. F. Dunlap, for appellee.

BRANNON, J. Robert D. Shanklin left the following will: "July the twelveth, 1899. I, Robert D. Shanklin, of the county of Monroe, State of West Va., being aware of the uncertainty, and in failing health but of sound mind and memory, do make and declare this to be my last will and testament in manners as follows, to-wit: First, I give to my two step-daughters, Austin Whitten's wife, Avaline, five hundred dollars. I also give

Delila Houchins, Allen Houchins' wife, five hundred dollars; my son, Riley C. Shanklin, that is dead, I gave all the brick house place part be sold the deed is recorded in the office in hinton; I thought that was his full part of my estate, but I will will his heirs fifty dollars more. I will to my daughter, Mary Wiseman, all the place she now lives on to Mary her lifetime, then go to her daughter, Ella Shanklin, and her husband, Burton Shanklin, at Mary's death. I also leave to Lee Wiseman ten dollars. I also will all my home place all to be sold, after paying all my debts, the balance to go to Lo My daughter, Ella Spicer, except five hundred dollars to Mary Wiseman and her heirs at my daughter's death. I also will to my four grandchildren that lives with Washington Mottesherd, their father, in Greenbryar county, W. Va., one hundred dollars apiece, making four hundred dollars. My home place when sold is to pay that five hundred dollars to Mary Wiseman, and four hundred—to my four grandchildren out of my home place. I also request my administrator to sell my personal property and give a credit for it. I also appoint George H. Vawter my administrator. Robert D. Shanklin. [Seal.]" C. E. Lynch, administrator c. t. a., filed a bill to construe it. The bill states that the personalty is not sufficient to pay the legacies to Avaline Whitten, Dellah Houchins, and the heirs of Riley Shanklin. An answer says the farm was sold at \$2,850 under the will, and that the personalty amounted to \$186. The decree in the case excluded Avaline Whitten and Dellah Houchins from any interest in the proceeds of the sale of the home place, and gave out of such proceeds to the plaintiff's attorneys, for their services, \$200, and Avaline Whitten and Dellah Houchins appeal.

The question is whether they are to be paid their legacies out of the land, or whether Ella Spicer gets its proceeds free of those legacies. It is the word "balance" that has strong import. It means after excluding what has been before given. It is a residuary clause. The word "balance" operates as a residuary clause. Page on Wills, § 506. Any word importing residue so operates. Schouler on Wills, § 522; 2 Lomax, Ex'rs, c. 5, § 2, p. 305; 18 Am. & Eng. Encyc. L. 723. Therefore, taken alone, this word imports that Ella Spicer gets only what is left after legacies already given and debts. True, realty is not chargeable with pecuniary legacies unless the intent appears (Thomas v. Rector, 23 W. Va. 26); but it does appear from the word "balance." Where it is manifest that the intent was that the legacies are to be paid at all events, the implication is that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous legacies. Bird v. Stout, 40 W. Va. 43, 20 S. E. 852; Thomas v. Rector, 23 W. Va. 26. Surely the testator intended that the two legacies to Avaline Whitten and Dellah Houchins, and the \$50 to heirs of Riley

Shanklin, should be paid. There is nothing to pay them except the home farm, and after giving these legacies he says the "balance" of it shall go to Ella Spicer. To what can the word "balance" relate but to those antecedent legacies? I do not suppose that it means balance after excluding debts alone. It cannot mean that in order to get at its meaning we shall go forward, and, finding legacies given afterwards to Mary Wiseman and the four grandchildren, say that the word "balance" means the balance after paying debts and these latter legacies; because, when he used that word "balance," his mind had not yet come to them, but it had dealt with the legacies to Avaline Whitten and Dilliah Houchins. Here we must not forget to weigh the word "except." He gives Ella Spicer the "balance" of the money from the home farm, "except" \$500 to Mary Wiseman and \$400 to the grandchildren; that is, he excepts from the "balance" these latter legacies; that is, after paying preceding legacies, he gives the balance to Ella Spicer, except the \$900; he makes an exception from the "balance"; in short, he gives Ella the net residuum after all these legacies. This gives these words "balance" and "except," each in its proper location in the will, its proper force, and carries out what we must say was the real purpose of the testator; that is, that all these legacies be paid out of the home farm, and Ella Spicer get the balance. True, where legacies are given they are, in general, not a charge on realty; but if the testator had in mind the land for their payment, if his intent was that the land should pay them, they are payable out of it. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754. In this case the word "balance" tells of intent that antecedent legacies shall be paid out of the land, and the word "except" tells of intent that the subsequent legacies shall be payable out of the land. Another consideration here is that, when the will was made, the testator had virtually no personality. Within a year he died, with only \$186. He could not have thought that legacies of \$1,050, besides debts, could be paid out of the personality. He looked to the land for their payment. Thus his situation and his words both show such intent. We may look at the condition of his property at the time to get his intention. *Atkinson v. Sutton*, 23 W. Va. 197. Ella Spicer is simply a residuary legatee by the words of the will, by the intent disclosed by its words, and the testator's situation as to estate; she gets the residuum after paying all debts and legacies.

Argument is made that legacies are not payable out of realty. They are, if such is the intent, as shown above. But another answer to this argument is that the will does not devise the land to Ella Spicer, but only money. The home farm is personality for all purposes of the will, as it converts realty into personality at death of testator. *Brown v. Miller's Ex'rs*, 45 W. Va. 213, 81 S. E. 956;

*Board v. Blair*, 45 W. Va. 824, 32 S. E. 203. Whether or not this conversion plays any part to show that the testator intended the legacies to be paid out of it, it is certain that the argument that legacies are not payable out of land has no force, because it was personality at the moment the will spoke. In fact, he directed a sale because otherwise there was nothing to pay legacies. "Where the testator, by provisions in his will, converts the real estate into personality out and out, legacies are entitled to payment out of the proceeds of such realty in case the personality is insufficient." 19 Am. & Eng. Encyc. L. 1360; Page on Wills, § 709. "The effect of conversion is to impress the property with the character of the property into which it is to be converted, even before a change in form. Thus, where there is a conversion of realty, the realty to be converted will be distributed as if personality." Page on Wills, § 708; *Tazewell v. Smith's Adm'r*, 1 Rand. 313, 10 Am. Dec. 533. Here are legacies; here is personal property; the testator designed to pay the legacies, else he would not have given them; and there is a clause giving Ella Spicer the "balance" of that personality. Why are those legacies not payable out of that personality?

The bill claims that the specific devise to Ella and Burton Shanklin is as much chargeable with the legacies as is the home place. This is not correct. The rule is that specific devises of land are not chargeable with legacies unless the intent is apparent. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754. "The presumption is, as between the specific devisee and pecuniary legatee, that the testator intends the money legacy to be paid first out of the personal property, and next out of the real estate which is included in the residue." 1 Underhill on Wills, § 396; 19 Am. & Eng. Encyc. L. 1313, 1356. Even if a specific devise of land is charged with debts, the residuary legacy must first pay them. Likewise as to legacies; if the specific devise would be liable to debts secondarily only, though so charged, much more would the residuary legacy have to pay when the specific legacy devise is not charged. *Harrison v. Haskins*, 2 Pat. & H. 388. But this specific devise is really not involved in this court. We must remember that Ella Spicer takes a legacy of personality under a residuary clause. "It is one of the most elementary principles of the law of distribution that the residuary personal estate must first bear the burden of the debts of the decedent, and that the residuary legatees can take nothing until all debts and prior dispositions have been satisfied. Consequently, though, of course, the residuary legatees contribute inter sese, in that each must contribute his proportionate share of the debts of the estate, and can only receive his proportion of the surplus remaining over and above all debts and legacies, they cannot call upon any other legatees to contribute or abate with them, whether these legatees be spe-

cific, demonstrative, or merely general, although the residuary personal estate is wholly exhausted." 6 Am. & Eng. Dec. Eq. 338.

I think it error to allow so large a sum to attorneys out of a small estate for services in a suit of no difficulty or size. The record is small, a short bill, a short decree—no depositions—only the construction of the will involved. This court and others have strongly condemned the allowance of heavy fees out of dead men's estates and funds. *Fowler v. Lewis' Adm'r*, 36 W. Va. 154, 14 S. E. 447; *Trustees v. Greenough*, 105 U. S. 537, 26 L. Ed. 1157.

We reverse the decree, and remand the cause to the circuit court in order that another decree may be entered conforming to the principles above indicated.

(53 W. Va. 421)

#### AMICK v. ELLIS et ux.

(Supreme Court of Appeals of West Virginia.  
April 28, 1903.)

#### SPECIFIC PERFORMANCE—CONTRACT TO SELL WIFE'S LAND—ACKNOWLEDGMENT.

1. A contract of sale of the wife's land by her and her husband, not acknowledged for recordation, cannot be specifically enforced in equity; and, on a bill to enforce the same, there cannot be a decree against the wife for repayment of purchase money. Mere colorable claim of jurisdiction will not do.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County; J. M. McWhorter, Judge.

Bill by J. A. Amick against R. H. Ellis and wife. Decree for plaintiff, and defendant wife appeals. Reversed.

J. W. Davis, for appellant. Payne & Hamilton, for appellee.

BRANNON, J. Virginia L. Ellis, wife of R. H. Ellis, being owner of land in Fayette county, she and her husband made a contract with J. A. Amick, 5th September, 1896, selling to him "all minerals and coal" in the tract of land; part of the purchase money being paid down, and part payable in future. Mrs. Ellis refused to accept the last payment, and Amick brought a suit in equity in the circuit court of that county, asking that Ellis and wife be compelled to perform the contract by conveyance according to it, or, if that could not be done, that the contract be rescinded, and that a decree be made in favor of the plaintiff for the money paid by him under the contract. A decree was made, rescinding the contract, and decreeing personally against Virginia L. Ellis \$232.13 on account of money paid under said contract, and subjecting to sale the minerals and coal in the land, from which decree Virginia L. Ellis appeals.

As this contract was not acknowledged for recordation, it could not be specifically enforced by conveyance of the land. *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918.

44 S.E.—17

The contract being on its face void in law for all purposes of equity jurisdiction, the alleged equity jurisdiction is merely colorable or pretended—just to get jurisdiction. *Laidley v. Laidley*, 25 W. Va. 525; *Thompson v. Whitaker*, 41 W. Va. 574, 23 S. E. 795. To give jurisdiction, there must be, "in addition to the simple setting up of the claim, some color for it; in other words, the claim must be of such character that its mere mention does not show it destitute of merit." *N. O. Waterworks v. Louisiana*, 185 U. S. 344, 27 Sup. Ct. 691, 46 L. Ed. 936. Hence we can not apply the rule that, having jurisdiction for one purpose, full relief or alternative relief will be given. There is jurisdiction neither to compel a deed nor for money. If there is any liability on Mrs. Ellis to recover back money paid under the contract, it is recoverable at law, under section 15, c. 66 Code 1899. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587; *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. 507.

Therefore we reverse the decree and dismiss the bill without prejudice to an action at law

(53 W. Va. 490)

#### NUZUM v. HERRON et al.

(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

#### JUDGMENT OF JUSTICE—LIEN—DOCKETING—APPEAL—OBJECTIONS TO EVIDENCE—CONFESSION OF JUDGMENT—PREFERENCE—SETTING ASIDE.

1. Under section 5, c. 139, Code 1899, a judgment for money rendered by a justice against any person is a lien from the date of said judgment, on the real estate of or to which such person shall be possessed or entitled at or after such date.

2. But such judgment is not a lien on real estate, as against a purchaser thereof for valuable consideration, without notice, until the same is docketed in the judgment lien docket in the office of the clerk of the county court as provided in section 4, c. 139, Code 1899.

3. Where the confession of a judgment before a justice is alleged in the bill, giving date and amount, and admitted by defendant in his answer, and proved in the cause by oral testimony, without objection or exception, the question of the sufficiency of the proof of the existence of such judgment, because the record of it was not produced, cannot be raised the first time in the appellate court.

4. Where a judgment by confession amounts to a preference, under section 2, c. 74, Code 1899, and has not been docketed in the office of the clerk of the county court, in the judgment lien docket, as provided in section 4, c. 139, Code 1899, a creditor is not limited to four months in which to attack it by suit as a preference.

5. Quære, whether, when so docketed, the creditor must sue within four months thereafter?

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Staats Nuzum against J. A. Herron and others. Decree for defendants, and plaintiff appeals. Modified.

W. S. Meredith, for appellant. Scott, Cobb & Maxwell, for appellees.

MCWHORTER, P. On the 14th day of May, 1894, James A. Herron purchased from Staats Nuzum a stock of goods and merchandise at the village of Colfax, in Marion county, for the sum of \$2,364.20, paying in cash or its equivalent \$450, and made his two notes, signed by himself, Helen Herron, and M. L. Herron, dated the 19th day of May, 1894—one for \$1,000, to be paid in payments of \$100 each on or before the 19th day of May in each year thereafter from the year 1898 to 1907, inclusive, with interest from date; whole interest to be paid annually; the other for \$914.20, to be paid in annual payments of \$130.60 each, payable on the 19th day of May of each year from 1908 to 1914, inclusive, with interest from date; whole interest to be paid annually. In addition to the said notes, said James A. Herron made and delivered to said Nuzum the following agreement: "Article of agreement made this the 19th day of May, 1894, between James Archable Herron, of the first part, and Staats Nuzum, of the second part, first party of the county of Randolph county, party of the second of the county of Marion, West Va. Witness, that the party of the first part doth covenant with the party of the second part that he has in his own possession as is assessed in his own name three hundred and eleven acres of land situated in the county of Randolph, assessed at or about one thousand dollars for which he claims to be worth \$2,000.00. And hereby binds himself in the sum of five hundred, if the above statement is not about as stated by him and also to deliver the store with all the goods therein, to the party of the second. The above \$500.00 to be paid to the party of the second. [Signature] J. A. Herron." Said Herron took possession of the stock of goods and carried on the mercantile business under the firm name of J. A. Herron & Co.; Helen Herron, the wife of M. L. Herron, being the partner representing the company. Payments were made on the first note, and indorsed thereon, May 22, 1895, "\$60.00, being interest for the first year," and June 15, 1896, "\$60.00, being Int. to May 19, 1896"; and on the second note are credits of \$4 May 22, 1895; "By \$14.85, being balance of first year's interest," and June 15, 1896, "By \$54.85, being Int. to May 19, 1896," which are all the payments that were made on either of said notes. On the 31st day of January, 1899, James A. Herron and Susan F. Herron, his wife, in consideration of \$100, conveyed by deed to Stella J. Herron 50 acres of the 311 acres mentioned in the agreement of the 19th of May, 1894, which deed was recorded on the 7th day of February, 1899; and on the same 31st day of January, 1899, they conveyed to French C. Herron, in consideration of \$150 (\$50 paid in hand, and \$50 to be paid on or before the 1st day of January, 1900, and \$50 to be paid on or before the 1st day

of January, 1901, to be paid in work), another 50 acres, more or less, of said tract of land, which deed was recorded February 17, 1899; and on the 1st day of April, 1899, James A. Herron and wife, in consideration of \$348, to be paid, as set out in the deed, in three payments, of \$100, \$100, and \$148, to be paid, respectively, on the 1st day of June, 1900, 1901, and 1902, conveyed to Jacob W. Cutright 43½ acres of said tract of land, retaining a lien for the purchase money, which deed was recorded April 5, 1899; and on the 3d day of April, 1899, said James A. Herron and wife, in consideration of \$1,052, to be paid \$200 on or before the 1st day of October, 1900, \$348 on or before October 1, 1901, \$348 on or before the 1st day of October, 1902, and \$160 on or before October 1, 1903, reserving their vendor's lien for the purchase money on the property sold, conveyed to Harriet M. Outright 168 acres of said tract of land. On the 22d day of April, 1899, Staats Nuzum sued out of the clerk's office of the circuit court of Randolph county his summons in chancery against James A. Herron, M. L. Herron, Helen Herron, Susan F. Herron, Stella J. Herron, French C. Herron, Harriet M. Outright, and Jacob W. Cutright, and filed his affidavit for an attachment, and caused his order of attachment to be levied upon the said two tracts, of 50 acres each, so conveyed, and designated Harriet M. Outright and Jacob W. Cutright and French C. Herron as being indebted to the defendant James A. Herron, and cited them to appear and answer as to their indebtedness; and at the June rules said Nuzum filed his bill, setting up the sale to Herron of the stock of goods, and filed therewith the statement or agreement in writing of the said Herron, dated May 19, 1894, claiming to be the owner of said tract of 311 acres of land; alleging that he gave credit to said Herron for said stock of merchandise upon his representation of his solvency and the ownership of said real estate; that the said James A. Herron, upon taking possession of the stock of goods, decided to carry on the business at the village of Colfax in the name of J. A. Herron & Co., which copartnership was composed of said Herron and his daughter-in-law Helen Herron, but the business was principally done by Helen and her husband, M. L. Herron; the business continued until the 1st of April, 1899, when the stock of goods was allowed to become small, by reason of sales, and not replenished, and then said M. L. Herron and wife secretly removed the stock on hand, as well as their other effects, to the state of Ohio; and alleging that said James A. Herron, who was a farmer, and residing on the 311 acres of land, about the first of the year 1899 fraudulently commenced to dispose of said land in such manner as to prevent plaintiff from compelling payment of his debts; that Stella J. Herron, to whom he conveyed 50 acres, was the wife of one of his sons, and French C., to whom he con-

veyed the other 50 acres, was his son; that on the 20th of May, 1899, a deed was recorded from defendant Stella J. Herron and her husband, B. D. Herron, to the defendant French C. Herron, for the 50 acres which was conveyed to Stella by James A. Herron and wife, which deed from Stella and her husband was dated March 15, 1899, and recites the consideration to be \$150 paid in hand. Copies of all of said deeds are exhibited with the bill. Plaintiff alleges that he is not advised whether the sales and conveyances to Jacob W. Cutright and Harriet M. Cutright were bona fide and for valuable consideration, or not, but alleges that such sales were made by Herron to defraud plaintiff out of the collection of his debt, and that, if notes were given by the Cutrights, they were intended by James A. Herron to be disposed of in a fraudulent manner, so as to prevent plaintiff from reaching the proceeds of the sales, and thereby realize upon said notes, and that plaintiff had been informed that such notes were taken, and had been, with fraudulent intent, assigned by James A. Herron to his wife, defendant Susan F. Herron; and alleging that the conveyances to Stella J. Herron and French C. Herron of the two 50-acre tracts were fraudulent, and made by said James A. Herron to hinder, delay, and defraud plaintiff in the collection of his debt, and that said Stella and French had notice of such fraudulent intent; and alleging that, in furtherance of his fraudulent intent, James A. Herron went before W. S. Woodford, a justice of Randolph county, and confessed a judgment in favor of his wife on the 15th of December, 1898, for the sum of \$327.48, and on the 27th day of December, 1898, before the said justice he confessed another judgment in favor of his wife for \$300, and on the 20th of February, 1899, he confessed another judgment in favor of his wife for \$286.25, which judgments had been paid by the said Herron to his wife by assigning to her notes taken by him from the purchasers of said land sold to the Cutrights, or one of them; that said confession of said judgments, and any assignment of any of said purchase-money notes to his wife for the pretended purpose of paying off said judgments, by the said James A. Herron, were fraudulent and without consideration deemed valuable in law, against the rights of plaintiff, of which fraudulent intent Susan F. Herron had notice; and sets up his attachment, and the service of it; and alleging that, if the conveyances to the Cutrights should be held to be valid, then the purchase money for the land so conveyed is liable to be applied to the payment of plaintiff's debt; that neither the defendants Helen nor M. L. Herron own any property in the state of West Virginia, nor is James A. Herron the owner of any other property in the state than the purchase notes; and alleges that said James A. Herron was insolvent, and that all his property would not pay all his debts, on the

16th of December, 1898, at the time of the confession of judgment in favor of his wife, and that, if this fact should be made to appear from the proofs, then the said confession of judgment should be held to be an assignment by James A. Herron of all his property for the benefit of plaintiff and all other creditors who might come into this suit and contribute to the expense thereof; and praying for an injunction restraining said James A. Herron and his wife, Susan F. Herron, or either of them, from assigning or transferring any of the notes of the Cutrights or Herrons given for the purchase of said lands, and that any assignments that might be made of any of said notes should be set aside, and the proceeds of the sales, as far as the same might be held to be valid, should be applied to the debts of plaintiff, and any of said sales that might appear to be fraudulent and invalid as against plaintiff should be set aside, and the conveyances for said land annulled, and the land decreed for sale, and proceeds applied to plaintiff's debt, or if it should be made to appear that said James A. Herron was insolvent on the 16th day of December, the time of the confession of the judgment in favor of his wife, all of his property then owned by him should be applied to the payment of plaintiff's debt and the other debts then existing against him, and for general relief.

Susan F. Herron filed her answer to the bill, denying all personal knowledge of the indebtedness of her husband, James A. Herron, to the plaintiff, and denying any interest in the conveyances to Stella and French, except that, if such conveyances should be set aside, the land so attempted to be conveyed should be subject to James A. Herron's indebtedness to her; denying that the sales and conveyances to the Cutrights mentioned in the bill were made by James A. Herron for the purpose of hindering, delaying, or defrauding the plaintiff or any creditor of said James A. Herron, but the said sales and conveyances were made in good faith and without any such fraudulent purpose; that it was true James A. Herron took from the Cutrights notes for the purchase price of the land, aggregating \$1,400, and assigned said notes to respondent, but denied that such assignment was for any fraudulent purpose, and that, if he had such fraudulent purpose in either transaction, she had no knowledge of it, and could not be affected by it; that at the time of the assignment of said notes she had no knowledge of the indebtedness of said James A. Herron to the plaintiff, and did not know that such indebtedness existed; that she had heard, in a general way, of the purchase of the stock of goods, but did not know that her husband was indebted for the same at the time of the assignment of the notes to her; that it is true the several judgments were rendered in her favor against her husband for the amount and at the times mentioned in the

bill, and that another judgment was rendered in her favor against him on the 4th day of May, 1891, for about \$173, with interest from that date, which was not mentioned in the bill, but denied that any of such judgments were gotten for the purpose of hindering, delaying, or defrauding the plaintiff, but avers that said James A. Herron was justly indebted to her in the full amount of all of said sums at the time they were rendered, for money borrowed from her by him, or for money actually expended by her for him at his special interest and request, and always as a loan, and which were always so recognized, for all which said James A. Herron always executed his note to respondent at the time of the loan, or very shortly thereafter, in accordance with the express agreement between them at the time of the loan; and avers that, at the time of the assignment to her of the notes, James A. Herron was indebted to her in the sum of over \$1,100; that she had, before the deeds to the Cutrights were executed, joined in other deeds conveying portions of her husband's lands, and had gotten no benefit therefrom, and, as he proposed to dispose of all his real estate, she refused to join in a deed therefor unless she received compensation for the surrender of her contingent right of dower, and said notes were assigned to her in payment of his indebtedness to her, and in consideration of her signing the deeds thereof as satisfaction of such indebtedness, and the residue was not as much as she demanded for the surrender of her contingent right of dower. Respondent avers that she was married to Herron September 30, 1886, then 36 years of age; that she then owned or used and controlled an individual interest in a valuable farm in the county of Lewis, and personal property of considerable value, consisting of live stock and some money, part of which was loaned out and bearing interest; that a portion of the live stock she brought afterwards to her husband's farm, in Randolph county; that there was increase of such live stock, and that since her marriage she had continued to deal more or less in live stock, buying and selling, sometimes keeping stock on her husband's place, and sometimes on her own place, in Lewis county, the same having been partitioned among the owners shortly after her marriage, and the portion allotted to her being about 60 acres; that from that place she had realized in money about \$40 per year since her marriage, most of which, from time to time, she loaned out, that it might draw interest; that all of the money loaned to or expended for her husband was her own separate estate, derived from other sources, and none of it was furnished by or belonged to him; that since her marriage she has continued to manage her own property and business, and, having children of her own, she felt that she ought to preserve for them what property she had, and increase it as much as she could, for their benefit and her own;

and denied all fraud and collusion, and prayed that the injunction be dissolved, and the attachment quashed and dismissed.

Defendant James A. Herron filed his demurrer and answer, and says that, after purchasing the goods, he and Helen Herron, his son's wife, entered into a partnership for carrying on the business of merchandising, which was committed to said Helen and her husband, and respondent knew but little about the business from that time until it was closed out, in the year 1899; that on one or more occasions while the business was being carried on he sent to Helen Herron or her husband small amounts of money to be used for the payment of goods purchased for the store; that he knew nothing of the purpose of Helen or her husband to close out when it was done, or to remove the goods from Colfax; that he had since been informed that M. L. Herron, claiming to act for the firm, borrowed money from his sister K. F. Snyder, to be used in the business, and executed to her the notes of the firm for the money, and finally sold the remainder of the stock to her in satisfaction of said indebtedness, receiving \$100, the excess of the valuation of the goods over the amount due her for the money borrowed; that he knew nothing of it until after it was consummated; admitted that he made the paper of May 19, 1894, and believed it was true when made, and that the statement was made in good faith; avers that respondent's health was very much impaired, and he was unable to manage or work the small farm on which he was living; that his son French O. Herron was living in Indiana, and in the fall of 1898 respondent requested his son to come back home and work on the place, and, as an inducement, offered to pay him \$50, or give him the value of \$50 in land; that French accepted his offer, and came home, and the deed was executed accordingly, and French, in pursuance of his undertaking, remained with the respondent and worked upon the farm until it was sold to the Cutrights; that Stella J. Herron was living in Pennsylvania; that respondent was anxious that she and her husband (respondent's son) should come and reside near him, and promised her \$100 in money, or 50 acres of land, if she and her husband would move back from Pennsylvania, which she consented to do, and the deed was made and delivered, but his daughter had not yet come back to Randolph county, having stopped in Marion county. He admits the sales were made to the Cutrights, and notes taken for the several amounts, and the same assigned to his wife, Susan F. Herron, in satisfaction of his indebtedness to her, and in consideration of her joining in said deeds so as to release her contingent dower in the lands; that respondent was justly indebted to his wife in the sum of over \$1,100, nearly all of which was for money borrowed of her, which money was all her separate estate, and none of which had been furnished her by him; that



before she had executed the last deed she demanded \$300 of the purchase price as a consideration, which respondent claimed she should have, and therefore all the notes taken for the purchase money were assigned to her, and were not sufficient to satisfy his indebtedness to her, and pay her the \$300 for joining in the deed; denies that the real estate was sold or notes assigned with fraudulent intent; that at the time of their marriage his wife had personal and real property of her own; that she owned or controlled an interest in a valuable farm, lying mostly in Lewis county; that in 1887—the year following their marriage—her interest in the farm was laid off to her, and consisted of 60 acres, which she had owned ever since; that no money or means of respondent ever went into said real estate, but the same was acquired by his wife entirely independent of him; that the several judgments mentioned in the plaintiff's bill, and also one other before Justice Rader on the 4th of May, 1891, for about \$173, were obtained by his wife, and that he was justly indebted to her in the several sums for which said judgments were obtained when so obtained, and that no part of the same, nor the debts for which they were obtained, had been paid when he assigned the notes of the Cutrights to his wife; that at the time of their marriage his wife had money, either in hand, or owing her responsible parties, to the amount of nearly \$300, and also considerable live stock; that as much as 10 or 12 years before their marriage his said wife engaged, to a greater or less extent, in raising, buying, and selling live stock, and has ever since continued to do so on her own account, with her own means, not furnished by respondent; that, from time to time since their marriage, respondent had borrowed money from his wife, always contracting to repay the same, and finally giving his notes for the amounts so borrowed, at the time or shortly afterwards, and the aggregate of the amount of such indebtedness was represented by the amounts of the several judgments; that, if there could be any question as to the validity of said judgments, yet the indebtedness upon which said judgments were based was bona fide and still existing at the date of the assignment of the notes, and constituting a valid consideration for such assignment to the amount of such indebtedness; and denying each and every allegation of fraud and of collusion for the purpose of hindering, delaying, or defrauding the plaintiff in the collection of his debt. Defendants J. W. Cutright and Harriet M. Cutright filed their respective answers, admitting the purchases made by them; averring that they had purchased in good faith, for a fair consideration, and that they knew nothing of the indebtedness of James A. Herron, except as to the judgment in favor of his wife, which Herron was to satisfy by the assignment of the notes for the purchases of respondents, which he did; and

denied all the allegations of fraud, unlawful combination, and confederacy contained in the bill, and all collusion for the purpose of defrauding, hindering, and delaying plaintiff or any one else.

Depositions were taken and filed in the cause, and the cause was heard on the 1st day of February, 1901, upon the bill taken for confessed as to all the parties, except the defendants James A. Herron, Susan F. Herron, H. M. Cutright, and Jacob W. Cutright, upon the answers and replications thereto, and upon the exceptions of plaintiff to the deposition of Susan F. Herron, and upon the order of attachment sued out and levied and upon the joint petition of creditors McCoy Shoe Company and others, filed on the 28th day of October, 1899, praying to be made parties to this cause. The court overruled the exceptions taken to the deposition of Susan Herron, and set aside, as fraudulent, the deeds to French C. Herron and Stella J. Herron, and from Stella J. Herron and her husband to French C. Herron, and held that, by reason of the institution of this suit, and the levying of the attachment on the two tracts, of 50 acres each, plaintiff had a prior lien thereon for the amount of his debt against James A. Herron, and that said tract should be sold to pay said debt. "And it further appearing to the court from the pleadings and proofs in the cause that the said James A. Herron was justly indebted to the said Susan F. Herron at the time he assigned and transferred to her the said notes of Jacob W. and Harriet M. Cutright, to the amount of said notes, and that such notes were assigned to her in payment and satisfaction of such indebtedness, and the court, being of opinion that such assignment and transfer was made in good faith to satisfy a bona fide debt, doth refuse to set aside such transfer, and the court doth dissolve the injunction heretofore awarded herein, so far as the same affects the right of said Susan F. Herron to collect or transfer said note. And the court doth quash the attachment of the plaintiff herein, so far as the same affects the said notes, or the funds payable thereon, and the said Susan F. Herron is authorized to collect or transfer the said notes of Jacob W. Cutright and Harriet M. Cutright free from the claims of the plaintiff or the other creditors of the said James A. Herron." The court further decreed that the conveyances of the 43½ acres to Jacob W. Cutright, of April 1, 1899, and of 168 acres to Harriet M. Cutright, of April 3, 1899, were made in good faith and for valuable consideration, without notice of any indebtedness or claim on the part of the plaintiff or any creditor of said Herron. Said conveyances were held to be legal and valid, and the cause was referred to a commissioner of the court, with directions to ascertain and report the valid debts existing against the said James A. Herron; to whom owing, and the amounts thereof, and their priority, if any, and to report any other per-

inent matter. From this decree the plaintiff, Staats Nuzum, appealed.

The first assignment of error is that the court erred in refusing to sustain the exceptions of appellant to the deposition of Susan F. Herron, and permitting same to be read in evidence in her behalf. It appears from the record that when the witness Susan F. Herron was dismissed from the witness stand, after agreeing to produce the notes that were assigned to her by her husband and to return for further examination, it was under this agreement: "By agreement of counsel appearing to these depositions, the same are to be filed with the understanding that the witness will return when requested by her counsel to be further examined; the redirect and probably the cross examination not being completed." The exception taken to the deposition is by the plaintiff, for the reason that she never returned to have her deposition completed, and never filed the notes, deeds, and other papers as a part of her deposition, which she promised under oath to do. There is nothing in the record to show that her counsel ever requested her to return according to the terms of the agreement, nor does it appear that the plaintiff ever required her appearance again as a witness. The only notes or writings witness promised to produce were the Cutright notes, and this was at the request of her own counsel. The plaintiff never called for any of the papers named in the exception.

The second, third, fourth, fifth, and sixth assignments are as follows: "Second. The court erred in quashing said attachment in so far as the same was quashed. Third. The said court erred in dissolving said injunction. Fourth. The said court erred in refusing to set aside the assignment of said promissory notes made by the said James A. Herron to his wife, and in not subjecting the said notes to the payment of plaintiff's claim. Fifth. The court erred in not adjudging that the said confession of judgment made by the defendant James A. Herron for the benefit of his wife on the 16th day of December, 1898, while the said James A. Herron was insolvent, operated and should be taken and construed as an assignment made by the said James A. Herron for the benefit of all his creditors. Sixth. For other errors apparent upon the face of the record." These several assignments of error may be properly considered as one. The fifth raises the principal question involved in this case; and, if this is well taken, then it follows that the third assignment must be sustained, and the fourth, also, to the extent that the court erred in refusing to set aside the assignment by James A. Herron to his wife of the purchase notes, and that these said notes should have been applied to all the indebtedness of James A. Herron, pro rata. I take it from the assignments of error by the appellant, as well as from the brief of the appellees, that there is no disposition to question the validity of the

sales and conveyances to the said Cutrights; the only question remaining, what is a proper disposition to be made of the proceeds of the sales to the Cutrights, and of the lands (two tracts, of 50 acres each) found to be fraudulently conveyed by James A. Herron and wife to French C. Herron and Stella J. Herron, respectively? The insolvency of James A. Herron at the time of confessing the judgment on the 16th of December, 1898, is charged in the bill, and is not denied, and his insolvency clearly appears from the proof in the record. Section 2, c. 74, Code 1899, defines what the word "charge" shall there be taken to mean. In that section it says, "The word 'charge' shall be taken to include every confessed judgment, deed of trust, mortgage, lien and encumbrance." Said section further provides: "Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor or to secure such creditor or any surety or indorser for a debt to the exclusion or prejudice of any other creditor shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts owed by such debtor at the time such transfer or charge is made: provided that any such transfer or charge by an insolvent debtor shall be valid as to such preference or priority unless a creditor of such insolvent debtor shall institute a suit in chancery within one year after such transfer or charge was made to set aside and avoid the same and cause the property so transferred or charged to be applied toward the payment pro rata of all the debts of such insolvent debtor existing at the time such transfer or charge is made, subject however to the provision hereinafter contained with reference to creditors uniting in such suit and contributing to the expenses thereof. But if such transfer or charge be admitted to record within eight months after it is made then such suit to be availing must be brought within four months after such transfer or charge was admitted to record." This provision of the statute is plain and unambiguous. The first judgment was confessed December 16, 1898, which was followed in quick succession by two others, December 27, 1898, and February 20, 1899; the three judgments amounting in the aggregate to \$913.73. This was clearly an attempt on the part of James A. Herron to give preference to Susan F. Herron, his wife, over his other creditors, and to secure her in the payment of her claims by creating liens upon or charges against his real estate in her favor, in violation of the statute just quoted, which says that such attempted charge "shall be void as to such preference or security but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts

owed by such debtor at the time such transfer or charge is made."

It is contended by appellees that the judgments confessed were no liens upon the property, because they had not been entered in the judgment lien docket of the clerk's office of the county court; and they cite *Dysart v. Branderth* (N. C.) 23 S. E. 988, where it is held, "After a judgment of a justice of the peace has been docketed in the superior court it becomes a lien on all defendant's realty in the county where it is docketed." This decision is under a statute of the state of North Carolina, doubtless, which provides that such docketing is necessary to constitute such judgment a lien, for it is in that case said by the judge rendering the opinion that "a justice's judgment, when duly docketed in the office of the clerk of the superior court, becomes a judgment of the Supreme Court, to all intents and purposes." But our statute makes every judgment a lien against all real estate of the judgment debtor, except as against a purchaser for value, without notice. Under section 5, c. 189, Code 1899, these judgments confessed before the justice became liens upon the real estate of said James A. Herron, but, not having been entered in the judgment lien docket in the clerk's office of the county court, they were not liens as against a purchaser for value, without notice, of said real estate, as provided by section 6, c. 139, but were liens except as against such purchasers, and were therefore charges against said real estate, as defined in said section 2.

It is contended by appellees that there is not sufficient proof of the confession of said judgments; that the record should have been produced, or its loss explained; and that to admit such evidence is to violate a fundamental rule of evidence. It is true, there were no copies of the judgments produced or offered, but the confessions were alleged in the bill, giving the date and amount of each judgment, making it certain; and both defendants James A. Herron and Susan F. Herron, his wife, the beneficiary in these judgments, in their several answers, admitted the confession and rendering of the judgments. Besides, it was proved on cross-examination of the debtor, James A. Herron, without exception or objection, and the judgments were also proved by the testimony of the defendant Sarah F. Herron, the beneficiary in said judgments, upon her examination in chief by defendant's counsel. That question cannot be now raised in the appellate court for the first time.

It is claimed by appellees that the ruling of the court in *Merchants & Co. v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813, is applicable to this case, where it is held that under section 2, c. 74, Code 1899, "a mercantile firm, although indebted to insolvency, may sell its stock of merchandise to a disinterested party, and receive his notes in payment therefor, payable to its order, and assign one or

more of said notes in payment of a debt owed by it to a bona fide creditor, and such transfer will not be void" under said section. This would be applicable to the case at bar but for the acts of the defendant Herron in confessing the several judgments. If no such confession had been made, and the defendant Herron had sold his real estate to bona fide purchasers, and taken their notes therefor, and assigned such notes to his creditors in payment of bona fide debts existing against him, the transaction would have come under the ruling in the *Whitescarver Case*, and be legal and valid; but having confessed the judgments, being insolvent at the time, such confession, under the statute, was, in effect, an assignment of all his real estate, being the property attempted to be charged for the benefit of all his creditors (*Mack v. Prince*, 40 W. Va. 324, 21 S. E. 1012); defendant Susan J. Herron having preference only for her judgment of May 4, 1891, for \$173, with interest from that date; the same being a lien upon the said real estate.

Appellees contend that the said suit not being instituted within four months after the confession of judgment on the 16th day of December, 1898, it is too late to avail him under section 2, c. 74. The judgment not having been docketed in the office of the clerk of the county court, it is clear that the suit could be instituted within a year from the confession. If the judgment had been so docketed, the question might have arisen as to whether such docketing constituted a recordation, in contemplation of the provisions of said section 2. It appears from the testimony of W. S. Woodford, the justice who rendered the judgment of December 16, 1898, that said judgment was founded on a note given by J. A. Herron to her, dated June 26, 1894, which, together with other corroborating evidence, is deemed sufficient to establish it as a bona fide claim against her husband, to be paid pro rata with the plaintiff's and other bona fide creditors, if any there be. But as to the other two judgments, they are held to be fraudulent, and not permitted to participate. Although the defendant Susan F. Herron denies in her answer that she had any personal knowledge of the indebtedness of her husband, James A. Herron, to the plaintiff, for the goods sold him, Cornelia Nuzum, wife of plaintiff, in her testimony, states at length a conversation between James A. Herron and Susan F. Herron and plaintiff and witness, had in relation to the debt of defendant Herron to plaintiff for the goods, when plaintiff was trying to get Herron to give him security on the notes, as it was claimed Herron had promised to do; Susan F. Herron refused to go on the notes as security because she said she was afraid that the store debt might take all J. A. Herron owned, and then come on her land to finish paying that debt, and she wanted her land for her children; that Herron and wife and

witness and her husband discussed the debt, and all the conditions concerning it, including the matter of security on the notes, and Mrs. Herron refused to become security for the reason given. She further stated that "Mrs. Herron said that 20 years was good time, and gave them a splendid opportunity to pay as large a debt as \$2,300. She said that they would try and meet their payments of \$100 a year and interest as they became due, but, as money matters were as close as they were, we ought not to expect them to do any better than to meet their payments as they fell due. She said that they would try and do this, but could not do any better." She further said that she was afraid that it would not pay the indebtedness of her husband; that said M. L. Herron's wife was very extravagant; that M. L. Herron's family lived entirely out of the store; that his wife made so many doctor bills for him to pay out of the store money; that he frequently had doctor bills of \$50 each to pay, and they kept too many people about them, to be kept out of the store; that M. L. Herron credited out too much; and that the financial condition at that time all tended to make it uncertain as to the store paying the indebtedness. Witness stated that this conversation took place at witness' home, in Colfax, in 1895. Mrs. Herron made no denial of this conversation, although the way was open for her to have again gone on the witness stand, as was provided, by agreement, that she should when she left the witness stand without closing her deposition. It is a significant fact that the amount claimed by Susan F. Herron to be paid her by her husband for signing the deeds to the Cutrights, thereby relinquishing her contingent dower, was an amount just sufficient, added to the claim she made against her husband for borrowed money, to cover the whole amount of the Outright notes to pay her claim, while the amount he paid her for her contingent dower was considerably more than her dower was worth in the purchase money of the real estate, selling at the price it did, if she had been at that time entitled to receive the dower. The defendant Susan F. Herron not only knew of the indebtedness of her husband, but well knew of his fraudulent purpose to work his property out of his hands, and into hers, for the purpose of hindering, delaying, and defrauding his creditors, and participated in his fraudulent acts, joining with him in conveying by deeds of January 31, 1899, 50 acres of land, each, to Stella J. Herron, a daughter-in-law, and to French C. Herron, a son, and on the 1st and 3d of April, 1899, respectively, 43½ acres to Jacob W. Cutright, and 168 acres to Harriet M. Cutright, the consideration for which two tracts was \$1,400, for which notes were given, and vendor's lien retained to secure the payment thereof, which notes, to the amount of \$1,100, were transferred to her in furtherance of his plans to cheat his creditors. The Cutrights, being purchasers for val-

uable consideration, without notice, except as to the confessed judgments, take good title to the property conveyed to them, their purchase notes being substituted to the benefit of the creditors in lieu of the land; and Susan F. Herron, being an active participant in the fraudulent conveyances of the land, with full knowledge of the fraudulent intent of said James A. Herron, is not entitled to anything for her contingent dower in the lands so conveyed.

The confession of the judgments by the insolvent defendant, James A. Herron, in favor of his wife, must be held to be, in effect, an assignment of his real estate for the benefit of all his creditors, to be paid pro rata, except as to the judgment of \$173 in favor of Susan F. Herron, which is the first lien on said real estate; and the decree complained of must be reversed in all respects, except in so far as it decrees the conveyances by James A. Herron and wife to French C. Herron, dated January 31, 1899, of 50 acres, and from said Herron and wife to Stella J. Herron, of the same date, for 50 acres, and the deed of March 15, 1899, from Stella J. Herron and her husband to French C. Herron, made in fraud of the rights of the creditors of James A. Herron, and also in so far as the decree sustains the conveyances to the Cutrights of 43½ acres and 168 acres, respectively, as legal and valid, which conveyances are dated, respectively, April 1, 1899, and April 3, 1899, and also as to that portion of said decree which refers the cause to a commissioner for the purpose as stated, as to all which matters the decree is affirmed, and the cause is remanded to the circuit court for further proceedings therein to be had according to the principles herein, and according to the principles governing courts of equity.

(52 W. Va. 435)

**KALBITZER et al. v. GOODHUE.**

(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)

**INJUNCTION—NOTICE OF APPLICATION—VOLUNTARY ASSOCIATION—MAJORITY RULE—ARTICLES OF AGREEMENT—ENFORCEMENT.**

1. Under section 3, c. 123, Code 1899, a circuit court, or judge thereof in vacation, on application for injunction, may exercise a sound discretion in the matter of requiring notice to be given to the adverse party, or his attorney at law or in fact, of the time and place of moving for it before the injunction is awarded.

2. A voluntary association having adopted a constitution or rules and by-laws, the same are to be considered in the light of a contract, and the "majority rule" in the government of the association does not obtain unless it is so provided in such contract.

3. To divert the funds of such association to other purposes than those set forth in the constitution, by-laws, rules and regulations adopted by the association requires the consent of each and every member of the association.

4. The articles of agreement adopted by a voluntary association, by whatever name called, whether "constitution," "by-laws," "rules and regulations," or any other name, constitute a contract between the members of such asso-

ciation which the courts will enforce, if not immoral, or contrary to public policy or the law of the land.

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County; H. C. Hervey, Judge.

Bill by Christian Kalbitzer and others against A. J. Goodhue, trustee. Decree for plaintiffs, and defendant appeals. Affirmed.

Howard & Handlan, for appellant. W. O. Meyer, for appellees.

McWHORTER, P. A voluntary association was formed in the city of Wheeling under the name of the Retail Butchers' Protective Association of Wheeling, W. Va., and adopted a constitution and by-laws, rules and regulations. The association was composed of 24 members. Article 5 provided for the revenues and disbursement thereof, consisting of seven sections as follows:

"Sec. 1. The dues of this association shall be twenty-five (25) cents per month.

"Sec. 2. The initiation fee shall be ten dollars, \$10.00.

"Sec. 3. Each member shall pay his dues and fines in person at a regular meeting.

"Sec. 4. Should the funds of this association become exhausted, the members thereof shall make such contributions as shall be determined by two-thirds of the members present. But no motion to tax the members of this association shall be decided at the same meeting at which it is made.

"Sec. 5. The funds of this association shall be applied to defraying its necessary expenses.

"Sec. 6. This association shall have power to appropriate such amounts, as may be deemed necessary for the relief of disabled members or widows or orphans.

"Sec. 7. This association may grant benefits to members for sickness and funeral expenses. In case of prolonged indisposition of any member of this association in good standing at the time of such occurrence, it shall be the duty of a special committee to inquire into the circumstances attending the case, and if they deem it necessary they may appropriate such amount as will defray incidental expenses."

Funds accumulated in the treasury to the amount of \$1,800. At a regular meeting held on the 27th day of February, 1901, 20 members of said association being present, an order was passed by said association, by a vote of 12 for and 8 against, to distribute the funds in the treasury, except the sum of \$100 to be left in the treasury for expenses, among the members in good standing in said association. Christian Kalbitzer and 8 other members of the association filed their bill in the circuit court of Ohio county praying for an injunction against A. J. Goodhue, treasurer of said association, restraining and enjoining him from paying out, distributing, and dividing among the members of the association who were in good standing any moneys in his

hands as treasurer of said association and belonging thereto, except as provided in the constitution and by-laws of the association. An injunction was granted until the further order of the court. The defendant, Goodhue, treasurer, filed his answer to said bill, admitting that he was such treasurer, and that he was about to proceed under the said order of the association to distribute the funds among the members thereof in good standing, retaining \$100 in the treasury, the amount of money in his hands as such treasurer when the injunction was served upon him, averring that said funds had been lying in the treasury unemployed for a great number of months, and the presence of which had been a constant menace to the peace and tranquillity of the association. The affidavit of John C. Medick, and joint affidavit of said Medick, Boniface Gartener, and Anton Korn, and also the separate affidavit of Boniface Gartener, were filed in support of said injunction, and on the 22d day of July, 1901, the cause was submitted on the bill and exhibits and the answer thereto, and upon the said affidavits, when the court entered the decree perpetuating the injunction granted on the 7th day of May, 1901, prohibiting and restraining said Goodhue, treasurer of said voluntary association, and his successors in office, from paying out, distributing, and dividing among the members of said association who were in good standing any moneys in his or their hands as such treasurer of said association and belonging thereto, except as provided in the constitution and by-laws of said association, a copy of which constitution and by-laws was filed with the bill as exhibit No. 1; but the court awarded no costs in the cause. From this decree the said A. J. Goodhue, treasurer, appeals, and says that the court erred in granting the injunction without any notice of application thereof, and in refusing to dissolve the said injunction, and in perpetuating and making permanent the same.

The first error assigned—in granting the injunction without any notice of application—is not insisted upon by the appellant in his brief, and it will be seen that under section 3, c. 133, Code 1899, the court is authorized to exercise a sound discretion in the matter of notice to the adverse party. Said section provides that "any court or judge may require that reasonable notice shall be given to the adverse party or his attorney at law or in fact, of the time and place of moving for it before the injunction is awarded if in the opinion of the court or judge it be proper that such notice should be given." 1 Bart. Chy. Pr. §§ 131, 133. It is insisted by appellant that, no member having a vested interest in any part of the funds owned by it, the association had the power to dispose of the funds in the treasury upon a vote of a majority of a quorum; that we have no statute, no adjudicated cases, which lay down rules for the government of voluntary associations and that the analogy between corporator

and mutual benefit associations or voluntary associations—the “majority rule”—is strictly applicable here. A constitution and by-laws adopted by a voluntary association constitute a contract between the members which, if not immoral, or contrary to public policy or the law, will be enforced by the courts. 1 Bacon on Benefit Associations, § 37, in treating of such associations says: “The articles of association are doubtless to be considered in the light of an agreement between the members extending or limiting any general obligation which binds them to each other as members of a partnership. \* \* \* The members have ‘established a law to themselves.’ \* \* \* This fundamental compact is generally called the ‘constitution,’ and is analogous to the charter of a corporation.” And in section 38, *Id.*: “The association cannot change the purposes for which it was organized, as specified in its articles of association, without the consent of all the members; and although a minority present at a meeting where money is disposed of for a purpose different from that prescribed in the articles of association are bound, unless they then and there dissent, the vote does not bind those that are not present.” See, also, sections 62, 69, *Id.* In *Mason v. Finch*, 28 Mich. 282, in the opinion of the court, at page 286: “There is nothing but unanimous consent which can bind any member of an unincorporated company by any action not within the terms of the association. In joint enterprises, matters within the proposed scheme are usually left to be determined by such agencies or such votes as are agreed upon. Outside of the agreement, no one can be bound without his assent.”

Appellant cites *Ostrom v. Greene*, 161 N. Y. 853, 55 N. E. 919, and quotes therefrom as follows: “In a voluntary association a majority is entitled to control, and the minority, however hard it may be, must submit.” This seems to be an effort to have the court understand that the court held in that case that in all voluntary associations this principle applies, when in fact the court was speaking for that case alone, which was without constitution, rules, or by-laws, and what the court actually said very properly applied to that case. What the court did say is: “A majority is entitled to control, and the minority, however hard it may be, must submit.” In that case it is said by the court: “The association was not organized to make money for its members, but for a patriotic purpose. It had no articles of association, constitution, by-laws, nor rules of procedure.” And it is there further said that it was customary in that association for each meeting to transact business by the vote of the majority of those present, whether they constituted a majority of the entire membership or not. In the absence of anything which amounted to a contract, the custom of “majority rule” in their meetings would make the action of a meeting binding, so that in that case it was

properly held that the minority must submit to the action of the majority; but that ruling could not apply to any association which had a constitution or rules and by-laws, unless it was provided therein that the “majority rule” should obtain. In *Abels v. McKeen*, 18 N. J. Eq. 462, it is held that: “The vote must be for some purpose for which the money was contributed. A majority cannot devote the money of the minority, or even of a single member, to any other purpose without his consent.” In *Brown v. Stoerkel*, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430, it is held: “The articles of agreement of such an association, whether called a ‘constitution,’ ‘charter,’ ‘by-laws,’ or by any other name, constitute a contract between the members which the courts will enforce, if not immoral, or contrary to public policy or the law of the land.”

There is no provision in the constitution or by-laws and rules of the association in case at bar that a majority of the members of the association may direct a distribution of its funds among the members entitled thereto, and such action can only be carried into effect with the consent of all the parties to the contract. *Torrey v. Baker*, 1 Allen, 120; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392.

It is conceded in the answer that there were 24 members of the association. The resolution complained of was adopted by a vote of 12 for to 8 against, there being 20 members present and voting and 4 absent, so that, even if a majority vote was sufficient under their rules to make an appropriation for other purposes than those mentioned in the constitution, they failed to have such majority, and did not have a two-thirds vote of the members present. There is no provision in the constitution as to how many members shall be required to make a quorum for the transaction of business. Under section 4, art. 5, a provision is made that, when the funds of the association become exhausted, the members shall make such contributions as shall be determined by two-thirds of the members present, but no motion to tax the members should be decided at the same meeting at which it was made. The appropriation of the money to be distributed among the members was a purpose for which no provision was made in the constitution, rules, regulations, or by-laws. It is contended in the answer of the defendant and by the brief filed for the appellant that the funds had accumulated to such an amount as to menace and endanger not only the peace and tranquillity of the association, but its very existence; that \$100 was sufficient to meet all demands that might properly be made upon the association. This is not sustained by the record. That amount (\$100) might be sufficient to defray the necessary expenses as provided in section 5, art. 5, of the constitution, but not for the purposes mentioned in the following sections, 6 and 7, of the same article, which are hereinbefore copied.

In *Zabriskie v. R. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, it is held: "Corporators or partners associated for a special purpose specified in their charter or articles of partnership cannot change that purpose without the consent of all the corporators or partners." As held by the circuit court: "To distribute the funds in the manner contemplated by the resolution would be therefore a violation of the agreement of the association, and cannot be done until the agreement is modified in the way pointed out by the laws. The injunction is made perpetual, but no costs are awarded."

The court committed no error, and the decree must be affirmed, and the decree of this court is also without costs. *Torrey v. Baker*, supra.

(53 W. Va. 436)

**POCAHONTAS LIGHT & WATER CO. v. BROWNING.**

(Supreme Court of Appeals of West Virginia. April 28, 1908.)

**ESTOPPEL—ACQUIESCENCE—MISTAKE.**

1. A party lays a pipe line for conveyance of water, by mistake, partly in land of another, without right of way, and seeks to maintain the easement on the theory of estoppel based on conduct of the landowner. He cannot assert such estoppel, first, because the landowner's silence in omitting to tell the other party of his right is not an estoppel in pais, and also because he did not know that the line would pass or was laid through his land until after its completion; also because what the landowner is shown to have said was without intent to mislead the other party, or with reasonable expectation that it would be acted on; also because the other party was not induced or misled thereby to lay the pipe line.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by the Pocahontas Light & Water Company against J. L. Browning. Decree for defendant, and plaintiff appeals. Affirmed.

A. W. Reynolds and Douglas H. Smith, for appellant. O. W. Smith, Henry & Graham, Chapman & Gillespie, and Brown, Jackson & Knight, for appellee.

BRANNON, J. W. H. H. Witten conveyed to the Southwest Virginia Improvement Company a right of way for a pipe line for the conveyance of water, and the company laid the pipe line, and later sold the water plant and right of way to the Pocahontas Light & Water Company. The right of way, as conveyed by Witten, passed for some 874 feet through land not owned by him, but owned by A. St. Clair. St. Clair conveyed his tract of land to J. S. Browning. After the water pipe line had been down and operating some seven years, Browning began to remove that part of it upon his land; and then the water

company brought a chancery suit in the circuit court of Mercer county to enjoin Browning from removing the pipes, to declare an estoppel against the claim of Browning to remove the pipes, and to quiet the possession of the water company and its use of said pipe line through Browning's land, and to declare that it had good right to the easement of its pipe line and right of way through Browning's land. The result was the dismissal of the bill, and an appeal by the water company.

It is not questioned that the pipe line is in part on land of Browning, nor is it claimed that St. Clair ever gave right of way through his land. The whole claim of the water company is that it has title by estoppel in pais from conduct of St. Clair. It is not claimed that he ever expressly gave right of way or his consent to the construction of the pipe line. The whole claim is that he knew of the laying of the pipe line, and made no objection—in short, he was silent. The utmost that can be said to support this contention is that St. Clair passed along by where the ditch for the pipe line was made, and while it was open, and saw some of the iron pipes lying on his land, and thus knew of the construction of the work, and made no protest, and that in the town of Pocahontas, while the work was going on in the country, he talked with the superintendent, asking him when the work would be completed so as to be used in the town, and expressed interest in its completion, and said he had suffered loss as a property owner in the town from fire, and that the waterworks would be a great benefit to the town. Whilst I do not think that, even if this is true, it would devert St. Clair of his land, it is a very important element, for the company to sustain its position of estoppel against St. Clair, that he should have known before the pipe line was laid that it was to be laid through his land, for then it might be said that he allowed the company to expend money without objection. "A representation, admission, or act after the party's position has been changed will not avail as grounds for estoppel, because it cannot have been acted on." 4 Am. & Eng. Dec. in Eq. 286, citing *McCall v. Powell*, 64 Ala. 254, and many other cases. But he says he did not know that the line passed through his land until after it had been laid. It is not proven that he did know until later. The witness who says he passed by where the ditch was, and the pipes were being unloaded, leaves us to think that St. Clair was engrossed with business thought and did not observe. He says he paid no attention to the ditch, but passed on to Pocahontas. He says the line passed through a rocky, wooded corner of St. Clair's land. St. Clair lived 10 miles away from the line. St. Clair says the only work he ever saw in cutting the ditch was at a different point on the line. St. Clair seems to be fair; certainly not partial to Browning in his evidence—rather otherwise. As to ex-

¶ 1. See *Estoppel*, vol. 19, Cent. Dig. §§ 230, 275.

pression of satisfaction with the coming improvement, that was in casual conversation—just what any one would say—and is utterly frail and incompetent for the basis of estoppel. Did he make the remarks with intent to bind himself? There is no evidence at all that the company constructing the water line was in the least influenced by his remarks or silence, because it did not then have the faintest idea that any of the right of way passed through his land. How can the company say it was misled by what he said, or did not say, when no one thought of the line running on land of St. Clair? To make it an estoppel, the company must be able to say that it was led thereby to make outlay of money. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788. I repeat language cited to the same effect in *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891—that, “to create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is acting or about to act as he would not, had the truth been told.” *Viele v. Judson*, 82 N. Y. 40. The old case of *Stuart v. Luddington*, 1 Rand. 403, 10 Am. Dec. 550, so holds. So does *Hall v. Hall*, 30 W. Va. 780, 5 S. E. 260. I repeat the company did not act on either St. Clair’s words or silence, because the company did not know that it was on his land. We must say it was misled to its injury to set up an estoppel. 4 Am. & Eng. Decisions in Eq. 281, 287, where will be found, in a note to *Williamson v. Jones*, a most elaborate and valuable discussion of estoppel, and collection of authorities. See 2 Pomeroy, Eq. § 805. But suppose the company did act on St. Clair’s silence or talk. It will not create an estoppel, because one must not thus act recklessly—must use some care and diligence himself. There were the deeds on record. There was the line fence crossed by the pipe line dividing the Witten land from St. Clair’s. It was not necessary to prove that one claiming estoppel had actual knowledge of the truth, in order to defeat him. It is enough if he was bound to know the facts, or his means of knowledge were equal to those of the other party, for a failure to protect himself by using means of knowledge was negligence and disentitles him to equitable relief. 4 Am. & Eng. Dec. in Eq. 274. He must not know, or must be without means of knowing, the facts. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

The doctrine “that one who stands by and sees another laying out money on property to which he has claim, and does not give notice of it, cannot afterwards, in equity and good conscience, set up such claim, does not apply to an act of encroachment on lands the title to which is equally well known or equally open to the notice of both parties.” *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208; *Casey’s Lessee v. Inloes*, 39 Am. Dec. 677. Was it not clear negligence in the company to

lay its line on another’s land, when it could so readily have learned? If you build on my land, and I do not warn you, you get good title to my land. You cannot do so, even if I see you building. You should have inquired. “If a stranger enter upon the land of another and make improvements by erecting buildings, they become the property of the owner of the land. Were it not so, a person might gain a title by commission of trespass, and strip his neighbor of his estate, or subject him to compulsory expenses, under the pretext of improving his property. The foundation of property consists in its being an exclusive right. Other persons cannot impair its enjoyment or impose burdens on it by intermeddling with it without the owner’s leave or color of legal authority. \* \* \* I know of no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril.” *Crest v. Jack* (Pa.) 27 Am. Dec. 854; note to same case. “Equity will not, on mere ground of silence of the owner, relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the lands of such owner, without obtaining or asking his consent. *Marsh v. Weckerly*, 13 Pa. 252; *Knouff v. Thompson*, 16 Pa. 364.” *Hill v. Epley*, 31 Pa. 331; *Rogers v. Walker*, 6 Pa. 374, 47 Am. Dec. 470. “It is difficult to imagine how the concealment of a fact which an individual of common prudence and sagacity would discover can constitute a fraud. It is a clear elementary principle that the laws impute to the purchaser a knowledge of every fact of which the exercise of ordinary diligence would have put him in possession. And such an imputation of knowledge is sufficient to rebut the inference of a merely constructive fraud, which might otherwise be implied from the silence of the party.” *Alexander v. Kerr*, 19 Am. Dec. 616. *Clark v. Parsons* (N. H.) 39 Atl. 898, 76 Am. St. Rep. 150, is in point here. The idea that one man can get title to another man’s land, or title to an easement upon it, by improvement upon it, or making a road upon it, or a sewer, because he is silent, just as if he had given a grant, is absurd. No estoppel to work that grave result can exist except in the clearest case. The statute of frauds says it takes a deed to do this, but here it is sought to pass an easement in fee not even by word of mouth, but by mere silence. If this proposition prevails, what tenure has a man of his lands?

Another vital requisite of estoppel is that the person to be bound by it must know that his own right in the matter is being prejudiced by the act of another. Since fraud is the gist of estoppel, unless the person is fully



acquainted with the true state of affairs and with his rights in the matter, he will not be estopped; and therefore one who makes statements or does acts in bona fide ignorance of the facts and his rights will not be estopped, unless his ignorance was the result of gross negligence. 4 Am. & Eng. Dec. in Eq. 269; Bigelow, Estop. 519; Bower v. McCormick, 23 Grat. 321. St. Clair did not know that the pipe line would be on his land, or that it was, until after it had been laid. Was he bound to look to see that it would not be put on his land? That is virtually the proposition. Was it not more the duty of the company to look at deeds and the line fence, and survey, if necessary, rather than the duty of St. Clair to guess the company might use his land, and see to it that it did not? "In order to establish an estoppel, it is necessary that the representation or conduct relied upon should have been intended to influence the other party to act; and, if there was no such intent, the estoppel is not made out." "If the person who makes the representations does not know, and has no reasons to believe, that the other will act upon them, he will not be estopped." 4 Am. & Eng. Dec. in Eq. 276; Pom. Eq. § 806. The truth is, St. Clair neither did nor said anything to mislead or that did mislead, but he was simply silent when he did not ever know his rights were being invaded. Of course, this excludes all elements of estoppel. The company simply made a mistake in using St. Clair's land, and now wish to make their own mistake St. Clair's mistake, and charge it to the burden of the land of his alienee. It practically says or shows nothing but that it believed that its title was good. Therein, it shut its eyes to deeds, line fence, and open means of knowledge. Mrs. Cautley innocently built the wall of her house six inches over the proper line, but her mistake gave no right to another's land. Cautley v. Morgan, 51 W. Va. 304, 41 S. E. 201. In that case are points fitted to this case. "There can be no acquiescence [of St. Clair] without knowledge." "Mere silence, or some act done where the means of knowledge are equally open to both parties, does not create an estoppel in pais." "Silence will not estop unless there is not only a right, but a duty, to speak." Suppose St. Clair had even consented by express words. It would defeat the law requiring deeds to thus vest an easement such as this in land. A sewer easement cannot be made without deed. Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399, 40 L. R. A. 497. The proposition of the appellant is simply that one can go upon another's land without his consent, without his knowledge, make a pipe line on the land, and get perfect title to the easement. Nothing but the statute of limitations will make such a trespass confer title. It is hardly necessary to add another cardinal rule as to estoppel in pais. "The estoppel must be certain, and by this is meant not only that the facts upon which it is based should be

clearly proven, but they should not be capable of bearing any other construction than that put upon them. If susceptible of an interpretation which will not imply an estoppel, the latter effect will not be given them. In other words, the representation or act relied upon, and its effect, must be plain and definite, not ambiguous or equivocal." 4 Am. & Eng. Dec. in Eq. 263. "What is the reason of this rule? It is accurately expounded in the same decision [footnote, referring to Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316]. While the owner of the land may by his acts in pais preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of a doubtful character." "The doctrine of estoppel is never applied, in any of its branches, upon an uncertain and speculative state of facts." Bargamin v. Clarke, 20 Grat. 544. It is useless to discuss the cases of Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878, and N. & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755, and like cases, because they are not analogous cases, since the evidence is too weak to parallel this case with them. The evidence does not lift this case to their standard.

The facts and law plainly call for affirmation of the decree of the circuit court, and such will be the decree.

(58 W. Va. 376)

### CLARK v. McCLAUGHERTY

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

#### TAX SALE—REDEMPTION.

1. By deed dated and recorded January 30, 1895, M. conveyed to F. lot No. 11, in the town of Union, Monroe county. The lot was not transferred on the assessor's books for the year 1895 to F., but was charged in name of M., returned delinquent, and sold by the sheriff for the taxes of that year on the 13th day of December, 1897, and was purchased by J. C. M. On the 28th day of July, 1898, F. conveyed the lot to C., trustee, to secure a debt to A. No offer was made to redeem within a year from day of sale, and the purchaser neither took a deed nor order therefor of a court or judge within the second year after the sale. On the 14th day of December, 1899, C., the trustee, offered to redeem the lot as such trustee, and, as such agent of F., when J. C. M. refused to permit redemption, and on the 16th of December, 1899, procured a deed from the clerk for said lot. In a suit brought by the trustee to set aside such deed, *held*, that C. had the right to redeem.

(Syllabus by the Court.)

Appeal from Circuit Court, Monroe County; J. M. McWhorter, Judge.

Bill by R. L. Clark against J. C. McLaugherty. Decree for plaintiff, and defendant appeals. Affirmed.

W. Walter McClaugherty, for appellant. R. L. Clarke and John Osborne, for appellee.

McWHORTER, P. By deed dated January 31, 1895, Alexander McClearn and wife conveyed to Minerva French lot No. 11, in the town of Union, Monroe county. By deed executed on the 28th of July, 1898, said French and her husband conveyed the said lot to R. L. Clark, in trust to secure the payment to Eunice J. Andrew of five negotiable notes of \$41.12 each, at one, two, three, four, and five years, respectively, with interest payable semiannually. Said lot was charged in the name of McClearn on the assessor's books for taxes for the year 1895, not having been transferred to the grantee on said books for that year, but in subsequent years was charged to said grantee and taxes paid. The lot was returned delinquent for the year 1895 in the name of McClearn, and sold by the sheriff for taxes for said year on the 13th of December, 1897, and purchased by J. C. McClaugherty, who was clerk of the county court of Monroe county. The lot was not redeemed, and no application made therefor to the purchaser by any person having a right to redeem it, as provided in section 15, c. 31, Code 1899, within the year from day of sale, and no steps were taken by the purchaser to obtain a title therefor within the second year after the day of sale. On the 14th day of December, 1899, after the close of the second year from the day of sale the trustee, R. L. Clark, plaintiff in this cause, applied to the purchaser, McClaugherty, and offered to redeem the lot, tendering the proper amount for its redemption, which the purchaser refused to accept or to permit the said Clark to redeem, and on the 16th day of December, 1899, the purchaser procured from J. D. Beckett, clerk of the circuit court of Monroe county, a deed for said lot, the clerk of the county court being the purchaser. At the September rules, 1900, the said Clark, trustee, filed his bill against J. S. McClaugherty, Minerva French, and Edith Andrew in the circuit court of Monroe county, praying that the deed for said property, made on the 16th of December, 1899, by the circuit clerk, Beckett, to the purchaser, McClaugherty, be set aside, canceled, and held for naught, and for general relief.

The depositions of Beckett and Clark were taken and filed in the cause, and on the 27th day of March, 1901, the cause was heard upon the bill and exhibits, the amended and supplemental answer of defendant, and the exhibits filed therewith, and the bill taken for confessed as to Minerva French, and set for hearing on order of publication as to defendant Andrew, when the court held that plaintiff, R. L. Clark, trustee, was entitled to redeem the lot of land from the purchaser, McClaugherty, and that he had offered to redeem the same before the defendant, McClaugherty, got a deed therefor, and entered a decree permitting such redemption upon the payment to McClaugherty of \$27.84, being

the amount of taxes, and interest, costs, and charges thereon, paid by McClaugherty on said lot as of March 26, 1901, and set aside the said deed to McClaugherty with costs against the defendant, McClaugherty, from which decree said defendant appealed. The only question involved in this cause necessary to consider is whether the plaintiff had the right to redeem the lot at the time he applied to the purchaser on the 14th of December, 1899, to make redemption thereof. If he had the right to redeem, then the decree must be affirmed.

It is contended by appellant that under section 24, c. 31, Code 1899, Minerva French is the only person who had the right to redeem; that said section cannot be construed to include the assignee, alienee, or vendor of the former owner, as the section provides that the "former owner, his heirs and devisees," only, were vested with the right to redeem; that, while section 15, extended the right to redeem to the former owner, his heirs or assigns, or any person having a right to charge such real estate for a debt, within one year from the sale, section 24 provided another and different period in which redemption might be made, and confined the right to redeem solely to the "former owner, his heirs and devisees." 25 Am. & E. E. L. 412 (1st Ed.), under "Who may Redeem," says, "The terms 'owner,' 'persons in interest,' and like expressions, have received a broad construction," and cites many authorities. In *Adams v. Beale*, 19 Iowa, 61, it is held, "The terms 'owner' and 'parties in interest' in redemption laws have a broad and comprehensive meaning," and, further, "Any right which in law or in equity amounts to an ownership in the land, any right of entry upon it, to its possession, or enjoyment of any part of it, which can be deemed an estate, makes the person an owner so far as it is necessary to give him the right to redeem;" and in *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325, construing a section of the act of Assembly of Pennsylvania providing for sale of lands for taxes, it is held: "The law of Pennsylvania authorizing the redemption of lands sold for taxes ought to receive a liberal and benign construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner. The purchaser suffers no loss. He buys with full knowledge that his title cannot be absolute for two years. If it is defeated by redemption, it reverts to the lawful proprietors. It would seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction. It comports with the words and spirit of the law to consider any person who has an interest in lands sold for taxes as the owner thereof, for the purpose of redemption. Any right which in law or equity

amounts to an ownership in the land—any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it—makes the person the owner, so far as it is necessary to give him the right to redeem.” In *Bouvier's Law Dictionary* it is said: “The word ‘owner’ has no technical meaning, and, being ‘nomen generalissimum,’ should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the Legislature to protect.” *Railroad Co. v. Boyer*, 18 Pa. 497-499; *Watson v. Railroad Co.*, 47 N. Y. 161; *Moeller v. Harvey*, 16 Phila. 66; *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201; 1 *Hare*, Am. Const. Law, 355; *Dow v. Gould*, 31 Cal. 629-649.

It has long been settled in Virginia and in this state that a trustee in a deed of trust is a purchaser for value; being a purchaser and holding the legal title, he is an owner having a right to redeem under said section 15. If an “owner” under section 15, he is certainly a “former owner” under section 24. In *Hogg, Eq. Pr. § 478*: “It is settled beyond any question that the trustee in a deed of trust is the agent of the grantor and the beneficiary, and that he should so act as to promote their best interests.” *Stove Works v. Gray*, 9 W. Va. 469; *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810 (Syl., point 7). The appellant insists upon a strict and literal construction of section 24, so as to confine it exclusively to “the former owner, his heirs and devisees,” where it is provided that “if no deed or order therefor, of a court or judge, be made under the provisions of this chapter within one year after the right to redeem the real estate sold as aforesaid, shall expire as hereinbefore provided, the former owner, his heirs or devisees, may after such year and before such deed or order is made, redeem,” etc. If this literal construction is to be given to section 24, then, applying the same rule of construction to section 15, a devisee could not redeem under that section, as devisees are not mentioned therein, but only the owner, and “the heirs or assigns of any person having a right to charge such real estate for a debt.” So, the twenty-seventh section, providing that “if the owner of any real estate sold for the nonpayment of taxes thereon, his heirs or assigns, claim that the taxes on account of which the sale was made were not in arrear, he may, within five years after the deed shall have been obtained and admitted to record, institute a suit in equity against the purchaser, his heirs or assigns, alleging the payment of taxes and seeking to have the sale and deed declared void,” etc. The same construction given this section as that insisted upon by the appellant to be given section 24 would afford no relief to the personal representative or devisees of the owner. Appellant claims that under said section 25, c. 31, it is provided: “If at the time of such sale the real

estate sold be under a mortgage or deed of trust, or there be any lien or encumbrance thereon, and the mortgagee, trustee, cestui que trust, or person holding any such lien or encumbrance, shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title and interest of such mortgagee, trustee, cestui que trust, and of the person or persons holding any such lien or encumbrance on the real estate so sold and not redeemed, shall pass to and be vested in the grantee in such deed; and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance.” This is a provision for the protection of the purchaser against the holder of a debt or lien who fails to exercise his right to redeem under said chapter, where a deed has been properly obtained. The plaintiff in this case not only offered to redeem in his own right as trustee for the cestui que trust, but as the agent for the owner. This case involves no question of irregularity invalidating a tax sale, but only the right of redemption from a regular and valid sale. Our construction of the statute is that during the first year, under section 15, certain persons have the right to redeem. If that right be not exercised within the first year, nobody can redeem as against the purchaser at any time within the second year. During that time he may take his deed, concluding the rights of all others as to the land. If he fails to take the deed during that year, section 24 reopens for redemption against him in favor of the “former owner, his heirs and devisees”; and we hold the trustee to whom the legal title was conveyed in the first year after the sale, to be an “owner,” within the meaning of section 15, and a “former owner,” within the meaning of section 24, and therefore entitled to redeem.

There is no error in the decree, and the same must be affirmed.

(53 W. Va. 465)

CITY OF BENWOOD v. WHEELING RY. CO. et al.

(Supreme Court of Appeals of West Virginia, May 2, 1903.)

MUNICIPAL CORPORATIONS—GRANT OF FRANCHISE—NOTICE OF APPLICATION—COMMON COUNCIL—VACANCIES—ELECTION TO FILL—PAROL EVIDENCE—FRAUD.

1. In granting a franchise or privilege, the council of a municipal corporation or a county court performs a legislative, and not a judicial, function, and the notice required by section 1 of chapter 29, p. 82, of the Acts of the Legislature of 1901, is provided merely in aid, protection, and extension of the right to be heard by petition, and need not set forth the day on which the application will be, or is expected to be, acted upon. As the act requires the application to be filed 30 days before action upon it, and forbids any action upon it until after 30 days' publication of notice, the notice is merely intended to apprise the public of its pendency.

2. A statute requiring notice to be “given by publication for thirty days in some newspaper

of general circulation" published in a county or city, is sufficiently complied with by publication in the successive issues of a weekly newspaper through the period of time named.

3. Under a city charter requiring a quorum, composed of a majority of the members of the council, for the transaction of business, less than a quorum cannot convene a session of the council and transact business.

4. Where, in such case, less than a quorum meet, and attempt to declare the seat of an absent member vacant, and elect another person to his seat, and still another to the seat of a member whose resignation has been placed in the hands of the mayor, but not acted upon, before the other regular members appear, thus illegally giving themselves an apparent majority in the council, the alleged elections to fill vacancies are void, and the strangers so obtruded upon the council have no right to vote, and no measure can be passed by their votes.

5. Although, in a collateral proceeding, parol evidence is not admissible to contradict the record of the proceedings of the council of a municipal corporation, it is admissible in such case to show that the council had not, and could not have, convened at all, or acquired the right to make a record, when the alleged elections took place, although the minutes contain the recital, "Roll of members called, and a quorum found present."

6. Fraud both lurks and deals in generalities. (Syllabus by the Court.)

Appeal from Circuit Court, Marshall County; Thayer Melvin, Judge.

Bill by the city of Benwood against the Wheeling Railway Company and another. Decree for plaintiff, and defendants appeal. Reversed.

Erskine & Allison, for appellants. Caldwell & Caldwell, for appellee.

POFFENBARGER, J. Wheeling Railway Company and Wheeling Traction Company appeal from decrees of the circuit court of Marshall county refusing to dissolve and perpetuating an injunction awarded upon the application of the city of Benwood restraining said companies from making certain connections of street railway tracks and trolley wires in the streets of said city for the purpose of establishing a through line between the city of Wheeling and the city of Moundsville, which, instead of running through the main portion of Benwood, would pass along the border of the thickly settled portion of its territory. Two principal questions are presented. One is whether an ordinance granting the right to make the connections was passed by the common council of said city of Benwood on the 9th day of July, 1901, and the other whether, if such ordinance was passed on that day, it was repealed on the 23d day of July, 1901. The validity of the action of the council, on July 9, 1901, whereby, it is claimed, the privilege was granted, depends largely upon the construction of chapter 29, p. 82, of the Acts of the Legislature of 1901, consisting of one section, which reads as follows: "No franchise shall hereafter be granted by the county court of any county, or other tribunal acting in lieu thereof, or by the council of any city, town or village incorporated under the laws of this

state, where the application for such franchise has not been filed at least thirty days prior to the time when it is to be acted upon, by such county court or council, and notice of such application, stating the object of such franchise, shall have been given by publication for thirty days in some newspaper of general circulation published in such county or city wherein such franchise is to be granted. Nor shall such franchise be granted within thirty days after the application has been filed, nor until an opportunity has been given any citizen or corporation interested in the granting or refusing of said franchise to be heard. Nor shall any franchise hereafter be granted by any county court, or other tribunal acting in lieu thereof, or by any council of any city, town or village incorporated under the laws of this state, for a longer term than fifty years: provided, however, that nothing in this act shall prevent the renewal of any such franchise for a term not exceeding fifty years, when the same shall have expired. No franchise hereafter granted for any longer term than fifty years shall be of any force or validity." Application for the franchise in question was filed May 28, 1901, more than 30 days before it was acted upon, and notice thereof was published from May 30, 1901, until June 27, 1901, inclusive, in a weekly newspaper, published in said city of Benwood. The objection is to the notice and the manner of its publication. It was not shown by the notice when the council would, or would be requested to, act upon it, and it is further objected that the publication should have been made in a daily newspaper.

By counsel for the appellee it is insisted the notice and the action of the council in pursuance thereof are void by reason of the failure to specify in the notice the time at which the application would be acted upon. It will be observed that such requirement is not expressed in the act, and that the only express requirement as to its contents is that it shall state "the object of such franchise." To hold that such specification is essential, it must be found that it arises by implication. The only clauses from which such implication could arise are: "No franchise shall hereafter be granted by the county court of any county, or other tribunal acting in lieu thereof, or by the council of any city, town or village incorporated under the laws of this state, where the application for such franchise has not been filed at least thirty days prior to the time when it is to be acted upon," and "nor shall such franchise be granted within thirty days after the application has been filed, nor until an opportunity has been given any citizen or corporation interested in the granting or refusing of said franchise to be heard." With these the direction as to the time and mode of filing the application must be considered. Mere inspection of the statute proves that it may be filed at any time "with the clerk of such court or

council." Neither the clerk nor the applicant can fix the time of acting upon it. The applicant may say in the notice that he will request action upon it at a certain regular meeting, but that would fall far short of showing "when it is to be acted upon," for he has no power to compel action at that time, nor to prevent action at an earlier date, should the tribunal before which it is pending see fit to make an earlier disposition of the matter. The only restraint imposed upon such tribunal is the inhibition of the statute that the franchise shall not be granted within 30 days of the time of the filing of the application, nor until 30 days' notice shall have been given interested persons to be heard. The rule of implication in construction is that when a thing is commanded to be done such command authorizes all that is necessary for the performance of what is ordered. Sedgwick, *Con. St.* 228. In such case there is a necessary implication, which cannot be dispensed with. But this is probably only applicable where something not expressed in a statute must be read into it in order to make it effective. There are, no doubt, instances in which, in the performance of a thing required by a statute, a choice of means is allowed, and in that sense powers not necessarily implied arise merely by implication. The question raised here, however, is whether there is a necessary implication—whether the statement of the time of action upon the application is so essential to the doing of the thing ordered that it cannot be omitted. Its solution depends somewhat upon the nature and purpose of the notice and the proceeding to which it relates.

The granting of a franchise is a legislative, not a judicial, function. An application for such a franchise is in no sense, nor to any extent, a proceeding *inter partes*. Nor is it an adversary proceeding. It is not adverse, in a legal sense, to the municipal corporation to whose authorities it is made, for they have absolute discretion to grant or refuse it, and from their decision, properly given, there is no appeal. In a sense, the granting of the franchise is a matter of grace, proceeding voluntarily from them, and not a right which anybody can obtain by compulsory process. As to the citizen, it is not adverse, for under the power of eminent domain his property may be rightfully taken or damaged pursuant to the franchise, and his right is limited to the exaction of compensation, which does not arise upon the application for, or granting of, the franchise. By the Constitution, art. 11, § 5, this unrestrained power is vested in the council, and left ungoverned by any direction as to the mode of its exercise. We now have for the first time, in the statute under consideration, a regulation of it by legislative act. That regulation does not expressly say the time of action shall be stated in the notice. If, in nature, the notice were judicial, and had been prescribed as a mode of exercising the

fundamental requirement, in judicial proceedings, of citation, before hearing or condemnation, the time of hearing would be material, and of the very essence of the notice. It would be read into the act as being necessarily implied. No man could be reasonably expected to be able to effectually make answer to a demand made upon him, without notification of the time and place of hearing. Here no demand is made upon any individual. He is not called upon to answer or defend, but only to advise. The statute commands a hearing to be allowed, not only to those who are interested in the refusing of the franchise, but to those interested in the granting of it as well. Plainly, the interest referred to is merely the interest of persons and corporations as citizens. No other interests of theirs are subject to the powers of the council in such proceeding. Property rights of the citizen resultantly and indirectly affected by it come up for determination in other and subsequent proceedings in other tribunals. What, then, is the object of this notice? Clearly, nothing more than an extension of the right of the citizen to be heard by petition in respect to legislation. The application shall be filed 30 days before action upon it, and notice of its pendency shall be given by publication for the like period before action upon it. The public are apprised by the notice of the pendency of the application, and it is filed with the clerk so that any person who cares to examine it may know where to find it. In what manner he may express his approval or disapproval is not indicated by the statute, and a choice of means is clearly left open to him; but, obviously, he cannot interpose in bar of the proceeding, any right of his. This construction of the statute clearly eliminates any imperative reason for holding that the time of action upon the application shall be stated in the notice. Hence it cannot be said to be necessarily implied. Having only authority to regulate the discretionary power vested in the council by the Constitution, and the regulation made being, in a sense, in derogation of the powers so vested, there is no reason why the courts should hold that there was legislative intent to make the regulation broader than the terms used in the statute, nor to divest the council of its constitutional powers, except by express enactment. "Notice," as used here, has not received any judicial construction which gives it the meaning contended for by counsel for the appellee. A notice somewhat similar in character is required by section 2 of chapter 44 of the Code, concerning the establishment of ferries, and its language clearly imports that notice of the presentation of the application is sufficient. The object of a notice of the pendency of a legislative proceeding is stated in *Smith v. Helmer*, 7 Barb. 416, as follows: "That notice was a direction to the public, calculated merely to guard the Legislature

from surprise and fraud, and to prevent hasty and improvident legislation." In support of their contention, counsel for appellee cite *Elliott on Railroads*, § 1020; *Railroad Co. v. Frederic*, 46 Miss. 1; and *Morgan v. Railroad Co.*, 36 Mich. 428 (relating to the sufficiency of notice in condemnation proceedings); and *Braze v. Raymond et al.*, 59 Mich. 548, 26 N. W. 699; 1 Mor. Cor. (2d Ed.) 531; *Cook, Cor.*, etc., § 595; and *San Buenaventura Com. Co. v. Vassault*, 50 Cal. 534 (concerning the requisites of notices of meetings of stockholders and municipal boards). These are so essentially different in nature that the authorities really have no bearing upon the question involved here. For the same reason, *Adams v. Clarksburg*, 23 W. Va. 209, and *Reilly v. Oglebay*, 25 W. Va. 38, are also inapplicable.

Nor can the objection to the mode of publication of the notice be sustained. Publication in a weekly newspaper is a substantial compliance with the statute. A strict construction in this regard would lead to great inconvenience. Many counties and towns have no daily newspapers, and no provision is made by the statute for want of such papers, and it mandatorily requires publication in a newspaper of general circulation published in the county or city wherein the franchise is to be granted. Counsel for the appellee claim *Kellogg v. Carrico*, 47 Mo. 157, sustains their contention, but it does not decide that publication in a weekly paper is insufficient. It only holds that the omission of Sundays in the publication of notice of a judicial sale requiring publication for 30 days did not vitiate the notice. A similar statute, relating to publication of notice of sale under an order of sale in foreclosure proceedings, was construed in *McCurdy v. Baker*, 11 Kan. 111. It required "public notice of the time and place of sale, for at least thirty days before the day of sale, by advertisement in some newspaper." The district court ruled that only one insertion, 30 days prior to the sale, was required, but the Supreme Court held that successive publications in issues of the paper, commencing more than 80 days before sale, were required. It was made in a weekly newspaper, and no question seems to have been raised on that ground. Had the Legislature intended the publication to be made daily, it would no doubt have been more specific in the designation of the newspaper. It is required to be only a newspaper of general circulation. In construing statutes requiring newspaper publications, this court has heretofore applied the liberal, rather than the technical, rule. *Marling v. Robrecht*, 13 W. Va. 440; *Miller v. Neff's Adm'r*, 33 W. Va. 197, 10 S. E. 378, 6 L. R. A. 515; *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563. No reason is found, either in the language of this statute or in its nature, which requires more than a substantial compliance with its terms. Publication "for thirty days in some newspaper

of general circulation" is substantially fulfilled by publication in all the successive issues of a weekly paper for the required period of 30 days.

A third contention against the validity of the ordinance is that it was passed by a conspiracy on the part of the members of council in attendance July 9, 1901. That body consisted of eight members. The meeting was a regular one, and six of the eight members were present, while the mayor and recorder and two members were absent. Five of the six members present favored, and voted for, the ordinance, while the sixth one protested against the action on the application, and refrained from voting. It does not appear that any representations or artifice were used to procure or induce the absence of the mayor, recorder, and two councilmen. They say they understood there was to be no meeting, but fail to show that such understanding was had with any of the five members who favored the ordinance. Objection is made that one of the members unlocked the recorder's desk, and took out the minute book, and used it as recorder pro tem. for that meeting. But for the grievance found in the passage of the ordinance, it is very unlikely anybody would ever have complained of his action. Absence of the mayor and recorder could not prevent the holding of a regular meeting, and the council, when in session, was entitled to the use of the official books and papers. Another charge of impropriety is that the recorder pro tem. took the minute book to the office of the attorney for the railway company, and entered in it the minutes of the meeting. As it is not claimed that the proceedings were entered otherwise than as they occurred, it is immaterial as to where the writing was done.

Was the ordinance repealed at the meeting held July 23, 1901? That was another regular meeting day of the council, and the minutes of the meeting read as follows:

"Benwood, July 23, 1901. Council met in regular session, Mayor Shepard presiding. Roll of members called, and a quorum found present. The minutes of meeting of June 11, 1901, was read and adopted. On the following affidavit of Wm. Anderson the mayor declared Jacob Schramm's seat vacant, which was read, as follows, and ordered put on the records:

"State of West Virginia, Marshall County, to wit. This day personally appeared before me, Henry Riddle, a Justice of the Peace of Union District, said county, Wm. Anderson, who being first duly sworn doth say that Jacob Schramm, one of the members of the common council of the city of Benwood, in said county, did on or about the 20th day of June, 1901, move his property and family to the city of Bellaire, Ohio, with the intention of occupying all of said property as soon as I could vacate the same. I gave him possession of said property to Jacob Schramm on the 28th June, 1901, and to the best of my

knowledge he has occupied the same ever since. Wm. Anderson.

"Sworn to and subscribed to before me this 10th day of July, 1901, in said county. Henry Riddle, a Justice of Peace."

"On the filing of the above affidavit, by a majority vote of council, John Blake, a resident of second ward, was declared elected, and was sworn in by Mayor Shepard, and took his seat as a member of council.

"The resignation of councilman Henry Slippner, which is as follows:

"Benwood, West Va., July 23rd, 1901. To the Honorable Mayor and Council of City of Benwood—Gentlemen: I hereby tender my resignation as councilman of the city of Benwood. Respectfully yours, Henry Slippner."

"Motion by Councilman Stewart of Second Ward, second by Gately of Third Ward, that the resignation be accepted, carried.

"Wm. Hall, of the Fourth, was nominated and elected to fill the vacancy. He, being present, was duly sworn in as councilman by Mayor Shepard.

"The following ordinance was presented and was read first, second and third time under suspension of the rules, and passed by its title by the following vote:

"Gately, Kelly, Stewart, Blake and Hall voting aye.

"Seabright, Miner and Whalen voting no.

"An ordinance entitled an ordinance repealing all ordinances and resolutions which was passed by the rump council of the city of Benwood on July 9th, 1901, and striking from the records, if any record appears of such action by said council.

"Motion by Gately to adjourn carried by the following vote:

"Stewart, Kelly, Hall, Blake and Gately voting aye. Those voting no, Miner, Seabright, and Whalen.

"F. W. Potterfield, Recorder."

The entry stating that a quorum was shown to be present on the roll call is clearly shown to be false. It is so admitted by the recorder, and the mayor denies recollection as to who were present. The only members present were Stewart, Gately, and Kelly. The mayor ruled, on the affidavit alone, that Schramm's seat was vacant, and that, as Slippner had tendered his resignation, the number of councilmen were reduced to six, and he himself was ex officio a member, making seven, of which membership the three members present and himself, making four, constituted a quorum. They elected Blake to take Schramm's seat and Hall to succeed Slippner. All this was done very quickly, and possibly before the hour of meeting had arrived, which was 8 o'clock p. m. Just as this work was concluded, the other four members, Schramm, Miner, Seabright, and Whalen, came in, but Schramm was not allowed to vote. Miner swears they appeared between five minutes before and five minutes after 8 o'clock. In point of fact, Schramm had not moved his property and family to Bellaire, but had gone

there to take charge of a barroom for one Snyder. Bellaire lies across the river from Benwood, and only a short distance therefrom. Schramm had taken over a couple of chairs and a bed, and stayed there all the time, but his family and the principal part of his furniture remained in Benwood. Occasionally he came home at night, and sometimes his wife and children went over and stayed with him. He did not move until the latter part of October or the early part of November following. He personally went over to Bellaire and took charge of the saloon on May 28, 1901. Whether he intended to change his residence does not appear. He made an ineffectual effort to regain his seat by injunction, and on the 13th day of August the council, under the impression that they were bound to do so by the temporary injunction, actually restored him to his seat in that body, and put Blake out. At the same meeting they expelled Seabright on the ground of his having used offensive language about the mayor in the meeting of July 23d.

There was no quorum nor any authority to do business when Blake was elected to membership. The council consisted of nine members, the eight councilmen and mayor, by express provision of the statute. The mayor had no right to declare Schramm's seat vacant on a mere ex parte affidavit, without notice or citation. Assuming that he could consider Slippner's seat vacant on his resignation, which had never been tendered to the council nor acted upon, there were present only four out of eight, and by express provision of the charter the mayor had no right to vote except in the case of a tie, from which it may be doubted whether he could be counted as a member making up a quorum, although the charter says the mayor and councilmen "together shall constitute a common council." However that may be, there was clearly no quorum present, and no session of the council had commenced, when Blake and Hall were admitted to seats. They had no right to sit or vote in that meeting, and on the vote upon the ordinance to repeal the ordinance of July 9, 1901, the result was a tie; among those actually voting and entitled to do so, Gately, Kelly, and Stewart voting aye, and Seabright, Miner, and Whalen voting no. Schramm attempted to act, demanded his seat, and probably attempted to vote with the opposition, but he was excluded. The mayor did not vote. Hence the measure did not receive a majority vote, and so was not passed.

But can this be established by parol evidence in contradiction of the recital in the minutes, "a quorum found present"? "The minutes or records of the proceedings of municipal corporations such as cities, districts, towns, school districts, boards of highway commissioners, and boards of county commissioners, cannot be contradicted by parol or extrinsic evidence in collateral proceedings." 20 Am. & Eng. Ency. Law, 510. It is so held by the courts almost universally.

In *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223, this court holds that: "In the case of an inferior court, board, or body required to keep a record, the facts essential to give it jurisdiction must appear in its proceedings, else its action will be void, and open to attack collaterally; but, if its record state such facts, its jurisdiction will not be open to attack, nor can such facts be disproven in a collateral proceeding, nor will any error appearing therein affect its action." It is to be observed that this law relates to the record of the proceedings of such inferior tribunal, not to its organization, or the commencement of its session. In *Shank v. Ravenswood* the copies from the minutes of meetings of the council filed as exhibits show that the names of members attending the meetings were set out in the caption. This question did not arise in that case. If three out of eight members of a body may come together and declare themselves to be a quorum by a mere assertion to that effect spread upon the minute book, and that cannot be contradicted by showing who were actually present, the matter becomes serious indeed. It is at variance with the universal practice of public bodies for all time. No court ever proceeds to transact business without showing the name of the presiding judge or judges. The first thing appearing upon every record of every court, board, or other tribunal is the name or names of the person or persons acting. A municipal board has no powers except such as are conferred by statute. It can transact no business without the presence of a quorum. That a quorum is present must appear upon its record as a fact, and not as a mere conclusion or opinion, and the only way to make it appear as a fact is to set forth on the minutes the names of the persons in attendance. When that is done at the beginning of the session, the status so established is presumed to continue, unless the contrary appears in some way upon the record. The attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to consider or act in any way upon any matter. When the body is so legally convened and constituted, it has power to consider what is within its jurisdiction and authority, and to declare the existence of facts other than the fact of its own existence. Until it comes into existence, it cannot proceed, nor make any record of its proceedings. It has no authority to make a record showing anything. Less than a quorum are without power to act or bind anybody in any manner. Their action, being absolutely void, may be ignored or attacked in any proceeding. The record of a legally constituted tribunal is aided and upheld by a presumption in favor of regularity. Surely, there can be no presumption in favor of a record made by persons who have no shadow of authority to act. By making what purports to be a record, they cannot preclude an inquiry into their authority to make it, with-

out so much as even disclosing who they are. To allow a mere general statement of a conclusion to be put upon the minutes in lieu of an affirmative statement of such a jurisdictional fact would be to ignore the maxima, "*Fraus latet in generalibus*," and "*Dolus versatur in generalibus*," where their application is most necessary.

No such inquiry could be made in respect to a judgment or order of a court of superior jurisdiction. "Courts of inferior jurisdiction or limited powers must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted. The record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular cause, otherwise the judgment may be impeached collaterally. No presumptions are indulged in its support, and want of jurisdiction may be shown by evidence *abunde*." Black, Judg. § 282. At section 287 of the same work the doctrine announced by this court in *Shank v. Ravenswood* is given, but it does not cover the question here presented, since it relates to proceedings, assumed to have been had in a tribunal the existence of which is not drawn in question.

*Mayer v. Adams*, 27 W. Va. 244, asserts a principle more in point here than any other found, for it indicates how jurisdictional facts shall be made to appear upon the record of a court of special and limited jurisdiction. There the record of the county court, made at a special term, recited that it was a called session, held "pursuant to notice, as provided for by section 6 of chapter 5, p. 22, of the Acts of 1881." Judge Green said: "What was necessary in such a case was to set out on the record the jurisdictional fact—in this case the notice—under which this special session was called in its exact language, and the fact that it had been posted for more than two days prior to the meeting of the court by the clerk at the front door of the court house." The mere recital that notice had been given as required by the statute, referring to the section and chapter, was not sufficient, and it was held that the court had proceeded without jurisdiction. So here there can be no certainty as to the existence of a quorum without a recital of the names of those present. The absurdity of allowing a substitute in the form of a conclusion is made apparent and accentuated by the flagrant transaction sought to be covered and hidden by it in this case.

These views result in the conclusion that the franchise claimed by the appellants, and from proceeding under which they have been enjoined, was granted, and has not been repealed. Hence the decrees complained of should be reversed, and the bill dismissed.

BRANNON, J. (concurring). I do not see that oral evidence can be received to contradict the statement of fact in the council



record that a quorum was present. The first thing a council meeting must do is to ascertain whether a quorum is present. When it states the fact, it must be taken that its inquiry revealed that fact. That is a jurisdictional fact, I concede; but the fact is the ultimate fact, the result of the inquiry, and the record need not detail the facts going to show why it was found that a quorum was present. I think the proposition stated in *Shank v. Ravenswood*, 43 W. Va. 246, 27 S. E. 224, that the "facts necessary to be shown of record by an inferior tribunal are those facts only without which it has no power to act." "If the record shows that such facts were ascertained, it cannot be collaterally impeached." 12 Am. & Eng. Ency. L. (1st Ed.) 274, and note 2. I hesitate to unite in a rule of law opening council records to inquiry as to the constitution of all meetings where the record shows a quorum. It may bring much evil. By a direct proceeding for falsehood and fraud, the record might be overthrown. I prefer to concur on the ground that the grant was accepted, and could not be repealed. 2 Smith, Munc. Corp. § 1708; *City v. Citizens*, 166 U. S. 568, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Town v. Railroad*, 51 W. Va. 183, 41 S. E. 418; *Mercantile v. Collins (C. C.)* 101 Fed. 347; *N. O. Waterworks v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525. The only question about this point is whether the company had expended money on faith of the franchise before repeal. Is not the obligation assumed by acceptance to do railroad service a consideration to make a contract? At any rate, was not the repeal arbitrary, causeless action?

(53 W. Va. 441)

**SNOOKS v. WINGFIELD et al.**

(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

DEED — INSUFFICIENT DESCRIPTION — PAROL EVIDENCE — CONSTRUCTION — RULINGS ON EVIDENCE — EJECTMENT — EVIDENCE — BILL OF EXCEPTIONS.

1. When a deed describes the property thereby conveyed as real estate situated in a certain town, and known on the plat of said town as "Lot No. 30, Block 7," the identity of the plat may be shown by parol evidence; and, when shown, the plat becomes a part of the deed as fully as if it were set out in it.

2. Construction of the terms used in a deed, aside from extraneous evidence, is for the court.

3. The application of the description in a deed to the land is for the jury, and parol evidence is admissible to aid in making the application, but it cannot be used to enlarge the description.

4. When a question occurs before a court of law, whether certain evidence is competent or not, the determination of which depends on certain preliminary facts, those facts must be decided by the court.

5. When, in an action of ejectment, predicated a claim of title solely upon a deed referring to a plat, there is sufficient evidence of the identity of the plat to show *prima facie* that it is the one so referred to, and there is no evi-

dence to the contrary, the court should construe the deed as if the plat were incorporated in it, and rule accordingly upon the admissibility of oral evidence offered.

6. A bill of exception to the action of the court in excluding evidence offered is not available as ground of error unless it shows that the evidence was, or would have become, relevant, material, and important.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County; John Homer Holt, Judge.

Action by O. P. Snooks against T. Wingfield and others. Judgment for plaintiff. Defendants bring error. Reversed.

Harding & Harding and E. D. Talbott, for plaintiffs in error. J. Wm. Harmon and J. P. Scott, for defendant in error.

POFFENBARGER, J. Jonas Kisamore, being the owner of certain lands in Randolph county, a portion of which lay in a bend of Gandy creek, laid off said portion into town lots, and had a plat thereof made, dated August 10, 1894. The town was called "Whitmer," and the Dry Fork Railroad runs through it, on a course almost north and south, in or along a street called "Railroad Avenue." This street runs straight from the creek at one point to the creek at another point, so that a considerable portion of the town lies between it and the creek, in the bend. At the south end of this street, and on the west side, is located lot 30 in block 7, and bounded on the north by lot 31, on the east by Railroad avenue, on the southwest by Gandy creek, and on the west by an avenue. The northern boundary line is 100 feet, the eastern 105 feet, the western 35 feet, while the distance it runs along the creek is not given. At this point the Dry Fork Railroad makes a curve out of the street up along the creek, leaving a strip of land between it and the creek unplatted. The plat does not appear ever to have been recorded. By deed dated October 20, 1894, Kisamore conveyed to O. P. Snooks, for a consideration, as recited in the deed, of \$50, said lot 30, describing it as follows: "All the following described real estate situated in the town of Whitmer in the county of Randolph state of West Va. and known on the plat of said town as lot No. 30 Block No. 7 said lot running a straight line from lot 31 to the Creek running back 100 feet to an alley in the rear." Later, April 7, 1897, Kisamore conveyed to Mrs. Hannah Wingfield a portion of the unplatted land lying between the railroad and Gandy creek, and just across Railroad avenue from lot 30. On the same day he conveyed to Isaac N. Graves another portion of said unplatted land, and on May 20, 1898, Graves conveyed this to Thomas B. Crittendon. O. P. Snooks, claiming under his deed, brought an action of ejectment against Wingfield and Crittendon for practically all of the unplatted land lying between the railroad, the creek, and Railroad avenue. His contention is that Wayne Kisamore, son and agent of

¶ 2. See Deeds, vol. 16, Cent. Dig. § 255.

the grantor, who delivered the deed, at the time of its delivery went with him to the northeastern corner of lot 80, and represented to him that the eastern line of the lot, instead of running straight with Railroad avenue to the creek, as shown on the plat, ran in a southeasterly direction from the corner of lots 80 and 81 in a straight line, touching the railway right of way, to a snag or stump standing in the edge of the creek, a distance of several hundred feet from said corner. The point claimed by him, as shown by the report of the surveyor, is 370 feet distant. Young Kisamore testifies that before that time he had shown Snooks the plat. Snooks denies this. Kisamore says he did go to the lot and point out the lines to Snooks, but not that he showed him the plat at that time. Snooks put S. K. Nelson on the stand as a witness, who corroborated him as to the representations made by Wayne Kisamore. Snooks also claims to have paid \$140 for the lot, and insists upon this as evidence in his favor, because it is more than the lot is worth, as bounded by the lines of the plat. Against this, Kisamore contends that he had contracted the lot to Joseph Verzl, and that the sale was made to Snooks by Verzl, and the deed executed to Snooks by direction of Verzl. Evidence was also introduced tending to show that Kisamore had admitted that he had conveyed to Snooks all the land bounded by the river and lot 80. Bearing upon these contentions, there is contradictory evidence relating to the existence of a road where Railroad avenue is laid down on the plat in front of lot 30.

There are ten assignments of error, all of which practically turn upon two questions: First, whether the plat offered in evidence is sufficiently identified as the plat of the town referred to in the deed; and, second, whether the plat, if so identified, forms a part of the deed. F. A. Parsons, witness for defendants, testified that a blue print of a plat offered in evidence by the defendant was made from a plat made by him August 10, 1894, from his survey in laying off the town of Whitmer. There is no contention, so far as the record shows, that any other plat of said town was made prior to the date of the deed to Snooks, or at any other time. The court sustained the objection of the plaintiff to the introduction of this plat as evidence. This was error. In the absence of contradictory evidence, the testimony of Parsons was sufficient to show that it was the plat of the town. This having been established, that plat became a part of the deed, as much as if it had been incorporated in the deed; and the lines on the plat, bounding lot 30, limited the conveyance to Snooks, and his title, to the lines of the plat, as perfectly as if those lines had been specifically set down in the deed, and oral evidence was inadmissible to extend that title or the bounds of the lot beyond the lines laid down on the plat. The construction of the deed is

matter of law for the court, and cannot be left to the jury. As the plat was identified by Parsons, and there was no evidence tending to show that it was not the plat referred to in the deed, the court should have ruled on questions relating to the admissibility of evidence, on the assumption that the plat was a part of the deed. While the identity of the plat is a question for the jury, the jury is bound to find upon that question according to the evidence. And it was competent for the court to so instruct the jury. Moreover, as it had been shown *prima facie* that the plat was a part of the deed, it was the duty of the court to exclude all evidence offered for the purpose of contradicting the deed, or setting up title under it to lands not included in the description given in the deed and plat.

When a plat of premises is referred to in the grant or deed, it becomes, by legal construction, a part of the grant ordered, and is not explainable by evidence allunde any further than if inserted in the deed or grant. Hutch. Land Title, § 517. "A map or plat referred to in a deed, to fix a boundary, is regarded as a part of it." Id. "A lot on a town plat numbered and so described in the conveyance makes the plat a part of the conveyance." Id., citing *Dolde v. Vodicka*, 49 Mo. 100; *McClintock v. Rogers*, 11 Ill. 279; *Mayo v. Mazeaux*, 38 Cal. 442. "When a grant or deed refers to a certain plan, such plan becomes, by legal construction, a part of the deed, and is not explainable by extraneous evidence any further than it would be if actually inserted in the deed." *Kennebec Purchase v. Tiffany*, 1 Greenl. 219, 10 Am. Dec. 60; *McCall v. Davis*, 56 Pa. 431, 94 Am. Dec. 92. "The boundaries, monuments, courses, and distances laid down on a map referred to are as much to be regarded the true descriptions of the land as if they were expressly recited in the deed." 1 Jones, Real Prop. Conv. § 424; *Railroad Co. v. Commissioners*, 14 Gray, 553; *Erskine v. Moulton*, 66 Me. 276; *Ambrose v. Raley*, 58 Ill. 506. "If a deed describes the property conveyed as a lot of land in a town known and described on the official map of said town as Block No. 6, the map may be identified by parol evidence, and, when identified, constitutes a portion of the deed." *Penry v. Richards*, 52 Cal. 496; *Caldwell v. Center*, 80 Cal. 542, 89 Am. Dec. 131; *Vance v. Fore*, 24 Cal. 435; 3 Wash. Real Prop. 367. If the plat can be identified, it is immaterial whether the grantee had actual notice of it. Why should he have such notice of it, any more than of every stake, tree, and other monument called for? He accepts the deed with the reference in it, incorporating the plat, and is deemed to have notice of it. "The construction of the terms used in a deed, aside from extraneous evidence, is for the court." Jones, Real Prop. Conv. § 339. "The question of the application of a description to its proper subject-matter is for the jury, who may

have the aid of all competent extrinsic evidence. The question of the identity of the location is always one of fact for the jury." *Id.* "Parol evidence is admissible to apply the description to the parcel intended to be conveyed, when the terms used in the deed leave it uncertain what property was intended to be embraced in it. Such evidence cannot be used to enlarge the scope of the descriptive words, but only to fit them to the land intended to be described." *Id.* Plaintiff based his claim of title solely on the deed, as he was bound to do, and then endeavored to change the written description by parol evidence. This he could not do. He acquired title by that instrument to no land except what falls within its description, for title to land can only pass by deed, will, or descent.

Having thus settled the principles governing the case, they must be applied to the rulings of the court to which exceptions were taken. It is first contended that the plaintiff's deed was not admissible because variant from the declaration. This is untenable, for the reason that the plaintiff is not bound to recover all the land described in his declaration, nor is it necessary that the boundaries of the deed and declaration correspond in all respects. If the land described in the deed can be located by parol evidence within the calls of the declaration, and consistently therewith, the deed is admissible. The parol evidence introduced with the deed in this case shows that this may be done. A witness was asked what lots adjoining lot 30 were selling at, and was permitted to answer, over the objection of the defendants. This evidence was introduced to support the claim of Snooks to land outside of lot 30 as bounded by the plat, on the theory that he had paid more money than lot 30 was worth, and must have thought he was getting more land. The objection should have been sustained, and the evidence excluded. The same witness was permitted to testify, over the objection of the defendants, that the board walk on Railroad avenue does not run past lot 30, but goes to the corner of lots 30 and 31, and then turns off at right angles, or about so, toward the railroad; thus indicating that Railroad avenue does not run along the side of lot 30. This was evidence tending to contradict the plat as to the existence of Railroad avenue—a monument of the boundaries of lot 30 as shown by the plat. It should have been excluded. Another exception is to the action of the court in refusing to allow the plat to be introduced. Of course, this exception is well taken. Defendants attempted to show by Verzi that Kisamore had first contracted the sale of lot 30 to him, and he had resold it to Snooks, and directed the deed to be made to him, by way of rebuttal of the contention of Snooks that he had paid Kisamore more money than lot 30 was worth. All testimony on that subject for both parties was irrele-

vant, and the court properly sustained plaintiff's objection to this evidence. There is another reason why this exception is not well taken. The bills of exception do not show what it was proposed to show by the testimony of Verzi. An exception to the refusal of the court to permit the introduction of evidence is not available unless it is made to appear that the rejected evidence was, or would have been, relevant, material, and important. *Maxwell v. Kent*, 49 W. Va. 542, 39 S. E. 174; *Hogg's Plead. & Forms*, 428. The bills of exception here show only the questions propounded to Verzi, omitting to show what it was expected his answers would be. This rule has been ignored in nearly all the bills of exception in this case. By bill of exception No. 6, it appears that the court refused to permit Wayne Kisamore to answer the question, "What was it that Joseph Verzi directed you to make a deed to O. P. Snooks for?" The exception is not well taken, first, because it does not appear what would have been shown in answer to the question; and, second, because it seems to relate to the matter of purchase money, which is irrelevant. The same bill of exceptions sets forth four other questions propounded to Kisamore in reference to the plat. As to the subject-matter, these questions were proper, but it does not appear what it was expected the witness would answer. Hence the exceptions cannot be sustained. The same objection applies to bill of exceptions No. 8. Bill of exception No. 10 shows that the plaintiff was permitted to testify that in selling a part of lot 30 to J. W. Phleger, whose deed called for a beginning point on Railroad avenue, he fixed the point on the line contended for by him east of Railroad avenue. This was evidence of conduct on the part of Snooks, consistent with his claim, and inconsistent with his deed. It should have been excluded. Bill of exceptions No. 11 was taken against the action of the court in overruling a motion to strike out evidence of Snooks in relation to the location of Railroad avenue different from that shown by the plat, which motion should have been sustained, for the reasons given in the discussion of the plat as part of the deed. T. Winfield, a defendant, being recalled in his own behalf, was asked if Snooks had pointed out to him the location of the Phleger lot, and whether he located it above or below Railroad avenue. To this question the objection of the plaintiff was sustained. The subject-matter of the question is immaterial, and it does not appear what the answer would have been. Hence the exception is not well taken. Another exception is to the refusal of the court to permit the defendants to ask Snooks, while on the stand, to read to the jury, from the deed executed by him to Phleger, the description of the land thereby conveyed. The deed was in evidence, and it was unnecessary to have the witness to repeat to the jury the description

contained in it, even if it had been relevant and material. But the execution of that deed and the description contained in it were matters between Snooks and Phleger, in no way determining or affecting the question of what land was included in Snooks' deed for lot 30. Hence it was immaterial and irrelevant. The last assignment of error is based upon the action of the court in refusing to set aside the verdict and grant a new trial. Enough has been said to clearly show that the verdict is contrary to the evidence, and is wholly unsupported by competent evidence. It gives the plaintiff land not included within the calls of his deed, and this verdict is based entirely upon oral testimony inconsistent with, and in direct contradiction of, the description of the land set forth in the deed and plat. The court erred in refusing to set aside the verdict.

To this disposition of the assignments of error, and declaration of the legal principles upon which it proceeds, it may be objected that we make the circuit court decide the whole case in passing upon the admissibility of evidence; but it must be remembered that the question of admissibility is always for the decision of the court, although the decision of a preliminary question may virtually end the case. This case well illustrates the folly of allowing a jury to determine the issue upon incompetent evidence. Every such verdict must be set aside at the end of the trial. Is it not more just, as well as consonant with reason, to rule out such evidence, so that the finding must be upon competent evidence? Here a finding against the identity of the plat would be flatly contrary to all the evidence on that subject, and could not stand, for there is no evidence tending the other way. In holding the plat to be admissible and to be part of the deed, the court does just what the jury would have been bound to do, under the state of the evidence. The determination of this fact, whether by the court or jury, governs the whole trial of the case thereafter. When the plat is read with the deed, as a part of it, the plaintiff's right to recover is limited to its calls, and he is not allowed to enlarge them upon mere oral testimony. The court must decide upon the admissibility of evidence, even when, in order to do so, it is obliged to examine and pass upon questions of fact. *Thomp. on Trials*, § 318. "The court must decide upon the competency of title papers, and the right to use them, and, incidentally, under what title the party entered." *Carrico v. McGee*, 1 Dana (Ky.) 5. "When a question occurs before a court of law, whether certain evidence is competent or not, the determination of which depends on certain preliminary facts, those facts must be decided by the court." *Clayton v. Anthony*, 6 Rand. 285.

Plaintiff seems to have wholly misunderstood the nature of the action of ejectment. It is not the remedy for reformation of in-

struments, correction of mistakes, or relief on the ground of fraud.

For the reasons aforesaid, the judgment must be reversed, the verdict of the jury set aside, a new trial granted, and the cause remanded to the circuit court of Randolph county for further proceedings according to the principles here announced, and, further, according to law.

(33 W. Va. 415)

**ULLMAN, EINSTEIN & CO. v. BIDDLE BROS.**

(Supreme Court of Appeals of West Virginia.  
April 28, 1903.)

**SALE BY BAILEE—TITLE ACQUIRED—BONA FIDE PURCHASER.**

1. In general, no one can transfer a better title to a chattel than he himself has—even to a bona fide purchaser.

2. Mere possession, without more, of a chattel by a bailee for storage, will not be ground for inference of authority to sell, so that a bona fide purchaser can buy from him good title against the owner.

(Syllabus by the Court.)

Error to Circuit Court, Wood County;  
L. N. Tavenner, Judge.

Action by Ullman, Einstein & Co. against Biddle Bros. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. N. Miller and Caldwell & Watson, for plaintiffs in error. Van Winkle & Ambler, for defendants in error.

BRANNON, J. Ullman, Einstein & Co. brought detinue in the circuit court of Wood county against Biddle Bros. to recover 10 barrels of whisky, which resulted in a verdict of a jury finding for the plaintiffs 8 of the 10 barrels, on which verdict the court gave judgment for the plaintiffs, and the defendants brought a writ of error.

The side of the case of the plaintiffs is that their agent, Guggenheim, sold to Wilson, a liquor merchant, the whisky, and shipped it from Cleveland to Wilson, at Parkersburg; that, when advised of the shipment, Wilson declined to accept the whisky, and wrote the plaintiffs a letter so declining; that on receipt of the letter said agent went to see Wilson, and tried to get him to buy the whisky, but Wilson declined, and then an arrangement was made between them that Wilson should take the whisky into his store, and keep for the plaintiffs, on storage, until they could sell it, and the whisky was taken to Wilson's store. Wilson says that Guggenheim tried to sell him the whisky, but he refused to buy, but that, notwithstanding such refusal, the whisky was shipped to him, and that he wrote the plaintiffs that he would not take it; that then Guggenheim came to Parkersburg, and Wilson agreed to take the whisky, at the invoice, and thus purchased it. The whisky was shipped 23d

¶ 2. See Bailment, vol. 6, Cent. Dig. §§ 22, 23.

April, and Guggenheim saw Wilson and made the storage agreement 1st May, and again in June, as Guggenheim claims. On 11th July, Wilson sold his entire stock, including this whisky, to J. W. Depue, and on same day Depue sold a half interest to the Biddles, and a few days later the other half, and shortly after Depue bought back of the Biddles about \$2,000 worth of the liquors. Not a dollar was ever paid the plaintiffs. Wilson was at all these dates heavily in debt, beyond solvency—far beyond.

On the trial the court, on the motion of the plaintiffs, gave the following instruction: "If the jury believe from the evidence that the plaintiffs were the owners of ten barrels of whisky described in the declaration, and that the plaintiffs sent said whisky to Parkersburg, in or about the spring of 1898, to be delivered to J. L. Wilson, or to some other person in his behalf; and if the jury further believe from the evidence that J. L. Wilson, after being notified that the whisky had been shipped, refused to buy or to accept said whisky as a purchase, but that the said Wilson did afterwards take the same into his possession as the property of the plaintiffs, with the understanding that he would hold the same for the plaintiffs, and subject to their order—then, so long as Wilson held such whisky under that arrangement, the whisky remained the property of the plaintiffs, and Wilson had no title thereto, and could not pass title to the whisky, or make lawful sale of the property. And if the jury believe from the evidence that Wilson did take such whisky into his possession, agreeing to hold it for the plaintiffs as their property, as above set forth, then, before the jury can find that the whisky subsequently became the property of Wilson, the burden of proof is on the defendant to show by fair preponderance of the testimony that Wilson lawfully acquired title to the property after agreeing to hold it for the plaintiffs."

We see no error in that instruction. Plainly, if there was no sale passing title out of the plaintiffs to the whisky, and Wilson got it into his hands on storage as a bailee, while such storage existed, Wilson had not a shadow of title, and could pass none to Depue, and Depue could pass none to Biddle Bros. The last clause is specified as objectionable because it put the burden of proof on the defendants. It says that if Wilson had the whisky on storage—if that status once existed—then the defense must show that the storage arrangement was ended by a sale, because the defendants so asserted and claimed. They claimed under title conferred by sale, and must prove it. 1 Greenl. § 74. It is said that this instruction ignores the law respecting the rights of *Perdue* as an innocent purchaser without notice, as affected by the character of the possession of the goods by Wilson, and the indicia of title which he held therefor, and propounds an illegal proposition as to the burden of proof

resting on the Biddles, as innocent purchasers, and takes no notice of the fault of the plaintiffs in allowing Wilson to remain in possession of the invoice and permit Wilson to mingle the liquors with others sold. Practically, if this broad proposition be held, there can be no bailment that does not lose the property to the bailor, and give the bailee power to confer title on a purchaser, though that bailee has not an iota of title. It would violate that basic principle in the law of sales found in *Mechem on Sales*, § 154: "It is a fundamental doctrine of the common law, from which all discussion of the question must proceed, that, in general, no one can transfer a better title to a chattel than he himself has. 'Nemo dat quod non habet' is usually the inflexible maxim. That some or all of the parties acted in good faith or parted with value is usually entirely immaterial. However innocent the motives, or however valuable the consideration, if the party who assumed to convey had no right or title to transfer, no title can pass to the other." The very authority cited to support the contention of the Biddles says that "simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. *Ballard v. Burgett*, 40 N. Y. 314. The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." Opinion in *McNeil v. Bank* (N. Y. App.) 7 Am. Rep. 343. So, 1 Rob. Pr. 506: "Authority to an agent to sell personal property may be expressly conferred, but may also be implied from circumstances. Such authority cannot be inferred from mere possession of the property, even though the alleged agent be a dealer in property of that kind, but the principal must have done something more. He must have so acted as to clothe the agent with apparent authority to sell, or must have conferred upon him, or permitted him to assume, all of the apparent indicia of title." *Mechem, Agency*, § 335. Thus the possession by Wilson conferred no appearance of authority to sell. He was simply an agent to keep in storage. What did the plaintiffs do besides allowing this possession to give color of authority to sell? Nothing. The case above cited by counsel for Biddle Bros. was one where the owner of bank stock delivered to brokers to secure a balance the certificate of stock, indorsed with blank assignment, and irrevocable power of transfer, signed by him, and the brokers, without his knowledge, pledged the stock to one advancing money in good faith, and received from the brokers the certificate. He was held entitled to hold the shares. This is not in point. The owner had given

strong indicia of power to dispose of the certificate, and thus inspired confidence in the broker's authority—held him out as authorized—and it was a case fit for the application of the rule that, where one of two innocent people must suffer, he who caused the loss must bear it. *Dias v. Chickering*, 64 Md. 848, 1 Atl. 709, 54 Am. Rep. 770, does not apply. A piano manufacturer sent a piano to a firm of two to sell. One of the firm moved the piano to his home, and there sold it as his own to a bona fide purchaser. A majority of the court held that the purchaser had good title, because it was intrusted to the firm, with undenied power to sell.

Another instruction for plaintiff is complained of, but it is identically the same as that just discussed, except in phrase.

The court gave an instruction for the defense that the question involved in the case was in whom was the legal title to the liquor, and that if the plaintiffs invoiced the goods and shipped them to Wilson, and he declined to accept them, and later the plaintiffs' agent procured Wilson to accept them, and they were accepted and purchased by Wilson, and Depue purchased of Wilson, then the defendants had good title, and the jury should find for the defendants. This fairly presented the defendants' theory—in fact, too favorably, because omitting the fraud element—and, with the instructions for the plaintiffs, placed the two sides of the controversy fairly before the jury.

The defense complains that the following instruction was refused: "The jury are instructed that this is not a suit attacking the sale of the goods sued for by J. L. Wilson to J. W. Depue, and by Depue to the defendants, Biddle Bros., and this is not a question before you. The sole question is whether the legal title to the said goods passed from the plaintiffs to the said J. L. Wilson, and by Wilson to Depue, and from Depue to Biddle Bros.; and if you find that the said goods were purchased by Wilson from the plaintiffs, either when originally invoiced to him, or subsequently, in May, 1898, when Wilson received and took possession thereof from the railroad company, then you should find for the defendants." There is no proper matter in this instruction not contained in the instructions given, but it tells the jury that the question whether there were real, bona fide sales from Wilson to Depue and from Depue to Biddle Bros. was foreign to the case; that is, that though they might believe from the evidence that one or both sales were sham, false, and fraudulent, done with design to cheat the plaintiffs out of \$750 purchase money for the whisky, yet it had nothing to do with the case. Plainly, this is not so. If there was such fraud, could not the jury infer that, as the evidence of witnesses to sustain the validity of the sale was false, so was Wilson's evidence that he had purchased the

goods? Again, say that Wilson, in May, agreed to accept the goods. He was steeped in debt over \$12,000, was insolvent utterly, and concealed this from the plaintiffs; buying the goods when utterly unable to pay for them on credit. He was so deeply indebted that he could not answer its amount. This was a fraud on the vendors. He bought as if able to pay, and on credit. "Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them on credit, the vendor, if no innocent party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods." *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Morrow v. New England Co.* (U. S. C. C. A.) 24 L. R. A. 417, and note; *Benj. on Sales*, § 440, note, p. 470. "The existence of the intent [not to pay] is a question of fact for the jury, and here, as in other cases of fraudulent intent, a wide range of inquiry is allowed, to put before the jury all the facts and circumstances which may throw light upon it." *Mechem on Sales*, § 905. The same book (section 903) says: "Direct proof of an intent not to pay is usually impossible to make. It may therefore be deduced from facts and circumstances, without any actual representations; full knowledge by the purchaser of his insolvency being always a controlling element." Now, under this law, could not the plaintiffs show fraud to show Depue not a bona fide purchaser? I shall not discuss the evidence of fraud. It all came from the witnesses of the defendants. These parties were intimates. They had sold to one another liquor establishments again and again. Depue sold once to the Biddles; then bought back; then sold to Agery & Co.; then they sold to Wilson; then Wilson to Depue; then Depue to the Biddles on the same day Wilson sold to Depue. Wilson's sale to Depue, and his to the Biddles, all within a few days. The whole transaction at once attacked by another creditor, and they compromise, and Depue helps to pay. These and many other circumstances enter into the question of fraud. To say, as the defense asked the court by this instruction to say, that fraud was foreign to the case, would have been improper.

Lastly, as to the verdict. We cannot set it aside. I think it justified by the evidence; but it is enough to say for the court that the case before the jury was on questions of fact, on a large mass of oral evidence, flatly conflicting, given by various witnesses. As to the material point whether Wilson did finally purchase or take the liquor in storage, as on other matters, the case turned on credibility of witnesses, and we cannot interfere with the verdict. In such a case the verdict of a jury is sacred and beyond our power, as held in *Young v. W. Va. & Pittsburg Railroad*, 44 W. Va. 218, 28 S. E. 932.

We therefore affirm the judgment.

(53 W. Va. 116)

## WALDRON v. SPERRY.

(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)MALICIOUS PROSECUTION—TERMINATION OF  
ORIGINAL PROSECUTION.

1. On complaint and information on oath of S., charging W. with a felony, the justice before whom the complaint was made issued his warrant in due form for the arrest of W. The warrant was placed in the hands of an officer, who was authorized to execute it. W. was arrested thereon, and brought before said justice for examination on said complaint. S. was the only witness summoned on behalf of the state. He failed to appear. For that reason the examination was, by the justice, continued until the next day. S. again failed to appear, although he was sent for. The complaint and warrant were then dismissed by the justice, without having heard any evidence whatever, and the accused was discharged from custody. W. has not been in any way further prosecuted on said charge. *Held*, the dismissal of the complaint and warrant and discharge of W. as aforesaid are a sufficient ending and termination of that particular prosecution to entitle W. to maintain his action for malicious prosecution, so far as that element of his case is concerned.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County;  
J. M. Sanders, Judge.

Action by John W. Waldron against J. J. Sperry. Judgment for plaintiff. Defendant brings error. Affirmed.

T. F. Henritze, for plaintiff in error.  
Strother, Taylor & Strother, for defendant in error.

MILLER, J. On the 4th day of October, 1900, John W. Waldron commenced his action in the circuit court of McDowell county against J. J. Sperry for an alleged malicious prosecution. At the October rules following he filed his declaration, containing two counts, and laying his damages therein at \$10,000. On the 3d day of September, 1901, plaintiff caused notice to be served on the defendant that he would, at that September term of the court, demand and insist upon a trial of the said action. On the 12th day of September, 1901, the defendant demurred to the said declaration, which demurrer was overruled, and thereupon the defendant entered his plea of not guilty, and, issue being joined thereon, he moved the court to continue the trial of the action until the next term, and in support of his motion tendered and filed his own and the affidavit of Dr. G. W. L. Sandford, who was also examined in open court, touching the matters referred to in his affidavit. The court overruled the said motion, and the defendant excepted. Thereupon a jury was impaneled and sworn in the case; the evidence adduced by the plaintiff was heard, the defendant offering none; and a verdict was rendered in favor of the plaintiff against the defendant for \$500. The defendant then moved the court to

set aside said verdict, and grant him a new trial of the action; but the court refused so to do, and the defendant again excepted, whereupon the court entered judgment upon the verdict for said \$500 against the defendant, who then moved the court to arrest said judgment, which motion was also overruled, and the defendant again excepted. The defendant also excepted to the refusal of the court to give to the jury three several instructions, Nos. 1, 4, and 5, asked for by him, and also excepted to the giving of an instruction asked for by the plaintiff, all of which are hereinafter referred to. The defendant, during the trial, also excepted to the action of the court in admitting as evidence a certain warrant of arrest, with the return of the execution thereof indorsed thereon, and an entry in the docket of the justice, made after the return of said warrant. All of the evidence adduced on the trial, with the several rulings of the court, excepted to as aforesaid, appear by bills of exception.

Dr. Sandford's affidavit, sworn to on the 10th day of September, 1901, before T. F. Henritze, notary public, states, in substance, that he was the physician of defendant, who was then suffering from general nervous debility; that defendant's condition was such that he was physically unable to undergo the fatigue and excitement incident to a trial; and that he had been waiting on the defendant for about two weeks. Being cross-examined, Sandford further stated that he had seen Sperry since making the affidavit; that his condition was slightly better; that defendant had nervous debility, produced by alcoholism; that on the evening before witness had seen Sperry walking around in his yard at home, with a gun, shooting bull bats; that his then condition would not exist if he had not been drinking; that he was in the habit of taking periodical sprees; that his condition was such that he might ride to town (meaning the county seat); that the ride would be beneficial to him; and that he could appear in court without detriment to himself, but that he did not think that defendant could be cross-examined.

Defendant's affidavit, sworn to before said Henritze on the 11th day of September, 1901, states substantially that he was not ready for the trial of the action at that term, for the reason that he was physically unable to attend the trial and testify; that his testimony in the case was material to his defense; that he could not prove the same facts which he would testify to by any other witness that he knew of; that T. F. Henritze, one of his counsel in the action, had, at his request, soon after the institution of the suit, written to R. C. McClaugherty, an attorney at Bluford, to employ him as co-counsel in the case; that defendant had relied upon said McClaugherty as his attorney in the case; that he had been advised by his physician that the excitement and fatigue

¶ 1. See Malicious Prosecution, vol. 22, Cent. Dig. § 72.

incident to a trial of the case would be highly injurious to him, owing to his then physical condition; that said McClaugherty was not in attendance upon the court; that he had been informed on the first day of the then term that McClaugherty was not in a condition physically to properly try the case; that McClaugherty lived at Bluford, 86 miles away; that all of the correspondence in regard to the suit had been carried on with McClaugherty by his other attorney, T. F. Henritze; that defendant had on that morning made the trip from his home to Welch, a distance of about one mile, and that he was then able to make such trip again, but that the excitement and anxiety incident to attending the trial and testifying in it, he was advised by his physician, would very much retard his recovery, and perhaps completely prostrate him. Plaintiff asked leave to cross-examine said Sperry upon said affidavit, but he did not appear in court to be so examined.

This evidence shows that defendant had brought upon himself his then nervous debility; and he fails to show that his case could not be safely tried without his own evidence. It also appears that he then had counsel in court, attending to his interests in the case. Defendant did not make out a proper case for a continuance. *Tompkins v. Burgess*, 2 W. Va. 187; *Dimmey v. Railroad Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Rossett v. Gardner and Richardson*, 3 W. Va. 531. The motion, therefore, was properly overruled.

The declaration contains all of the requisites required by our adjudicated cases of this character. Appellant has not specified any defects therein. We find none. The demurrer thereto was also properly overruled.

The said warrant, as the evidence shows, was issued on the 12th day of September, 1900, in McDowell county, by W. G. Hunt, then a justice in and for said county, duly qualified and acting as such, upon the complaint and information on oath of said J. J. Sperry before said justice, and recites that John W. Waldron, on the 11th day of September, 1900, in the said county, one Smith & Wesson revolver of the value of \$24, of the goods and chattels of J. J. Sperry, then and there being found, did steal, take, and carry away. The warrant is directed to the sheriff, "or any other constable of said county," and required the officer forthwith to apprehend and bring before that or some other justice of said county the body of said Waldron to answer the said complaint, and to be further dealt with according to law. The return indorsed on said warrant shows that A. C. Hufford, deputy for W. W. Whyte, sheriff, executed the warrant by arresting J. W. Waldron, therein named, and delivering him to W. G. Hunt, Justice of the Peace of McDowell county, W. Va., on the 13th day of September, 1900. The entry in the docket of the justice recites that on informa-

tion on oath of J. J. Sperry on the 12th day of September, 1900, in the said county of McDowell and state of West Virginia, a warrant was issued for the arrest of John W. Waldron, for this, to wit, that he one Smith & Wesson revolver of the value of \$24, of the goods and chattels of J. J. Sperry, then and there being found, did unlawfully and feloniously steal, take, and carry away, and that the said warrant was duly served and returned before said justice on the 13th day of September, 1900, the said Waldron having been arrested by A. C. Hufford, and brought before the justice under said warrant on said 13th day of September, 1900; that thereupon said case was continued until the 14th day of September, 1900, for trial, said Waldron being left in the custody of said Hufford, a deputy sheriff, during said time; and that on said 14th day of September, 1900, said Waldron appeared, and announced himself ready for and demanded a trial, and, no witness appearing for the state, the case was dismissed without trial. We see no reason why said warrant, return thereon, and entry of the justice dismissing said prosecution should not have been received by the court as evidence along with the other testimony adduced. The court did not err in admitting them.

It was proved that A. C. Hufford arrested Waldron upon said warrant; that Hufford was a deputy sheriff of McDowell county at the time; that Sperry handed said warrant to him, and said he wanted Hufford to arrest that d—n s— b—, John Waldron; that he (Waldron) had stolen his pistol, and to put him in jail; that on the morning of the 13th of September Hufford did arrest Waldron; that Sperry was summoned as a witness, and the only witness, for the state; that several witnesses were summoned on behalf of Waldron; that in the evening of that day Waldron was taken before Justice Hunt; that his witnesses also appeared, but Sperry failed to appear, although he was sent for; that because of the absence of Sperry the examination was, by the justice, continued until the next day, and Waldron was again placed in the custody of the officer; that in the evening of the next day the said officer, with Waldron, went again before the justice; that two attorneys in behalf of Waldron and his witnesses were also there, but said Sperry, although again sent for, failed to appear, whereupon the said prosecution was dismissed by the justice, without any evidence being heard, and said Waldron was discharged therefrom, and released from custody; and that Waldron has not been in any way further prosecuted for or on account of said alleged offense. It was further proved that on the night of the 11th day of September, 1900, Waldron, being then a deputy sheriff of McDowell county, went into Hutson Bros.' saloon in the town of Welch; that at the time there were in the saloon Sperry, who was intoxicated, Dan



Harman, Bill Payne, Bub Payne, Clarence Switzer, Hutson, and others; that Sperry had a 32 Smith & Wesson revolver, loaded, in his hand; that he had been thrusting his pistol in the faces of some of the people there; that Waldron had gone into the saloon to see about the matter; that while Waldron and W. B. Payne were talking about it, Sperry came across the room, and jabbed Waldron in the stomach with the muzzle of the pistol; that Waldron grabbed the pistol, and wrenched it out of Sperry's hands, and put it into his own pocket; that afterwards Sperry asked him to give up the pistol, but Waldron told him that he would not give the pistol back to him until he got sober; that Sperry got angry, and said he would have Waldron removed as deputy sheriff; and that very soon afterwards, Sperry having disputed Waldron's word, Waldron knocked him down. It was also shown that the pistol was a new one, in good condition, loaded all around, and that such pistols could be bought in the market for \$12 or \$15. It was further proved that Waldron had been a deputy sheriff of the county continuously since 1893. There was other evidence given on unimportant matters, but none of it favorable to Sperry.

The instructions refused and the one given by the court, complained of by defendant, are in the words and figures following:

"(1) The court instructs the jury that the evidence in this case is entirely insufficient to entitle the plaintiff to any verdict in the case, and the jury is instructed to find for the defendant."

"(4) The court instructs the jury that the process upon which the alleged malicious prosecution in this case is based is void, and, if the jury believe from the evidence in the case that there was no restraint put upon the liberty of the plaintiff by the deputy sheriff, A. C. Hufford, in connection with said alleged prosecution, the jury shall find for the defendant."

"(5) The court instructs the jury that if they believe from the evidence in this case that the defendant was intoxicated, and approached the plaintiff on the night of the 11th of September, 1900, in a crowd, at the saloon, and punched him with his pistol, and the plaintiff forcibly took said pistol out of the possession of the defendant, and a quarrel ensued, in which the plaintiff struck and knocked the defendant down, and told him that he would return the said pistol to him when he got sober; and that the plaintiff did not return the defendant's pistol to him, and still had possession of the same on the 12th day of September, 1900, at the time the warrant referred to in this case was issued and delivered to A. C. Hufford, and that the plaintiff retained possession of said pistol until the 13th or 14th of September, when he turned the same over to the justice—such retention of said pistol was wrongful, and there

was probable cause for such prosecution, and the plaintiff cannot recover in this case."

"The court instructs the jury that, although no actual damages may have been proven by the plaintiff in this case, John W. Waldron, as to actual attorney fees and expenses about his defense in the prosecution commenced or pursued against him by the defendant in this case, J. J. Sperry, and although he may have proven no actual damages for loss of time because of the prosecution against him—but of all this the jury are to judge from the evidence in the case—yet the jury may give such damages as they think proper for injury to the plaintiff's feelings, person and character by his detention in custody and prosecution, if they believe from the evidence that there was a prosecution commenced or pursued against him by the defendant; and that said prosecution was instigated by the defendant, Sperry, without probable cause therefor, and with malice express, or implied from the want of probable cause; and that the prosecution was conducted to its termination to the final discharge of the plaintiff, John W. Waldron, without proof as to the amount of such damages, and the jury may give such punitive or exemplary damages as they may think proper for the conduct of the defendant, J. J. Sperry, if they believe from the evidence in this case that the said prosecution against John W. Waldron was commenced or pursued for the private ends of defendant, Sperry, or if they believe from the evidence that said prosecution was commenced or pursued with reckless disregard of the rights of the plaintiff, Waldron, and may assess such damages without proof as to the amount thereof, the amount of said damages not to exceed ten thousand dollars."

The gist of this action is the want of probable cause and the maliciousness of the defendant's conduct. *Tavener v. Morehead*, 41 W. Va. 116, 120, 23 S. E. 673; *Harper v. Harper*, 49 W. Va. 661, 669, 39 S. E. 661. In legal effect, instruction No. 1 declares that upon the evidence in the case Sperry had probable cause for instigating and procuring the prosecution of Waldron, as alleged in the declaration. In actions for malicious prosecution, whether a state of facts admitted, undisputed, or assumed constitutes probable cause or not, or whether from such facts the existence or absence of probable cause is to be inferred, is a pure question of law for the decision of the court, and not for the jury. Upon a supposed or assumed state of facts, no matter however complicated, if there be testimony tending to prove such facts, and they are pertinent to the question, the court is bound, at the instance of the parties, to instruct the jury whether such supposed or assumed state of facts does or does not amount to probable cause. *Vinal v. Core and Compton*, 18 W. Va. 1. The proposed instruction was improper in this case. The court

did not err in refusing to give it. The restraint or abuse of restraint of Waldron by the officer having him under arrest does not go to the foundation of this action, as instruction No. 4 assumes. Therefore the court correctly rejected said instruction No. 4. The theory of instruction No. 5 is that, if Waldron was guilty of a wrongful act toward Sperry, he (Sperry) had probable cause for the criminal prosecution against Waldron. The bare statement of this proposition shows the fallacy of the contention. Instruction No. 5 was also improper. The court did right in rejecting it.

No contention is made by defendant's counsel concerning the said instruction given at the instance of plaintiff. We see no objection to it.

Defendant's counsel contend that, the criminal prosecution against Waldron having been dismissed by the justice without any evidence having been heard, and said Waldron having been discharged from custody upon said charge, it is not such sufficient ending of the prosecution as entitles the plaintiff to maintain his action. *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470, is cited to sustain this view. On pages 403 and 404, 98 Va., pages 471, 472, 36 S. E., the court says: "Notwithstanding the warrant in the case at bar charges that the larceny committed was felonious, the justice before whom the accused [defendant in error] was brought for trial was clothed with power to convict or acquit him upon hearing the evidence. The offense charged in the warrant is a misdemeanor under our statute, the word 'feloniously' being used to characterize the intent with which the taking and carrying away was done; a felonious intent being an essential ingredient in the crime of larceny, whether grand or petit, distinguishing it from a mere trespass. \* \* \* In this case, therefore, the justice, with full power, upon hearing the evidence, to convict or acquit the defendant in error of the charge made in the warrant without hearing any evidence, dismissed the warrant, and discharged him. This action amounted to no more than the assent of the justice to a cessation of the proceedings without any examination whatever of the cause upon its merits. It was the equivalent of a nolle prosequi, nothing more, and could not establish the innocence of the defendant in error, nor show want of probable cause for the prosecution." The case of *Jones v. Finch*, 84 Va. 207 [4 S. E. 342], very much relied on by counsel for defendant in error, was a similar action to this, and it was there held that a discharge of the accused brought before a commissioner of the United States court upon the charge of robbing the United States mail, the commissioner being clothed with the power to send the accused on for trial or discharge him, was a sufficient termination of the prosecution to maintain an action of malicious prosecution; but the

court, in reaching that conclusion, emphasizes the fact that the declaration alleged that the commissioner discharged the accused and dismissed the warrant upon hearing the evidence. That is not this case. While the declaration here does allege that the prosecution upon which this action is founded 'is now wholly ended,' it is but an allegation of a conclusion of law, not warranted by the facts recited, and upon which it is made. They do not convey the idea of trial and acquittal, but import only a cessation of the proceedings without any examination whatever of the case upon its merits, and were, therefore, no bar to the institution of another prosecution for the same offense." It will be observed in the case cited that "the justice before whom the accused [defendant in error] was brought for trial was clothed with power to convict him upon hearing the evidence." The offense charged was a misdemeanor. In the case of *Jones v. Finch*, 84 Va. 207, 4 S. E. 342, the language of the court is: "The commissioner being clothed with the power to send the accused on for trial or discharge him, the discharge of the accused was a sufficient termination of the prosecution to maintain an action of malicious prosecution." The decisions cited are placed on the ground that the justice and commissioner were clothed with the power to try and determine the guilt of the accused upon the evidence. By certain provisions in chapter 50 of the Code of 1899, a justice has jurisdiction of certain misdemeanors, and may try, determine, and give judgment therein, with or without a jury, if none be demanded by the accused. Section 226 of said chapter defines the cases in which a jury may be impaneled. Section 230 prescribes the cases, and defines the modes of appeal to the circuit court; but in no case can a justice try and determine the guilt of the accused, and render final judgment therein, where the charge is for a felony. Code 1899, c. 156, § 1, provides that "a judge of a circuit court, in vacation, as well as in term time, or a justice, may issue process for the apprehension of a person charged with an offense." Section 2 that "on complaint to any such officer of a criminal offence, he shall examine, on oath, the complainant and any other witnesses, and if he see good reason to believe that an offence has been committed, shall issue his warrant reciting the accusation, and requiring the person accused to be arrested and brought before a justice of the county; and in the same warrant may require the officer to whom it is directed to summon such witnesses, as shall be therein named, to appear and give evidence on the examination." Section 15 of the same chapter provides that: "The justice shall discharge the accused if he consider that there is not sufficient cause for charging him with the offence; and he shall commit him to jail, if he consider that there is such cause, or let

him to bail under the sixth section. He shall require recognizance, with or without sureties, as he deems proper, from all material witnesses against the accused, and also for him if he desire it." And section 16, *Id.*, provides that: "When a justice so considers that there is sufficient cause for charging the accused with the offence, unless it be a case wherein it is otherwise specially provided, the commitment shall be for trial and the recognizance be for the appearance in the circuit court on some day of the term then being held, or on the first day of the next term thereof." In this case the justice could determine only whether or not there was a sufficient cause for charging Waldron with the offense stated in the complaint and warrant. If the justice considered that there was not sufficient cause for so charging Waldron, it was his duty to discharge him.

There was no evidence against Waldron, and, so far as the record in this case discloses, there could have been none produced to show that he either stole, or intended to steal, Sperry's pistol. What was the justice to do under the circumstances? He had adjourned the examination from the 13th to the 14th of September. Was he to hold Waldron in custody indefinitely? We think not. He dismissed the complaint, and discharged Waldron. This particular proceeding was then at an end. No appeal from the action of the justice could have been taken. It is true that the dismissal of the complaint and the discharge of the accused were not a bar to any further prosecution against him upon the said charge, but it is proved that there has been no further prosecution therefor. In *Harper v. Harper*, 49 W. Va. 661, 39 S. S. 661 (Syl., points 1 and 2), it is held: "Under section 12, c. 156, Code 1899, it is the duty of any justice before whom any person is brought for an offense, if demanded by such person, as soon as may be to examine on oath, in the presence of the accused, the witnesses for as well as those against him." "In an action for malicious prosecution, the discharge by a justice of the plaintiff, who has been arrested and brought before him for examination, or the refusal of the grand jury to indict him, is *prima facie* evidence of a want of probable cause, except in a case where it shall appear that such discharge or refusal to indict was after the hearing by the justice or the grand jury of the witnesses for the accused as well as for the prosecution, and such *prima facie* evidence is liable to be rebutted by proof." It seems that there was in this case a final determination and ending of the said criminal prosecution. The said verdict was warranted by the evidence. There is no error in the refusal of the circuit court to set aside the said verdict and grant the defendant a new trial of the action.

The judgment is right, and must be affirmed.

(38 W. Va. 332)

**BANK OF BRAMWELL v. WHITE et al.**  
(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

**DECREE—ENTRY—AMENDED BILL.**

1. The Bank of Bramwell brought its suit in the circuit court of Mingo county for the benefit of itself and all other lien creditors who would come in and contribute to the expenses of the suit against W., principal debtor, and T., his surety, for the purpose of subjecting the surety's real estate to the payment of the liens thereon. The cause was referred to a commissioner to ascertain and report the real estate of said T. and the liens thereon, and on the filing of the commissioner's report, on motion of the plaintiff, the cause was remanded to rules, with leave to file an amended bill making new parties, to sue out process, etc. An amended bill was filed, but it does not appear from the record that it was matured. The cause was brought on to be heard, among other things, upon the demurrers of T. and W. to the original and amended bills of plaintiff, and the defendants, T. and W., suggested the absence of the amended bill, and objected to a hearing of the cause until the same was restored; the amended bill not appearing in the record. *Held* error to enter final decree at that time.

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County; E. S. Doolittle, Judge.

Bill by the Bank of Bramwell against H. S. White and another. Decree for plaintiff, and defendants appeal. Reversed.

Sheppard & Goodykoontz, for appellants.  
Rucker & Anderson, for appellee.

McWHORTER, P. The Bank of Bramwell, suing for the benefit of itself and such other lien creditors as would come in and contribute to the expenses of the suit, filed its bill in the circuit court of Mingo county, against H. S. White and G. W. Taylor, at the June rules, 1897, alleging that it had recovered judgment before M. A. Hatfield, a justice, against the defendant H. S. White, for \$205.73, with interest from April 13, 1895; that on the 15th of April, 1895, an execution issued upon said judgment, directed to J. E. Steele, a constable of Mingo county; that on the 29th of April the execution was returned unsatisfied, because of a stay bond filed by White, under the statute, with G. W. Taylor, his surety; that on the 31st of October an execution was issued against White and his surety, Taylor, on his stay bond, directed to said Steele, constable, which execution it is alleged was returned January 25, 1896, unsatisfied; and that on the 25th of March, 1896, the third execution was issued on said judgment and stay bond, and returned to the justice with the indorsement thereon by the constable, "No property found." It is further alleged that still another execution was issued on the — day of March, 1897, on said stay bond and judgment, by A. M. Toler, justice, successor to M. S. Hatfield, directed to Elbert Riley, a constable, and by him returned with the in-

dorsement thereon. "No property found," as it was alleged would appear from a duly-certified copy filed with the bill, marked Exhibit 4, but no such exhibit appears in the record; that said judgment had never been paid; that subsequent to the rendering of said judgment, and before the expiration of the stay claimed by the justice, defendant White became insolvent, and his property and effects were placed in the hands of a receiver appointed by the District Court of the United States, and that he was still so insolvent; that the said stay bond under the statute had the effect of judgment as to said Taylor, and was in effect a confession of judgment, and was a lien upon Taylor's real estate, and the suit was for the purpose of enforcing the lien against the real estate of Taylor. And plaintiff further alleged that on the 13th of April, 1895, I. T. Mann also recovered judgment before the same justice against said White, and said Taylor signed a stay bond with White upon said judgment, and claiming that said Mann had a lien or liability upon the estate of said Taylor, which would be enforced in that court, and that said lien had never been paid by White or Taylor, or by any one for them, and mentioned other judgments against the same parties. Several of the exhibits, like Exhibit 4, before referred to, purporting to be filed with said bill, do not appear in the record, and that fact is set out as one cause of demurrer by the defendants, White and Taylor. The court sustained the demurrer to the bill, and gave plaintiff leave to amend at the bar, "which was accordingly done," when the said defendants again demurred to the bill as amended, but the demurrer was overruled.

There is but one bill filed in the cause, and it does not appear in what particulars the bill was amended. An order was entered May 17, 1898, showing that certain new parties were necessary, and remanding the cause to rules, with leave to plaintiff to amend its bill, making necessary parties, to sue out process, etc. It can be gathered from the record that an amended bill was filed, but it does not appear to be in the record, or that it was ever matured, at rules or otherwise. On the 16th of September, 1898, defendant Taylor filed his answer, to which there was general replication; he denied the material allegations of the bill, and called for strict proof of the allegations; denied that the so-called judgment claimed by plaintiff against the defendant White had not been paid off by the defendants or either of them, or that anything remained due thereon. Respondent admitted that after the rendition of said so-called judgment, the validity of which he denied, and before the expiration of the so-called stay bond granted by Justice Hatfield, the defendant White became insolvent, and his property and effects were placed in the hands of a receiver as stated, and that he was still insolvent, but denied that White's

estate would not be sufficient to pay the judgments; but on the other hand, his estate was worth more than \$80,000, a large portion of which consisted of real estate in Mingo and Marshall counties, and that if such judgment lien existed it was a lien upon the real estate of H. S. White, and it was the duty of plaintiff to enforce the same against the real estate of White before proceeding against the real estate and property of respondent, and denied the judgment and stay bond of I. T. Mann, and avers that, on the 31st of October, Mann caused to be issued against respondent and White, upon the said so-called judgment and so-called stay bond, the validity or existence of which respondent denied, in his favor, an execution, which was placed in the hands of J. E. Steele, a constable, upon which the following indorsements were made by said Steele, constable:

"Executed November the 22d, 1895, by levying the said execution on 15,000 feet of poplar lumber, the property of H. S. White, in Mingo County, West Virginia; advertised for December the 4th, 1895. J. E. Steele, C. M. C.

"December the 4th, 1895. No bidders; sale postponed until December the 20, 1895.

"December the 7th, 1895. Sale of the above property is enjoined. J. E. Steele, C. M. C."

That on the said 31st day of October, 1895, plaintiff caused to be awarded upon his pretended judgment and stay bond in its favor an execution, which was likewise placed in the hands of said Steele, constable, by virtue of which execution said constable levied on and took into his possession a large quantity of lumber on Beech Creek, located on the land of Elbert Kennada, and the said lumber so levied upon was worth at a fair cash value more than \$10,000, and which was the property of H. S. White, to which he had a valid and substantial title; that long after said executions went into the hands of said constable, to wit, in the month of December, 1895, White's property was placed in the hands of B. F. Meighen, receiver for said White, appointed by the United States Circuit Court for the District of West Virginia, in the equity cause of A. J. Sturgiss against H. S. White et al.; that said executions, by virtue of the levy aforesaid, became valid, existing, abiding, and continuing liens upon the said property levied upon, and were in full satisfaction and payment of said executions; and denied the charge of plaintiff's amended bill, to the effect that plaintiff's claim and the claim of Mann had been presented in said cause, and expressly denied that the plaintiff and said Mann had followed the said property and assets so levied upon into the federal court, and there asserted their lien thereon; upon the other hand, he charged that by the gross and wanton neglect and delay of said plaintiff and Mann in failing to assert their execution liens from

the time of the levy thereof, to wit, in the month of April, 1895, until the month of December, 1895, and afterwards into the federal court, was the sole cause of their failing to collect the amounts of the judgments mentioned, and that, if they had so failed to collect their debts, it was no fault of respondent; that the sales of said property under said executions in favor of said plaintiff and said Mann were postponed from time to time by the constable in whose hands said executions were placed, by the consent and direction of plaintiff and said Mann, all of which was without the consent or direction of defendant, whereby he was released and relieved of all liabilities by virtue of either of the stay bonds signed by him in favor of plaintiff and said Mann; and denied that it was true, as alleged in the bill, that the estate of White was wasted and misappropriated by the management of said White and agent for said receiver, or that the proceeds arising from the sale of estate would not be sufficient to pay the expenses of said receivership and cost of suit; that if said property had been wasted and misappropriated it was no fault of the respondent, and he should not be chargeable therewith, as the plaintiff and Mann took no steps whatever to protect their rights in the premises against the said White, knowing that if respondent was liable at all for the payment of their judgments he was only bound as surety therefor, and that it was not true, as alleged in the bill, that the plaintiff had no means of making its debts in any way, except out of the property of respondent; and denied that White was perfectly insolvent or unreliable, and that the property delivered by him to his receiver would not be sufficient to pay the plaintiff any part of its debt; and denied that said I. T. Mann was the absolute bona fide owner of the judgment in the bill mentioned; and named a list of 12 judgments, reported by Commissioner Hatfield in the cause as liens against respondent, which had been fully paid off and satisfied, amounting in the aggregate to \$986.34; and denied the existence of any judgment against him in favor of Baldridge-Hogan Saw Company, Sandford Dempsey's heirs, and Francis Biddler & Co.; and claims to have paid \$75 on the lien reported in favor of the defendant H. S. Waldron.

The defendant H. S. White filed his answer by leave of the court, and to which the plaintiff replied generally, which answer simply adopts each and every part of the answer of Taylor as his answer. The cause was referred to Commissioner J. M. Hatfield to ascertain and report the amount of real estate owned by defendant Taylor, its location, value, and his title thereto, and his interest therein, the liens thereon, and whether the rents and profits would pay off the liens within a period of five years or less. The commissioner made his report, to which the

defendants, White and Taylor, filed exceptions. In view of the fact that the record clearly shows that the cause was prematurely heard and final decree rendered before the cause was matured, it is not deemed necessary or proper to make further statement of the proceedings in the cause, except as to such final decree. On the 19th day of January, 1899, a final decree was entered, in part as follows: "This day this cause came on again to be heard upon the plaintiff's original bill and exhibits therewith filed, upon the proceedings at rules, and upon all the former orders and decrees heretofore entered herein, upon the demurrers of G. W. Taylor and H. S. White to the original and amended bills of the plaintiff, and the defendants, White and Taylor, suggested the absence of the amended bill, and objected to a hearing of this matter until the bill is restored, the answers of G. W. Taylor and H. S. White to the bill of plaintiff, with general replication thereto, and upon the report of account made by Commissioner J. M. Hatfield filed in open court on the 18th day of May, 1898, and upon the depositions returned with said report, and upon the exceptions to said report filed by G. W. Taylor and H. S. White; and, the same being argued by counsel and the report having been seen and inspected by court, said exceptions are overruled, and said report is hereby in all things approved and confirmed; and thereupon the death of the defendant J. A. Nighbert was suggested and admitted, but the plaintiff declines to revive his bill so far as the suggestion is concerned; and it appearing from said report that the defendant G. W. Taylor is indebted to the following named persons in the amount set opposite their respective names"—and proceeded to make a list of claims, amounting in the aggregate to nearly \$3,000, which are decreed to be liens upon the several tracts of real estate belonging to said Taylor, which real estate is decreed to be sold to pay off said liens. From this decree the defendant G. W. Taylor appealed, assigning numerous errors; but it is unnecessary to notice more than one. It will be seen that the defendant Taylor denied in his answer allegations alleged in the answer to be contained in the amended bill, and which are not in the bill which is set out in the record, which allegations are important in arriving at proper conclusions on the issues involved in the cause, which emphasizes the necessity of the presence of the amended bill, that a full, fair, and just hearing may be had of the cause. The defendants, Taylor and White, having suggested the absence of the amended bill and objected to a hearing until it was restored, it was error in the court to hear the cause at that time.

Therefore the decree is reversed, and the cause remanded to be fully matured and proceeded in according to the rules governing courts of equity.

(53 W. Va. 348)

**NICHOL v. HUNTINGTON WATER CO.**(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)**WATER COMPANIES—LIABILITIES—LOSS BY  
FIRE.**

1. A water supply company occupying the streets of a city under an ordinance requiring it to maintain a certain number of fire hydrants, and providing for payment of an annual rental therefor by the city out of its revenues derived from taxation, is not liable in an action, either *ex contractu* or *ex delicto*, for the loss of a building by fire, which could have been saved but for its failure to have the mains and hydrants supplied with sufficient water for fire protection at the time of the fire.

2. Recovery for such loss cannot be had by the owner of the property upon a contract between his tenant and the water company to keep the building supplied with water for "domestic, sanitary, and fire purposes."

(Syllabus by the Court.)

Error to Circuit Court, Cabell County; *Els. Doolittle, Judge.*

Action by Frances L. Nichol against the Huntington Water Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Williams, Scott & Lovett, for plaintiff in error. Simms & Enslow, for defendant in error.

POFFENBARGER, J. Frances L. Nichol complains of a judgment of the circuit court of Cabell County sustaining a demurrer to her declaration against the Huntington Water Company, a private corporation, and dismissing her action upon her declination to amend. She was the owner of a building, called the "Hotel Adelphi," which was totally consumed by fire July 2, 1901, which, when first discovered, was confined to the top of the building, and did not burst through the roof into a blaze until some time after the arrival of the city firemen, with hose and appliances suitable and sufficient to have extinguished the fire and saved the building had there been water in the pipes and hydrants of the defendant company.

Said declaration further avers the authority of the city of Huntington under its charter to make regulations guarding against danger or damages by fire to itself and owners of property within its limits, by erecting, authorizing, or prohibiting the erection of waterworks in or near the city; that it had passed an ordinance authorizing certain individuals to construct, maintain, and operate waterworks to supply the city and its inhabitants with water for fire and domestic purposes; that said franchise or contract had been assigned, by the individuals to whom it was granted, to the defendant company; that, in pursuance of the authority given by said ordinance, said company constructed said waterworks, and was operating the same at the time of said fire; that, by contract contained in the said ordinance as

accepted, 84 hydrants were located and constructed by the company for fire protection, in consideration of an annual rental of \$3,000 to be paid by the city; that a number of these hydrants were located near enough to said hotel to have been available for its protection had they been supplied with water; that all taxable property in said city, including the said hotel property, had been assessed with taxes for the payment of said rental, which taxes assessed upon said property of the plaintiff had been paid; that by its acceptance of said franchise it became and was the duty of the defendant company to keep all of said hydrants in good order, and constantly supplied with sufficient water for fire service; that plaintiff's tenants then in possession of said hotel, by payment of the sum of — dollars, had acquired the right to use, and the defendant company undertook and promised to supply, water at said hotel, for the then current quarter, for domestic, sanitary, and fire purposes, in consideration of the payment of said sum; that the contract so made between the said city and W. S. Kuhn, and assigned to the defendant company, was made for the use and benefit of all the property owners and inhabitants of said city, including the plaintiff, who then owned said hotel; that by virtue of the premises it was the duty of the defendant to keep a constant and sufficient supply of water in its pipes and hydrants, to afford, at all times, the greatest possible protection to all property within the city; and that, at the time of said fire, the defendant had persistently, carelessly, and negligently, and not because of unavoidable accident, refused and failed to furnish its mains and hydrants with any water with which to extinguish the fire, and so refused, neglected, and failed to furnish any water to the said hotel, by reason of which tortious and negligent conduct her said building was wholly destroyed by said fire, whereby she suffered damages amounting to \$30,000.

The writ commands the defendant to be summoned to answer the plaintiff "of a plea of trespass on the case." The declaration recites that it has been summoned to answer in the same way.

The allegations of the declaration strongly import a purpose to state a cause of action founded upon contract, and, for the plaintiff in error, the declaration is so treated in the brief. For the defendant in error, it is insisted that the declaration is for a tort, based upon a breach of duty arising from the two alleged contracts, one between the city and the defendant, and the other between the plaintiff and the defendant. As the all-important question is whether a cause of action, either *ex contractu* or *ex delicto*, is or can be stated upon the facts disclosed by the declaration, it is unnecessary to give time and labor to an attempt to settle the controversy concerning the character of the de-

laration. If it shall be found that a good cause of action cannot be predicated upon the facts, such an attempt would not only be supererogant, but might result in an erroneous determination of a doubtful question and the making of a bad precedent.

The case of *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665, establishes the doctrine that a city owning its own waterworks under a charter not compelling, but permitting, it to own and operate such works, is not liable for loss of property by fire caused by the negligence of the agents and servants of the city in suffering the water pipes to become useless, so that they will not supply water for the extinguishment of fire. It is further held in that case that it is wholly immaterial, on the question of such liability, whether the city charges those who are supplied with water a certain annual water rent therefor, by way of raising the means to defray the expenses of the maintenance and operations of such works, or whether such expense is defrayed by funds provided by direct taxation. In that case, the opinion delivered by Judge Johnson reviews practically all the cases which rest a distinction upon the ground that the city charges individuals for services rendered them, such as furnishing water or gas, and repudiates that distinction in the following language: "The idea seems to have been in the minds of these courts that, unless the cities were to receive a profit for the use of their waterworks, they would not be liable for the improper construction or improper use of the works. They seemed to so hold in view of the fact that it had often been decided that a municipal corporation was not liable for injuries resulting from the negligence of its agents while discharging a purely governmental duty. It seems to me that, as applied to a municipal corporation, the idea of profit to be received by the corporation has nothing to do with its liability. It receives no profits, in the sense that a private corporation does, from its operations. In the case of a private corporation the profits received are divided among its stockholders. After the payment of the debts of a private corporation, every dollar of its earnings is at the disposal of the corporation, to be distributed in dividends to its stockholders or reinvested for their individual benefit. Not so with a municipal corporation; not one dollar of its earnings, after its expenses and other debts are paid, can by any possibility accrue to the benefit of any private individual. There is no stock, and can therefore be no stockholders, in a municipal corporation. If any profits accrue to it, they at once go to the benefit of the public. \* \* \* If a city owns its waterworks, it may pay its running expenses and repairs by taxation, if it pleases, and furnish water free to all who will comply with its regulations; or, as is generally the case, and is more just and equitable, it may keep up its works and repairs by charging each

individual at a fixed rate for the water he uses, and, if there is any surplus, it is used in some other way for the benefit of the corporation to lessen the burdens of its citizens. Whatever profit, if it may be so called, it receives, the officers of the city charged with municipal duties, among which are the management of its waterworks, do not receive it, or any part thereof, but it goes to the benefit of the public. It is not, properly speaking, a profit, but it is a mode of taxation to meet the burdens of the municipal government. No case has been cited which shows that the plaintiff's action here can be maintained. On the contrary, many cases have been cited which in principle decide that a municipal corporation is not responsible for damages for loss by fire which was caused by the negligence of the servants or agents of the city in charge of the waterworks and pipes under the city's control."

This effectually disposes of a large number of authorities cited in the brief for the plaintiff in error as sustaining the contention that there is nothing in the nature of the contract that would relieve the water company from liability; it being contended that as, under these authorities, the city would be liable upon such a contract as was made with the water company, and to the extent of the damage set up against the defendant, said defendant would be clearly liable, it being only a private corporation. These authorities are, *Tied. Mun. Corp.* 644, § 327, also pp. 644-688, §§ 327, 336; *Sher. & Redf. Neg.* § 236; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Bailey v. Mayor, etc.*, 3 Hill, 531, 38 Am. Dec. 669; *Savings Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Oliver v. Worcester*, 102 Mass. 500, 3 Am. Rep. 485. Most of these authorities are wholly inapplicable to the case presented here, for they relate to actions for injuries inflicted upon persons or property in the exercise of the powers conferred—affirmative acts inflicting injury—and not to cases of failures to exercise the powers at all, in consequence of which individuals have suffered losses. Many of the authorities say that, for injuries resulting from the negligent exercise of the power, municipal corporations are liable, upon the theory that, in undertaking to furnish water or gas or other commodities to individuals, and charging therefor, they depart from the purpose for which such corporations are created, and engage in business enterprises, and become assimilated to private corporations. That is stated merely as a reason for holding them liable for injurious acts done in the exercise of such power. These courts do not go so far as to say that there is a binding contract between the municipal corporation and the individual for the nonperformance of which, on the part of the corporation, the individual has a right of action for damages. As has been seen, this court puts the ground of recovery of damages for injuries resulting from the negligent

exercise of the power upon an entirely different ground. In *Saving Funds Soc. v. Philadelphia*, the question was not liability for damages, either for the nonexercise of the power or the negligent exercise thereof, and the court adopted the same line of reasoning in reaching the conclusion that an injunction be awarded against the city restraining it from taking possession of gas-works to the injury of persons holding loan certificates, called "City Gas Loans." So that case has really no application here.

In the opinion in *Mendel v. Wheeling*, the following is quoted from the opinion in *Brinkmeyer v. Evansville*, 29 Ind. 187, delivered by Elliott, J.: "A municipal corporation is for the purposes of its creation a government possessing, to a limited extent, sovereign powers, which in their nature are either legislative or judicial, and may be denominated 'governmental' or 'public.' The extent to which it may be proper to exercise such powers, as well as the mode of that exercise by the corporation within the limits prescribed by the law creating them, is of necessity intrusted to the judgment, discretion, and will of the properly constituted authorities to whom they are delegated. And, being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them, or for error committed in their exercise." As much of the substance of this quotation is incorporated in the syllabus of *Mendel v. Wheeling*, it is but fair to say that this court has approved it as sound law. It lies at the basis of the decision of that case. It holds that a municipal corporation is not bound to furnish protection from fire, and that, when authorized so to do by legislative act, it has discretion to omit the exercise of that power, and there is no duty resting upon it which may form the basis of a contract between the corporation and the citizen who owns property. This is the position taken by the great majority of the courts which have passed upon the question. *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Grant v. City of Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Tainter v. City of Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Foster v. Water Co.*, 3 Lea (Tenn.) 42; *Vanhorn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256.

This principle governs also the relation of a private or quasi public corporation toward the citizens and property owners of the city in which, under a contract with the city, it undertakes to furnish water for protection against fire, in consideration of the payment by the city of an annual rental. *Davis v. Water Works Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; *Becker v. Water Works Co.*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Britton v. Water Works Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856;

*Howsmen v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Ferris v. Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Fowler v. Water Works Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Mott v. Water & Mfg. Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Safety Deposit and Trust Co. v. Water Co. (C. C.)* 94 Fed. 238.

Thus, in *Becker v. Water Works Co.*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377, it is held that "the law which authorizes cities to contract for the building and operation of waterworks by individuals or companies confers no power to contract with such individual or company to indemnify a citizen and taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action therefor in his own name." In the *Howsmen v. Water Co.* Case, the ordinance provided that, "should said water company, from lack of supplies, or any other cause, except providential, or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect." But the court held that "a water company which agrees with a town to be liable for damages caused by its failure to supply water sufficient to extinguish all fires cannot be sued on such agreement by a citizen, though he and others pay a special tax to the company under the contract." In *Davis v. Water Works Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185, the court treated the water works company as an agency or instrumentality in the hands of the city, in the exercise of its police powers, and gave it the same immunity from action by citizens as is given to the officers of a city, using the following language: "The plaintiff received benefits from the water thus supplied, in common with all the people of the city. These benefits she receives, just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city." This is quoted with approval in *Fitch v. Water Co.*, 139



Ind. 214, 219, 37 N. E. 982, 984, 47 Am. St. Rep. 258.

An effort has been made here, as in many other cases, to maintain this suit on the ground that the contract made between the city and the waterworks company contains a promise, or a contract, made for the benefit of the plaintiff. Practically all the courts hold the contrary of this proposition. In *Ferris v. Water Co.* the court say: "The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all the property holders of the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon a contract." The following cases also hold that a citizen whose property has been destroyed by fire, in a city where water is furnished by a private corporation under contract with the city, cannot sue on that contract, under the exception which allows a stranger to a contract to sue on it when it contains a promise for his benefit: *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Davis v. Water Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; *Fowler v. Water Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Nickerson v. Water Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Safety Deposit Co. v. Water Co. (C. C.)* 94 Fed. 238; *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987.

Two cases referred to in the brief for defendant in error assert a doctrine contrary to that enunciated in the cases hereinbefore referred to. They are *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, and *Gorrell v. Greensboro Water Supply Co. (N. C.)* 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. The Kentucky case has been disapproved in *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Britton v. Water Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; *Safety Deposit Co. v. Water Co. (C. C.)* 94 Fed. 238. The North Carolina case, *Gorrell v. Water Supply Company*, admits that the Kentucky case is against the weight of authority, but approves and follows it on the ground that "if, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This language is quoted from a note by Judge Freeman in 29 Am. St. Rep. 863. The opinion then proceeds thus: "This

is a complete reductio ad absurdum, and we prefer not to concur in cases, however numerous—there are probably a dozen scattered through half a dozen states—which lead to such conclusion." The answer to this is that, although the property owner has not a right of action against the waterworks company for his damages, he is in no worse condition than he would be if the protection of his property were intrusted to the city, exercising its police power itself, and not through a waterworks company as an agent or instrumentality in its hands. Why should a citizen recover his damages from a waterworks company when the courts universally hold that he cannot recover from the city itself? Nor does it follow from this that the protection from danger by fire is less when it is intrusted to a private corporation than when it is retained by the city, since the city has almost as ample power to compel the waterworks company to perform its full duty in the premises as it has in the case of its own agents in charge of its own waterworks. In either case, the property owner must sometimes suffer loss on account of the negligence of the agent, whether he acts under a mere appointment, or a contract in the form of an ordinance. It is to be noted also that the chief justice and one of the judges of the North Carolina court dissented in that case.

From the foregoing, it is very clear that no recovery can be had upon the contract between the city and the waterworks company. Nor can a different conclusion be reached by applying the principles governing actions *ex delicto*. In *Fowler v. Water Works Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313, the court say: "There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire." *Wright v. Augusta*, 78 Ga. 241 [6 Am. St. Rep. 256]; *Am. & Eng. Ency. of Law*, vol. 7, p. 997 et seq. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law." To the same effect are *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654.

But one question remains to be considered, and that is whether a recovery can be had upon the contract alleged to have exist-

ed directly between the plaintiff's tenants and the water company. There is no allegation that the premises were supplied with hose and other appliances which would have enabled the occupants of the building and the firemen to have extinguished the fire from the hydrants on the premises, even had there been water. This alleged right of recovery might be disposed of upon the narrow ground that, even though a good cause of action might be set up on this contract, the allegation falls far short. But there is no sufficient allegation that there was a contract between the owner of the property and the defendant. The allegation reads as follows: "That the said plaintiff, by its tenants then in possession of the said Hotel Adelphi, had a contract with the defendant, at the time of and before the destruction of the said Hotel Adelphi by fire, as hereinafter complained of, whereby and by virtue whereof the plaintiff and her said tenants acquired the right to use, and the defendant undertook and promised to supply, water at the said Hotel Adelphi for the quarter then current, for domestic, sanitary, and fire purposes, and in consideration of the said contract the plaintiff, by its said tenants, had paid to the defendant in advance a water rental in great amount, to wit, the amount of \$——." On its face this allegation admits that the contract was with the tenants, and that the tenants paid the water rent. It is a mere attempt on the part of the property owner to claim the benefit of a contract made with the tenant. There is no allegation in the declaration that the tenants were the agents of the owner of the property, and no such relation exists by force of law. Agency between the landlord and tenant would have to be established as a separate and independent relation, either to impose a liability upon the landlord or to enable him to claim the benefit of a contract made by the tenant. No authority is cited, and none has been found, holding the contrary of this proposition. It is too well established to require citation of authority that the tenant cannot bind his landlord by his contract for repairs to the property. If he cannot bind his landlord, it follows that, unless specially authorized, he cannot make a contract in reference to the property for the benefit of the landlord, for, in order to do so, he would be compelled to bind his landlord to pay the consideration for the benefit contracted for. Hence no recovery can be had upon the allegation of the declaration above quoted. Whether, if it had been alleged that such a contract existed between the owner of the property and the defendant, recovery could be had upon it, is reserved for future determination, if such question shall ever be presented. It is not intended here to intimate any opinion, one way or the other, upon that question.

There is no error in the judgment, and it must be affirmed.

(52 W. Va. 486)

**WALL v. NORFOLK & W. R. CO. et al.**  
(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

**ATTACHMENT—RAILROAD PROPERTY—GARNISHMENT—CARS UNDER CONTRACT—INTERSTATE COMMERCE.**

1. Under section 8 of article 11 of the state Constitution, rolling stock and all other movable property of a railroad company or corporation are subject to process of attachment, where the attachment is applicable, as well as to ordinary execution.

2. The right under attachment of the garnisher as to the garnishee does not by garnishment rise higher than the right of the principal defendant as to the garnishee. When the right of such defendant is subject to a right of the garnishee under a contract between them, the right of the garnisher is likewise subject to the right of the garnishee.

3. One railroad company has an agreement with another by which loaded cars of the one are to be received at connecting points by the other, and hauled over its line to the destination of load of the car, and then be reloaded with other freight by the receiving company on its line, and carried over its line, and returned loaded to the railroad of the owner of the cars; the receiving company compensating the owning company for such use of the cars. Such cars cannot be seized under an attachment against the company owning the cars, so as to defeat the rights under such arrangement or contract of the company receiving and entitled to so use the cars, and a garnishment of the receiving company cannot affect its rights under such arrangements by reason of its possession of such car.

4. A railroad car sent loaded with freight from another state into this state, and to be returned loaded to the former state in the transaction of interstate commerce, cannot be levied upon under an attachment in this state; nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company, against which an attachment was issued. This is because of the commerce clause of the national Constitution and the interstate commerce act of Congress.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by C. F. Wall against the Pennsylvania Railroad Company and others. Decree for plaintiff, and defendants appeal. Reversed.

Marshall McCormick, Cleon Moore, and Jos. I. Doran, for appellants. J. M. Mason, Sr., and John W. Daniel, for appellee.

BRANNON, J. C. F. Wall brought an attachment in equity against the Pennsylvania Railroad Company in the circuit court of Jefferson county to recover damages for some cattle killed and others injured while being carried over the line of the defendant in the state of Pennsylvania, and sued out an attachment and levied the same on a freight car of said company found at Shepherdstown, in Jefferson county—the car being in the possession of the Norfolk & Western Railway Company—and served the attachment also

¶ 1. See Attachment, vol. 5, Cent. Dig. § 137.

on the latter company, as a garnishee, on account of its having the car in its possession. The Pennsylvania Railroad Company is a foreign corporation. That company did not appear in the suit; but the Norfolk & Western company filed an answer, which stands as taken for true and uncontroverted as to its statement of facts. That answer, after stating that both railroad companies are common carriers of goods by railroad, states: "That at the time of the issue and service of the writs of attachment herein upon the garnishee, and ever since that time, an arrangement and understanding existed between the defendant and garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives the loaded cars of the other from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them, as soon as and when practicable, in the due course of business, reloaded with freight, to some point on or near or reached by the line of the company owning them. That under the arrangement and understanding existing as aforesaid, the Norfolk & Western Railway Company, the garnishee, had the right to use in its business the cars aforesaid; the cars owned by it while on the lines of the Pennsylvania Railroad Company being similarly in current and constant use of the Pennsylvania Railroad at all times, and each company paying the other by wheelage or mileage of such cars. The method aforesaid of receiving and returning railroad cars of other lines by railroads facilitates traffic, and is a great accommodation to the shipping public, and has become a part of the general system of freight transportation throughout the United States. That it would be practically impossible for the garnishee to carry on its business with arrangements and understanding of this character with other lines, and that the garnishee, under the arrangements and understanding aforesaid, is entitled to hold and use as aforesaid the cars for said business free and discharged of, and without interference from, attachment or garnishment proceedings herein, and that the maintenance of such proceedings would nullify the rights of the garnishee with the defendant under the arrangement and understanding aforesaid, and interfere seriously with the proper movement of traffic and accommodation of the shipping public." The car levied upon had been loaded beyond Hagerstown, Md., with sacks of patent plaster, consigned to Shepherdstown, and when levied upon was standing upon a side track, loaded with plaster, to be delivered in said town, according to said bill, and, according to the

answer, was being unloaded when the garnishee was served with the attachment. The case resulted in a decision by the circuit court holding the attachment and garnishment valid, and a decree was rendered against the Norfolk & Western Railway Company for \$432.25 on account of its liability by reason of its possession of said car, and that company has appealed to this court.

The question is raised, is this car subject to attachment? Upon the question whether the property of a quasi public corporation, essential to its operation, is so liable, there is much conflict of authority, as will appear from the authorities cited. *Brady v. Johnson* (Md.) 28 Atl. 49, 20 L. R. A. 737; *Gooch v. McGee*, 35 Am. Rep. 558; *Ammant v. New, etc., Co.*, 15 Am. Dec. 593, note 595. All admit that the property of a purely private corporation, not serving the general public, though ever so essential to its use, is liable to execution; but, as to those corporations created to carry on business valuable to the public, such as a railroad corporation, which is a common carrier, this conflict of cases exists. On the one side, it is said that such a corporation would be disabled from performing its public duties if its property essential in so doing could be seized and sold away from it, and thus the public would suffer great harm. On the other side, to exempt so much property cripples the power of the law to enforce payment of debts, and exempts from its scope a great mass of property. If we say that such property is not wholly free from subjection to debt, for the reason that it may be reached by sequestration of earnings or by the sale of the whole property, the reply is that the ordinary and ready remedy by execution upon judgment is abortive, and that relief is practically denied to small debts. Between these adverse interests the courts have greatly conflicted. All the cases say that, unless statute authorizes, the franchise itself cannot be sold under execution; and the major part of legal authority says, also, that property of such corporations essential to the exercise of such franchise is also not subject to execution. In *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L. Ed. 635, the United States Supreme Court held that a corporate franchise to take tolls on a canal cannot be sold under *ieri facias*, unless authorized by a statute of the state granting the incorporation, and also that the lands or works essential to the enjoyment of the franchise cannot be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. So in *East Alabama Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136, it was held that a railroad right of way could not be sold to any one not owning the franchise, under an execution. *Elliott on Railroads*, vol. 2, § 520, says: "The franchise of a railroad company, and corporate property essential to the enjoyment to the franchise, are not subject to sale on execution unless the Legis-

lature authorizes or assents to the transfer. But locomotives, cars, and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution; and there seems to be no reason why property of a railroad corporation, not essential to the enjoyment of its franchise, should not be subjected to the payment of its debts." Amid the conflict, I have concluded that the law is properly stated in 11 Am. & Eng. Ency. L. (2d. Ed.) 620, as follows: "In the case of corporations, such as railroad or bridge companies, which, though not strictly public corporations, are created to serve public purposes, and are charged with public duty, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation is not, according to the weight of authority, apart from statutory provision, subject to execution at law. But the property of a quasi public corporation, not necessary or not used for the purposes which called the corporation into being, is not exempt from seizure or sale under execution." There are some cases which, while admitting that a franchise or things indispensable to its use cannot be levied on under execution, yet hold that rolling stock is liable to execution. *Louisville Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435. It thus seems that the franchise itself and everything pertaining to it, essential to its operation, are exempt from execution, and thus the matter turns upon the question whether railroad rolling stock is so essential. I do not think that that question is tested by whether the property is indispensable in the use of the franchise, but that, as put by the case of *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737, if it is of a nature to be of practical use in the operation of the franchise. Rolling stock is essential, next to the track or right of way—in fact, equally with them. True, rolling stock taken can be replaced, but often this is beyond the ability of the company, and we can easily imagine cases where seizure of rolling stock would stop the performance of public duties. So I think the common law exempts such rolling stock from execution. The convention which framed our Constitution must have been of this opinion when it inserted in article 11, § 8, the provision: "The rolling stock and all other movable property belonging to any railroad company or corporation in this state, shall be considered personal property and shall be liable to execution and sale in the same manner as the personal property of individuals." It is argued that this section can have no application to foreign corporations, but only to those chartered by this state. It is a principle that no state can, and therefore no state is presumed to intend to, legislate as to persons or things outside of its territory, and I would be inclined to concur

—first concur—in that view; but that

would establish a difference between the property of home and foreign corporations, found within the territory of the state. And in this connection we must remember that it is a proposition disputed by no one that "a state having property of a nonresident within its territory may appropriate it to satisfy demands of her citizens." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585. So I do not see but that the state Constitution would make all rolling stock of a railroad company, whether foreign or domestic, liable to execution when found within the state. If that provision of our Constitution had no application to property owned by a foreign corporation, then this car would not be leviable, but I think the Constitution applies to it.

It is said that this provision of the Constitution does not apply, for the reason that it makes rolling stock liable to execution only, and not to attachment, as execution is only the end of the law, issuing only upon a judgment, whereas an attachment goes at the opening of the suit, and is only a means to compel the appearance of the defendant. Such was the object of the ancient process of foreign attachment, according to the custom of London; but the modern doctrine is that attachment is not for the purpose of bringing the defendant into court, and that its object is to give the plaintiff execution against the thing attached—to seize it, and create a lien upon it conditional upon the rendition of judgment. In this state, upon judgment, the order is not for another execution, but for sale under the attachment. 3 Am. & Eng. Ency. L. 187; 4 Cyc. 395; 1 Shinn on Attachment, § 2. I do not think that it was the intention of the convention to make railroad rolling stock liable to ultimate execution, and deny its liability to attachment, as attachment would often be the only process available for prompt seizure to answer ultimate judgment. The object of the section was to do away with the law exempting rolling stock and other movable properties of railroad and other corporations, and not to discriminate between writs of process.

Is the Norfolk & Western Company liable as garnishee, under the circumstances of the case? It had possession of this car under the circumstances stated in the answer. We must look at the character of this possession. The garnishee held the car under "an arrangement and understanding between the defendant and the garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives the loaded cars of the other, from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them as and

when practicable, in due course of business, reloaded with freight, to some point on or near, or reached by, the line of the company owning them." Here is a contract between the two companies, vesting the Norfolk & Western Company with a valuable right, which it could carry into effect by reason of its possession of the car, but could not if it was seized and taken from it. The Pennsylvania Company had got the load of plaster from some point on its line, carried it in this car to Hagerstown, where its line connected with the line of the Norfolk & Western, and the latter took up the car and hauled it to Shepherdstown; and, in consideration of so doing, it had the important right of loading that car, after discharge of the plaster from it, with freight at some point on its own line, hauling it over its own line, earning compensation thereby, and turning it over to the Pennsylvania Company for further transportation. The answer says it paid wheelage for this right. It is needless to endeavor to impress the fact that the use of a car to a railroad company to carry on its business is a valuable use. In short, the garnishee company had a subsistent contract for the possession and use of this car, and it had executed that contract, so far as was to its disadvantage, by haulage to the place to which the plaster was consigned, but had not yet enjoyed that part of the contract most beneficial to it, by loading it with freight on some part of its line, and earning compensation for its carriage. It had the right to keep the car until it returned it loaded to the Pennsylvania Company at Hagerstown, and it could not be levied upon and taken from it to defeat this right because of principles of law that are beyond all question. What is such law? Drake on Attachm. § 462, states that law as follows: "It is an invariable rule that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself." "A plaintiff by garnishment cannot place himself in a superior position, as regards a recovery, than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant." 2 Shinn on Attachm. § 516. In *Mill v. Steel Co.*, 152 U. S. 619, 14 Sup. Ct. 717, 38 L. Ed. 565, we find the court saying: "The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor." "The service of the garnishment neither changed nor interrupted the contractual relations existing between the Chicago Company and the St. Louis Company. The right and equities existing and to arise out of those contractual relations, were in no way terminated or defeated by

that service." *B. & O. R. Co. v. McCullough*, 12 Grat. 595, is pointed authority; also *Neill & Ellingham v. Rogers*, 41 W. Va. 37 23 S. E. 702. Therefore we hold that the Norfolk & Western Company could not incur liability by the possession of that car. Liability could only arise from possession of it. It did not owe the Pennsylvania company anything. It had the right to use that car, regardless of the levy on it, and carry it to Hagerstown and return it to the Pennsylvania Company, under its contract with that company. It will not do to say that it could be liable by reason of the ultimate right of the Pennsylvania Company to have possession of the car, because the right of the Norfolk & Western would be defeated by the subjection of the car to the attachment—its right to carry the car back to Hagerstown. It would be impracticable, under the circumstances, to subject such reversion. In fact, the court took no steps to ascertain the value of the reversion, as its order shows that it ascertained the value of the car as it stood at Hagerstown, without reference to any idea of reversion, and, finding it greater than the demand, gave a personal judgment against the garnishee.

The case of *M. C. R. Co. v. C. & M. R. Co.*, 1 Ill. App. 399, is very pointed in this case to sustain our decision. Loomis brought suit against a railroad company, and garnished another, having in its possession cars of the debtor company, just as in this case. It was held that "a railroad company is not liable to garnishment for cars received of a connecting line under running arrangements existing between them, such as are usually adopted by connecting lines throughout the country, whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as practicable in due course of business." But it is said that the answer of the company does not set up a contract as actually existing, but relies simply on a universal custom among railroad companies as to such traffic arrangement. This contention cannot be sustained in the face of the fact that the answer affirmatively avers that "an arrangement and understanding existed between the defendant and garnishee companies." Those words plainly import a perfect contract, because by the agreement and understanding of the parties there is a union of minds upon a specific thing. What if the answer does say that such agreement was according to the universal custom in such cases among railroad lines? That does not destroy the statement that there was an agreement and understanding between the parties to a certain effect. The averment as to custom is surplusage, merely stating that the contract con-

formed to such custom. Therefore we hold that, by reason of the contractual relation between the two companies, the car was not attachable; the garnishee was not subject to garnishment and liability. It is argued that there was no contract such as would forbid the Pennsylvania Company from taking the car from the Norfolk & Western Company at any time. There was that contract. It forbade the Pennsylvania Company from taking the car from the Norfolk & Western Company. The latter company had the right to do as it did under the contract; that is, take the car to Luray and load it with freight, and haul it to the end of its line, and there deliver it to the Cumberland Valley Railroad, to be carried over that road and delivered to its owner.

It may be thought that if the attachment created a lien on the car, conceding the right of the Norfolk & Western, under said contract to carry the car back to Hagerstown, yet the attachment lien still clung to the car; and, it giving Wall a right superior to the right of the Pennsylvania Company, it was the duty of the Norfolk & Western to carry the car back to Jefferson County, to be made amenable to the attachment. It is an accepted principle of law that the laws and process of one state have no force outside of that state, and to say that the lien of the attachment clung to the car in its physical absence from the state would seem to violate that principal of law. This lien exists only under the attachment law and process, and is not a contractual lien. It passes no title. Where there is a mortgage or other conveyance passing the title to movable property, doubtless that title can be asserted in another state so as to recover the property there. So, likely, will a contractual lien avail there. How far this doctrine goes, is not well settled. Even such mortgages or liens passing title have been held subordinate to rights acquired in the state to which the property is removed by third persons. *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Walworth v. Harris*, 129 U. S. 355, 9 Sup. Ct. 340, 32 L. Ed. 712; *Corbett v. Littlefield* (Mich.) 47 N. W. 581, 11 L. R. A. 95, 22 Am. St. Rep. 681; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556; *Harrison v. Sterry*, 5 Cranch, 298, 3 L. Ed. 104; *Story on Conf. L.* § 402. These authorities are not cited as pointed on this question, for they involve rights of third persons, but are cognate. In our case the rights of no third person had intervened. We do not say whether or not Wall could enforce this lien in another state. If he could not, the lien would end at the state line, and the garnishee, having rightfully taken the car to Hagerstown, would be under no obligation to return it. We must pass simply on the rights between Wall and the Norfolk & Western. The company had right to take the car loaded to Hagerstown. It seems clear that at that point it had the

right to end its obligation to the Pennsylvania Company by delivery of the loaded car to it. It was not under obligations to assume the burden of carrying the car back to Jefferson county. Its contract placed upon it no such burden. On the contrary, that contract gave it the right to end its relation with Pennsylvania Company by delivery of the car, and thus end its obligation, as the right to end an obligation under a contract is an essential part of the contract. The Norfolk & Western Company could not be called upon to unload the car, for that would be a violation of the rights of the shipper in the middle of the transit, and the company could not be required to haul the load back to Jefferson county, first, because that, also, would be a great wrong upon the shipper of the load in the car; and, second, because it would place a burden upon the Norfolk & Western, which its contract did not put upon it. Thus we cannot see that the garnishee company was under any obligation to return the car.

There is another reason still, of very controlling force, exempting the garnishee from liability, and that is that clause of the federal Constitution giving power to Congress to regulate commerce among the states, and the act of Congress providing "that every railroad company in the United States, whose road is operated by steam, its successor and assigns, be and is hereby authorized to carry over its road passengers, freight and property on their way from any state to another state, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination." It has been frequently held that the powers of the federal government under said clause of the Constitution are exclusive of all power in the state. This power in the national government was held in *Bowman v. Chicago*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, and *Railroad v. Richmond*, 19 Wall. 584, 22 L. Ed. 173, to be "designed to remove trammels upon transportation between states which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi to reach trammels interposed by state enactments. \* \* \* The power to regulate commerce among the several states was vested in Congress to secure equality and freedom in commercial intercourse against discriminating state legislation. \* \* \* So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself." It would be easy to cite many federal cases to show that any state legislation hindering, obstructing, or placing burdens upon interstate commerce are void, and that no state legislation can be so used or ap-

plied as to effect this result. No one can claim that the attachment laws of West Virginia are void under the commerce clause of the federal Constitution, but that the use of the writ of attachment in this case works a hindrance of the freedom of interstate commerce; that is, that the writ is abortive and of no effect, applied as in this case. Any statute or action by state authorities which amounts to a regulation of commerce between the states is void, and, if it works obstruction or even retardation of such commerce, it is, in law, a regulation of commerce. Thus a state tax on telegraph messages beyond the state is void for that reason. *Telegraph Co. v. Texas*, 105 U. S. 480, 26 L. Ed. 1067. A state act requiring a telegraph company to deliver messages within a mile of the office was held void under the commerce clause. *W. U. Tel. Co. v. Pendleton*, 132 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. A state statute prohibiting a greater charge for a shorter than for a longer haul was held invalid because it tended to hinder interstate commerce, from the fact that it might prohibit, or operate to prohibit, the railroad from carrying freight from another state at lower rates than it could afford to carry for from points within the state. It worked a consequential effect upon business outside the state. *L. & N. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416. A steamboat was engaged in navigating a river between two towns in Michigan, but it was in a habit of carrying goods destined for points in another state. The court said that the case related to transportation on navigable waters, and, further, it was unable to draw any distinct line between the authority of Congress to regulate an agency employed in commerce between the states, and when it is confined in its action entirely within limits within a single state. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary of the other, would not oust the federal power under the commerce clause. *Daniel Ball v. U. S.*, 10 Wall. 557, 19 L. Ed. 999. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, it was held that the statute requiring a steamboat to carry colored passengers in the same cabin with white was unconstitutional, in requiring those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, and was void under the commerce clause. These cases will show that, no matter what the form, mode, or means by which such commerce is impeded or obstructed, it is void. 4 Elliott on Railroads, § 1664. Even the state's power of taxation, large as it is, cannot be exerted on interstate commerce, because it tends to lessen it and impair it. *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694. It is true that, in order to brand state law or action as contrary to the federal Consti-

tution and law, the operation of such state law or action must be direct and substantially hurtful to such commerce, not merely remotely hurtful. *L. & N. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 293. But is not the operation of this writ of attachment a direct impediment and obstruction of interstate commerce? If this levy is given any effect, it would take the car from the custody of the Norfolk & Western after it had started on its mission of carriage from one state to another, while yet its freight was under its roof and entitled to shelter from the elements and the security of its inclosure. Its transit with its freight had not yet ended when the writ was levied. The protection and security of the plaster were a part of the function of interstate carriage, and the railroad company and consignee were entitled thereto, just as much as they were entitled to the car for transportation to the point of consignment. Not only so, because that attachment would prevent the Norfolk & Western Company from taking that car to some point on its line, loading it with goods, and hauling it back over its road, and prevent the Cumberland Valley Road from hauling in Maryland and Pennsylvania, and prevent the Pennsylvania road from hauling it on to Newark, it would prevent those companies from earning freight for such return load, and would prevent citizens of West Virginia and another state from the benefit of such car in transporting their goods, and thus deprive them, as consignor and consignees, from the full enjoyment of the benefit of interstate commerce. I cannot imagine anything more directly operative on interstate commerce than an attachment so used. The Norfolk & Western Railroad Company passes from state to state with its line, and is engaged in the business of interstate commerce, as held in *Norfolk, etc., Railroad v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. It is a link and part of lines of railroads affording communication and transportation between different states.

It will not do to say that we can find no act of Congress saying that state process shall not be served upon railroad cars running from state to state, and that, until there is such act, state process can be so used. Powers of the national government were given to it in this commerce matter by the states at the foundation of the government, in order that the indispensable transaction of interstate commerce should be under one single governmental power, for the sake of uniformity, so that it would not be hampered and crippled by the action—the different and diverse and variant action—of many states, which would forbid the growth of commerce and prosperity of all the states; and this power in the nation is exclusive. It is well established that, “so long as Congress does not pass any law to regulate commerce among the states, it thereby indicates its will that commerce shall be free and



untrammelled." *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. The power is exclusive, and "the failure of Congress to make express regulations indicates its will that the subject shall be free from any restriction or imposition; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom." *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

I have already said that our state attachment statute is entirely valid, but that it cannot be used in a manner and in cases in which it would operate to infringe upon the exclusive power of the federal government as to interstate commerce. It may be asked, if this is so, what becomes of that section of the very Constitution of this state providing that rolling stock shall be liable to execution? I apply to it the same rule as the attachment law is subject to. Both are subject to the paramount force of the national Constitution, as it is an admitted principle that a state Constitution can no more detract from the force of federal law than can a state statute. It may be that this ruling will render the application in practice of the provision of the state Constitution making liable the rolling stock of foreign corporations, or even of railroad companies created by the state, very narrow; but, if so, it is the result of the force—the paramount force—of the federal Constitution.

For these reasons, we reverse the decree of the circuit court and dismiss the plaintiff's suit.

(53 W. Va. 450)

**PENNSYLVANIA R. CO. v. ROGERS et al.**  
(Supreme Court of Appeals of West Virginia.  
March 21, 1903.)

**GARNISHMENT — JURISDICTION — PROCEDURE — NONRESIDENT GARNISHEE — FOREIGN CORPORATIONS — DEBT DUE PRINCIPAL DEFENDANT — DUTIES OF GARNISHEE — RETURN OF SERVICE — PROHIBITION — EXEMPTIONS.**

1. Garnishment is the exercise of a special and limited statutory power, the requisites of which are jurisdictional.

2. Although, in such proceeding, there is no actual manual seizure of property by the executing officer, it is in the nature of a proceeding in rem, and jurisdiction of the debt or property sought to be thereby subjected must be obtained, else the court cannot pronounce judgment of condemnation against it.

3. Garnishment is a dual proceeding, moving against the garnishee in personam to compel him to answer and disclose what property and estate of the defendant he has in his hands and to hold the same subject to the order of the court, and against the property and estate itself to extinguish the right of the defendant in it by condemnation and appropriation of it to the satisfaction of the plaintiff's claim.

4. A nonresident, temporarily in the state, may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless, when garnish-

ed, he have in the state property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the state.

5. Foreign corporations and nonresident individuals stand upon the same footing in respect to garnishment, except that the former are subject to garnishment when doing business in the state in which the garnishment issues in such sense and to such extent as to have become domiciled therein.

6. A debt due from a foreign railroad corporation operating no railroad in this state, and doing no business here other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of this state, and not subject to garnishment here.

7. The garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings.

8. A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid.

9. Omission to show, in the return of service of an order of attachment upon a foreign corporation as garnishee, that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and, in such case, the court obtains no jurisdiction of the res, for want of service on the garnishee.

10. Prohibition lies from a circuit court to a justice of the peace to restrain him from proceeding in an action when the subject-matter thereof is beyond his territorial jurisdiction, and also when, by reason of want of service or invalidity of service, he has not acquired such jurisdiction; although, when he has jurisdiction of the subject-matter, and the question of his jurisdiction of the person depends upon some fact to be determined by him, his erroneous decision in favor of jurisdiction is only error, not subjecting him to prohibition.

11. In so far as *Mahany v. Kephart*, 15 W. Va. 600, and *Stevens v. Brown*, 20 W. Va. 450, hold that the exemption laws of another state have no extraterritorial force and will not be enforced by the courts of this state, they are reaffirmed.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by the Pennsylvania Railroad Company against W. W. Rogers and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. B. Sommerville, for plaintiff in error.  
Caldwell & Caldwell, for defendants in error.

**POFFENBARGER, J.** This case involves the consideration of questions arising upon the invocation of the extraordinary legal remedy, prohibition, in restraint of the special and limited proceeding known as garnishment. As prohibition lies only to restrain a court or other tribunal from proceeding without jurisdiction, or in excess of its jurisdiction, and as attachment is a purely statutory proceeding, the questions pre-

¶ 4. See Garnishment, vol. 24, Cent. Dig. § 144.



sented are principally jurisdictional in character, and perspicuity demands an inquiry into the nature of both proceedings. This should be preceded, however, by a statement of the case.

W. W. Rogers, a citizen of Ohio county, doing a detective and collection business, and having taken, by assignment, a large number of claims from persons residing in Pennsylvania against employes of the Pennsylvania Railroad Company, a foreign corporation, which claims that it does not own or operate any railroad or do any business in this state, instituted, before D. Z. Phillips, a justice of the peace of Ohio county, more than 400 suits against the said nonresident employes on the accounts so assigned, and made the said railroad company a garnishee in each of them. The service of process, as to the garnishee, was by delivering a copy of the order of attachment "to J. J. McCormick, agent of the said garnishee in charge of its business, in the city of Wheeling, in said county, there being no other person within the state of West Virginia upon whom said order of attachment can be legally served." In some of these cases the railroad company appeared specially for the purpose of objecting to the service of process upon it, and moved to be discharged because the order of attachment issued therein had not been properly or legally served upon it. After hearing the evidence and argument of counsel upon the motion, the justice overruled it. Then the garnishee filed its answer, admitting indebtedness, but claiming it was not liable as garnishee, for the following reasons: First, because the justice was without jurisdiction in said cause; second, because said Pennsylvania Railroad Company and the principal debtor in the action were both citizens of the state of Pennsylvania, and the money due was for wages earned by the defendant as an employe of the railroad company, under a contract between him and the railroad company in Pennsylvania, and was not, therefore, subject to garnishment in West Virginia; third, because the wages of the defendant were exempt from execution or forced sale under the laws of Pennsylvania, and could not be subjected to garnishment in the state of West Virginia. The garnishee, therefore, again asked to be discharged, but the motion was overruled, and judgment entered against the garnishee for the amount of the indebtedness admitted. The record here shows a transcript of the proceedings in only one of these cases, that of Rogers, assignee, against James R. Snyder. The bringing of these suits was commenced in July or August, 1901, and many judgments were rendered against the garnishee. On the 10th day of January, 1902, the Pennsylvania Railroad Company presented to a judge of the circuit court of Ohio county its petition, praying for a writ of prohibition to restrain Rogers and Phillips, and each of them, "from proceeding further

in their said acts, doings, and proceedings, and from instituting any other or further proceedings against" the petitioner, "either in regard to the said claims of the said Rogers against" the petitioner "arising out of the assignment of claims to the said Rogers by any person, or against" the petitioner's "said employes residing in the said state of Pennsylvania." In addition to the facts hereinbefore set out, the petition contains the following averment: "Your petitioner does not own and does not operate any railroad or any part of a railroad in the county of Ohio, or in the state of West Virginia, and does no business in the said last-named state or county. There is, however, located in the said city of Wheeling, an agent of what is known as the 'Star Union Line,' which is an association of several railroads, formed and kept up for the purpose of facilitating the handling of certain freight business, in the city of Wheeling. The name of said agent is J. J. McCormick, and the only service which was had upon your petitioner in said suits brought before the said Phillips, justice as aforesaid, by the said Rogers, was had by serving copies of the orders of attachment issued in said cause upon said J. J. McCormick. Your petitioner is advised that the said J. J. McCormick is not your petitioner's agent, and that the said service of the said copies upon him is not such a service as should or will bind your petitioner in the said cases, and that therefore the said Phillips, justice as aforesaid, is without jurisdiction to render any decision, or enter any order or judgment, against your petitioner in the said cases." The petitioner further shows that some of the employes against whom these actions were brought had instituted chancery suits in Pennsylvania, seeking to restrain the railroad company, by injunction, from paying the judgments recovered by Rogers in Ohio county, and a transcript of the record of one of said equity cases, showing all the proceedings therein and the opinion of the judge in the cause, is filed as a part of the petition. A rule was awarded against Rogers and Phillips, returnable on the 16th day of January, 1902, which on said date was continued until the 1st day of February, 1902, when there was a final hearing, and the court discharged the rule, dismissed the petition, and gave costs against the petitioner, and the cause is now here on a writ of error to said judgment.

Attachment is no part of the general jurisdiction of any court. It is purely statutory, and, though everywhere vested by statute in courts of general jurisdiction, it is still a special and limited power, resting upon its own peculiar grounds, acting in its own prescribed modes, and leading to its own specific results. Drake on Attach. § 83; Waples on Attach. §§ 635, 637. When jurisdiction by attachment is conferred upon and exercised by courts of general jurisdiction, it is special,

and unsupported by presumptions in its favor. *Waples on Attach.* § 639. The statutory prerequisites to attachment are jurisdictional. *Waples on Attach.* §§ 625, 627.

Attachment is in the nature of a proceeding in rem. There is an actual seizure of property, except where it is in the form of garnishment. In the case of garnishment, it retains its character as one in the nature of a proceeding in rem, although there is no actual seizure of property under the order of attachment, for by service of the order upon the garnishee it arrests the debt in his hands, and holds it through him, subject to the judgment of the court. The claim subjected by garnishment is estate of the principal debtor in the hands of the garnishee, and the proceeding is against it as a res, a thing, and not against the garnishee personally, except to compel him to turn it over to the creditor of the principal defendant in satisfaction of his claim. In every practical sense, it amounts to a seizure of a thing. "Garnishment is in the nature of a proceeding in rem, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant." *Drake on Attach.* § 452; *Wade on Attach.* § 338. Without such seizure, no jurisdiction over the res is acquired, and no judgment against it can be rendered, although the court may have jurisdiction of the parties. Garnishment is no exception to this rule, as will be shown. Jurisdiction of the person of the garnishee must be acquired by service upon him, but this does not necessarily give jurisdiction of the res or debt owing by him, which belongs to the defendant, whose right to it must be extinguished by bringing it within the jurisdiction of the court by proper proceedings, and subjecting it to the satisfaction of the plaintiff's demand by a proper judgment.

Just here it is to be further observed that courts have no extraterritorial jurisdiction over either persons or property in attachment suits. To maintain a proceeding, there must be jurisdiction over the one or the other, or both. *Waples on Attach.* § 644. "Jurisdiction over persons and property in any state is confined to the persons and property within the territorial bounds of the state. No court within it can exercise jurisdiction beyond it. To exercise it over persons or property in another state would be an unwarrantable assumption and arrogation of unlawful authority, entitled to no respect on the principle of comity, but meriting rebuke and resistance as a wanton abuse of power. A judgment rendered in any state against a person or property over which the court has no jurisdiction is not entitled to 'full faith and credit' in other states, but its validity may be questioned on jurisdictional grounds, and its enforcement resisted; for, not being by due process of law, it is entitled to no

regard, even in the state where it is rendered; and it may be impeached collaterally anywhere." *Waples on Attach.* § 648. In other words, such action is absolutely null and void for want of jurisdiction.

In exact alignment with this general proposition of law, which is not questioned anywhere, it has been held by the courts of this country, with practical unanimity, that a nonresident cannot be subjected to the process of garnishment, although caught within the state temporarily and served with process. The moment that it is made to appear to the court that he is a nonresident only temporarily within the state, without property or effects of the defendant in his possession in the state, or owing him a debt payable within the state, the jurisdiction of the court ends. "In this country the question has been repeatedly presented, and the uniform tenor of the adjudications establishes the doctrine, that, whether the defendant reside or not in the state in which the attachment is obtained, a nonresident cannot be subjected to garnishment there, unless, when garnished, he have in the state property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that state." *Drake on Attach.* § 474; *Wade on Attach.* § 413; *Waples on Attach.* §§ 387-392.

It is said that the first announcement of this doctrine in this country was made by the Supreme Judicial Court of Massachusetts. In that state the proceeding is called "trustee process," and the garnishee here would there be called the "trustee." The reason given for holding that a nonresident cannot be subjected to garnishment is stated in *Tingley v. Bateman*, 10 Mass. 346, 347, as follows: "The summoning of a trustee is like a process in rem. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by this species of effects. These are, however, to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights in this respect are not to be considered as following the person of the debtor to any place where he may be transiently found, to be taken there at the will of a third person, within a jurisdiction where neither the original creditor nor debtor reside." It is further stated in said opinion that, in the process of foreign attachment by the custom of London, out of which our system of attachment law originated, and from which it differs to no considerable extent, the garnishee must be suggested to be a man within the city. Proceeding, the court says: "The principal has not been made a party by any legal summons, and he may justly object to the transfer of his demands against Daggett, attempted to be made in this case by Daggett's collusive

or transient removal within the process of this court; that the credits or effects in his hands belonging to Bateman have never been legally attached, and that the summoning of Daggett was to no purpose a sufficient service of this writ; and, as this defect of service appears in the proceedings, the court dismiss the action *ex officio*." The same principle is announced in all the following cases: *Nye v. Liscombe*, 21 Pick. 263; *Hart v. Anthony*, 15 Pick. 445; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Smith v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Baxter v. Vincent*, 6 Vt. 614; *Green v. Bank*, 25 Conn. 452; *Ray v. Underwood*, 3 Pick. 302; *Cronin v. Foster*, 13 R. I. 196; *Smith v. Eaton*, 36 Me. 307, 58 Am. Dec. 746; *Jones v. Winchester*, 6 N. H. 497; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Ross*, 31 N. H. 201; *Peck v. Barnum*, 24 Vt. 75; *Lawrence v. Green*, 52 Vt. 204; *Squair v. Shea*, 28 Ohio St. 645; *Peters v. Rogers*, 5 Mason, 555, Fed. Cas. No. 11,033.

In 14 Am. & Eng. Enc. Law (2d Ed.) 815, it is said: "Under statutes providing generally for summoning, as garnishees, persons indebted to the defendant, or having in their possession property belonging to him, it has been held that nonresidents were exempt from liability to be so summoned, though found temporarily within the state, and in some jurisdictions the statutes have expressly provided that only residents of the state shall be so summoned. On the other hand, there are statutes which expressly provide that nonresidents may be summoned as garnishees, and by the weight of authority it seems that the mere fact that a person is a nonresident does not exempt him from liability to be so summoned when the question is not affected by the situs of the res sought to be reached by the process." A hasty reading of this might lead one to say that it is in conflict with the general proposition heretofore announced, but it is not. The distinction between summoning the garnishee, by which jurisdiction over his person is acquired, and the obtaining of jurisdiction of the res, the claim sought to be subjected, must be observed. If a nonresident be found temporarily within the state, he may undoubtedly be summoned, and must appear and answer. But when it is shown by his answer that he is a nonresident, having no property of the defendant in his possession within the state, nor owing him any debt payable within the state, nor bound by any contract to deliver any property to him within the state, the want of jurisdiction of the res appears, and, when established, the proceeding must end, although there is jurisdiction of the person of the garnishee. "When one is summoned as garnishee in a state of which he is not a resident, it is necessary for his own protection that he should answer to the proceeding, and avail himself of whatever defense he has against liability, or he will be liable to a judgment by default against him, if the law under which

he was summoned authorize that course of proceeding; for, by the service of process, the court acquires jurisdiction over his person, and the question whether it has, or can take, jurisdiction of the effects in his hands, can only be raised by himself upon his answer." Drake on Attach. § 476. It is to be observed that in the quotation from 14 Am. & Eng. Enc. Law (2d Ed.) it is said the nonresident is liable to be summoned "when the question is not affected by the situs of the res sought to be reached by the process."

But two cases have been found which completely ignore the principle that a nonresident cannot be held as garnishee when it is shown that he is a nonresident, and has no effects of the debtor in his possession within the state, and owes him no debt payable within the state. They are *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662, and *Morgan v. Neville*, 74 Pa. 52. Both of these cases not only ignore that proposition, but fail to distinguish attachment, which is a special limited statutory proceeding, from proceedings in which the courts exercise general jurisdiction, and in which strict compliance with the requirements in matters of procedure is not ordinarily jurisdictional, as we have seen that it is in attachment and garnishment. Where the action is in personam, jurisdiction of the person of the defendant is plenary jurisdiction, giving the court full power for all purposes of the action. But in garnishment, as we have seen, jurisdiction of the person of the garnishee is only partial jurisdiction. It is generally so held. No attention whatever was paid to this distinction in the two cases named. The Pennsylvania decision is vigorously condemned by Mr. Thompson, in his Commentaries on the Law of Corporations. See volume 7, § 8073, note 4, pp. 6432, 6433. In 14 Am. & Eng. Enc. Law (2d Ed.) 805, the following is found: "The rule announced in a number of late and well-considered cases, and which seems to be the doctrine which will best protect the interest of commerce, is that a debtor may be charged as garnishee of his creditor, without regard to the illusive theories as to the situs of a debt, in any jurisdiction in which an action could have been brought by such creditor against the debtor for the recovery of the debt, though personal service cannot be had upon the defendant." For this proposition, several cases are cited. But these cases do not repudiate, overturn, nor say anything in conflict with, the proposition that a nonresident cannot be subjected to garnishment unless he has effects of the debtor within the state, or owes any debt payable within the state, or has contracted to deliver to him property within the state. Most of them are cases against foreign corporations doing business within the state, and which have, in some sense, become domestic corporations by having complied with the statute of the state, and voluntarily made themselves subject to

its process, just as if they were domestic corporations. Such is *Mooney v. Buford*, 18 C. C. A. 421, 72 Fed. 32. In *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636, the garnishee was a resident of the state. In *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. 343, the garnishee railroad company operated its railroad within the state, and was held to be a citizen of the state. In *Bank v. Insurance Co.*, 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316, the garnishee insurance company was held to be doing business within the state, and the case was assimilated to the *Mooney* Case, and the decision based upon the same principle. In *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497, the garnishee railroad company had leased property and was doing business within the state. In *Railroad Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143, the railroad company did business and operated its road in both of the states between the courts of which the conflict occurred, and the question was not one of jurisdiction on the ground involved here, but the enforcement of the exemption laws of a foreign state in the garnishment proceeding. In *Harvey v. Railroad Co.*, 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84, involving the validity of a garnishment made in Montana, it was found and held that the railroad company operated its railroad in the state of Montana. In *Hardware Co. v. Lang*, 127 Mo. 242, 29 S. W. 1010, the garnishees were residents of the state. In *Insurance Co. v. Chambers*, 53 N. J. Eq. 468, 82 Atl. 663, the garnishee insurance company was held to be doing business within the state in which it was garnished. In *Railroad Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889, the garnishee railroad company was held to be a domestic corporation of the state. It is also insisted in the brief that *Railroad Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, at least countenances the proposition that a nonresident temporarily within the state may be subjected to garnishment. It certainly does not so decide. Mr. Justice McKenna says, "We are not concerned to inquire whether the cases which decide that a debtor temporarily in a state cannot be garnished there are or are not justified by principle." At another place he says, of the locality of the debt, "But we do not think it necessary to resort to the idea at all, or to give it important distinction." On the contrary, the following language from him strongly indicates that, at least, the domicile of the garnishee determines the jurisdiction of the debt sought to be subjected: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do this, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity,

and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem." By the word "debtor" here he means the garnishee, the man owing the debt sought to be subjected by attachment. He quotes from the opinion in *Andrews v. Clarke*, 1 Carth. 25, passing upon the law of attachment under the custom of London, where it is said: "For it was always the custom in London to attach debts upon bills of exchange and goldsmiths' notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed liveth within the city, without any respect had to the place where the debt was contracted." In that case a prohibition was denied which had been asked, upon the grounds that the cause of action did not arise in London, but was made in the county of Middlesex. What Mr. Justice McKenna was disposing of as fallacious and unsound was the proposition, advanced by a Kansas judge, that the situs of the debt is with the man to whom it is due, and not with the man who owes it. He not only abstains from questioning the soundness of the decisions holding that a debtor temporarily in a state cannot be garnished, but he shows also that the case he was considering was within that principle, for he says, "There is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted." This opinion does not militate against the principle so generally recognized, but rather upholds it.

This question seems never to have been raised nor passed upon in this state. But two cases, not like, but in some respects similar to this, have been decided. *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450. By reference to them it will be seen that in each the *Baltimore & Ohio Railroad Company* was proceeded against as garnishee and debtor of a nonresident person, and that the jurisdiction was sustained upon the ground that said railroad company maintained and operated its road in the state of West Virginia; and it was pointed out in the opinion that it had been held in *Hart v. Railroad Co.*, 6 W. Va. 336, that the acts of the Legislature had conferred corporate powers and privileges upon said railroad company, and that said railroad company is an incorporated railroad company within the boundaries of this state, and that the court would take judicial notice of the fact. It is thus seen that it was found and expressly determined, in order to uphold the jurisdiction of the court, that the railroad company was within the state of West Virginia, and subject to its process. While it is not said that it was domiciled in this state, somewhat stronger language was used,

importing that it was substantially a domestic corporation. In *Mahany v. Kephart*, the following is quoted from Drake on Attach. § 479: "Where, as is sometimes the case, a corporation is chartered by two or more states, it is not in any of those states a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the state in which the garnishment takes place." The other case, *Stevens v. Brown*, was disposed of, and the jurisdiction sustained, upon the same grounds. As tending to uphold their position, counsel for defendants in error quote the following from the opinion in *Beirne v. Rosser*, 26 Grat. 538, which was quoted also in *Mahany v. Kephart*: "All actions are either local or transitory. Real actions are local, and personal actions are transitory. This is a personal action, being for the recovery of damages for the breach of a contract, and is therefore a transitory action. It is a general principle of the common law that a transitory action can be brought against a party wherever he may be found and served with process, no matter where he may reside, or where the execution may have arisen." This has no shadow of application. It was quoted to uphold the action of the court in giving a personal judgment against Kephart, a nonresident who had appeared to the action, being the defendant, not the garnishee, in the action.

The principle which forbids garnishment of a nonresident individual temporarily in the state applies to foreign corporations. Unless doing business within the state, they are not subject to garnishment therein. This is the only extent to which the rule is relaxed in such cases. "Owing to the growth of corporations, and the transaction of their business in jurisdictions other than those in which they were incorporated, there are statutes in practically all jurisdictions which authorize the service of process upon certain officers or agents of foreign corporations, and a foreign corporation, transacting business in a jurisdiction in which such statutes exist, impliedly submits itself to the jurisdiction of the courts therein, and may be summoned as garnishee if corporations and nonresident individuals are liable to be so summoned." 14 Am. & Eng. Enc. Law (2d Ed.) 816. Observe that this rule says they may be summoned. It does not say that, by summoning them under such circumstances, jurisdiction of the res is obtained. It is not enough in such case, to confer such jurisdiction, that jurisdiction of the person of the garnishee may be obtained, any more than in the case of an individual. "A corporation frequently does business at the same time in several different states, and it is liable to garnishment in any one of them where it has an officer upon whom process may be legally served, if it has property of the defendant there. If a corporation is chartered in different states, it has corporate existence in each, as a matter of course, and may be

treated in each as a resident. But if not thus chartered, so as to be, in contemplation of law, a resident of the state, it comes under the rule governing natural persons." Waples on Attach. § 391. In this statement, Waples appears to be fully sustained by the numerous cases cited in support of the text from the American and English Encyclopædia of Law last above quoted. In most of these cases it appears that the foreign corporations garnished had places of business where they transacted their corporate business with agents in charge of it as their own business. In some, they were railroad companies operating lines through the states under legislative permission, and subjected by legislation to the liabilities of domestic corporations. In some, the statutes expressly made foreign corporations liable to garnishment. Generally, they uphold the propositions quoted from Waples.

The garnishee sought to be held by the justice in this state admitted in its answer that it owed the defendant \$24. As it was bound to answer fully, if at all, and make a full disclosure of all the estate of defendant in its hands, and this answer was not controverted or excepted to, the answer amounts to a denial that the railroad company had anything in its hands except said sum of money, and substantially denied that that sum was payable in the state of West Virginia. By the same answer it averred that it was a citizen of the state of Pennsylvania, that Snyder was a citizen of said state, and that said sum was due for wages earned in Pennsylvania under a contract made in Pennsylvania. Being uncontroverted, the answer must be taken as true as to all these matters. It negatives any liability to the defendant in West Virginia either for money or on account of property, and also the jurisdiction of the court because of the nonresidency of the garnishee. The uncontroverted averment that the money was due on account of wages earned in Pennsylvania under a contract there made gives rise to the legal presumption that it is payable in Pennsylvania. *Heflebower v. Detrick*, 27 W. Va. 16. That negatives any mere presumption of money agreed to be paid to Snyder in this state. The petition admits, however, that the railroad company had some connection with the Star Union Line of which McCormick was agent, but denies that the railroad company itself was doing business in the state. The existence of this Star Union Line and its operations in the county of Ohio is the only ground for saying that the Pennsylvania Railroad Company does business in the state. This seems to be fully admitted. It is not contended that the railroad company has complied with the statutory requirements giving to foreign corporations the rights, and subjecting them to the liabilities, of domestic corporations. So it must be determined whether its connection with the Star Union Line amounts to a doing business within the

state so as to make it liable to garnishment. The Star-Union Line is a sort of joint traffic arrangement maintained by several railroads to facilitate the handling and forwarding of freight. One of these is the garnishee company. It appoints the president of the Star Union Line, and he appointed McCormick, the agent in charge, and it is said McCormick solicits freight for the Pennsylvania Railroad Company. The garnishee company contributes to the expenses and maintenance of this arrangement, and in that way to the payment of the agent for his services. It does not amount to a doing business within the state within the meaning of the law of garnishment. The Pennsylvania Railroad Company has not in any sense made itself a West Virginia corporation by contributing to the maintenance of this joint traffic arrangement, although it may in some sense—a limited sense—amount to a doing business within the state. It could not be regarded as being within the state otherwise than transiently. It operates no lines here, runs no cars here, and performs none of its business as a common carrier within the state. Whether it would amount to doing business within the meaning of the statute prohibiting a foreign corporation from doing business without complying with certain regulations is not the test. To do business within the meaning of the law of garnishment, it must bring itself within the state in some substantial way. It is not enough, as has been said, that process may be served upon it. That only gives jurisdiction in personam, not necessarily jurisdiction of the claim sought to be reached in its hands. This view is undoubtedly supported by the great weight of authority. In some states, nonresidents are by statute expressly made liable to the process of garnishment, and many cases are to be found in which the decisions are based upon these statutes. Where they do not exist, the foreign corporation held as garnishee is held to be within the state in the transaction of its ordinary corporate business, and that holding is based, in the cases of railroads, in almost every instance, upon the operation of a line of railroad within the state, and not merely upon the presence of an agent whose business it is to solicit freight or to manage a joint traffic arrangement which is handled over the line of some other railroad within the state. *Thomp. Com. Cor.* vol. 7, §§ 8069-8073, fully supports this decision. For a full discussion of the subject and a conclusion in exact accord with ours, see *Freeman on Executions*, § 161a.

The justice was without jurisdiction for another reason. The return of service of the order of attachment is clearly insufficient. It does not show that McCormick, the agent, resided in the county of Ohio. The service was evidently made under section 35 of chapter 50 of the Code. Section 38 of the same chapter provides that service, under any of the preceding four sections, shall be made in the county in which the person serv-

ed resides, and that the return must show that he resides in the county. It says further that, if the return does not show this, the service shall not be valid. In *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1009, it has been decided that a judgment based on a return of service not showing that fact is void, there having been no appearance. To the same effect is *Frazier v. Railroad Co.*, 40 W. Va. 224, 21 S. E. 723; and the doctrine is approved in *Hopkins v. Railroad Co.*, 42 W. Va. 535, 26 S. E. 187, and *Ry. Co. v. Wright*, 50 W. Va. 633, 41 S. E. 147.

This defect of service would be cured by an appearance in an action in personam, and especially in a justice's court, for section 33 of chapter 50 of the Code provides that an appearance by the defendant is equivalent to personal service. But it does not say that an appearance by a garnishee shall be equivalent to personal service, and to construe it to mean that would do violence to the spirit of the law of garnishment. Nor does the statute anywhere provide that a garnishee may confer jurisdiction by his appearance without service of process. Section 197, c. 50, relating to that subject, requires the delivery of a copy of the order of attachment to the person designated by the plaintiff as garnishee, and there is no provision for his appearance until after that is done. Why is this? The garnishee is a stakeholder, and must be impartial. He cannot voluntarily place his creditor's debt within the jurisdiction of a court to the end that it may be taken by some other person. The debt must be arrested and detained in his hands by the service of process, and that must be a sufficient service to hold it. "Garnishment rests wholly upon judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee. Such acts will be regarded as void, so far as they interfere with the rights of third parties. Thus, under a law requiring the garnishment process to be personally served on the garnishee, it was held that he had no right to do so, and that the acceptance or waiver of service was a nullity as against other attaching creditors, and equally so as against an assignee of the debt in respect of which the garnishee was charged. So, where the statute prescribed that process should be served on a corporation by service on the president, or any director or manager thereof, an admission of service of garnishment by the attorney of a corporation was held insufficient to give the court jurisdiction of the corporation. So, where no legal service of process had been made on a corporation as garnishee, and yet the secretary of the corporation appeared and answered, and made no objection to the sufficiency of the service, it was held that no judgment could be rendered against the corporation. So, where a garnishment was made after the return day of the writ, and the garnishee appeared and answered, and judgment was rendered against

him, it was decided that the process under which he was summoned had no validity, and that he therefore stood as though he had voluntarily appeared and answered interrogatories without notice, and the judgment against him was set aside as against other creditors." Drake on Attach. § 451b. "The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense and injury of another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another." Schindler v. Smith, 18 La. Ann. 476. To the same effect, see Wade on Attach. § 336. It is to be remembered that there has been no service of process on the defendant.

The whole case rests upon the sufficiency of the proceeding against the garnishee, to arrest in its hands the right of the defendant to the debt sought to be subjected. In such case, the court's jurisdiction depends upon something having been seized. Without it, no suit can be maintained against the garnishee. The case is quite different from one in which the defendant has been served or has appeared, and is in a position to take his own exceptions to the proceedings on the ground of insufficiency. Waples on Attach. § 474. "The return of the writ must state all of the facts that are essential to a valid service thereof. It must be certain, and must show that the property was attached in the hands of the garnishee, or the court acquires no jurisdiction over the res. The return should also state on whom the writ was served, and the time when service was made. It must recite the performance of those acts required by the statute as conditions precedent to a valid service in garnishment." 9 Enc. Pl. & Pr. 827, 828. "In order that the defendant may be concluded by the proceedings, it has been held necessary that there should have been a proper service of process on the garnishee. The latter has no power to affect the rights of the defendant by voluntarily appearing as garnishee, and, if he does voluntarily appear, the proceedings will afford no protection to him against subsequent liability to the defendant." 14 Am. & Eng. Enc. Law (2d Ed.) 885.

Counsel for defendant in error insist that jurisdiction is admitted by the plaintiff in error in its petition for the writ of prohibition. As before stated, that petition shows that employes of the company have instituted suits in equity in Pennsylvania to enjoin the petitioner from paying over their wages in satisfaction of the judgments rendered by Phillips in Ohio county, W. Va. In the petition is incorporated the record of one of these chancery causes, namely, O. C. Galbraith v. R. M. Rutter and the petitioner.

The answer of the railroad company in that suit set up the Ohio county judgment against Galbraith, and insisted upon its validity as a defense in the equity suit, and averred that the claim of Rutter was assigned to Rogers; that the attachment was issued by Phillips, "justice of the peace of Washington district, Ohio county, West Virginia, a competent tribunal under the laws of the state of West Virginia, having jurisdiction of the subject-matter; and that the summons was duly served, and the attachment was duly served on an agent of the defendant, garnishee, and that the proceedings affecting such jurisdiction are regular." The Pennsylvania court record further shows that evidence was taken to sustain the allegations of the answer, and that the court found against the railroad company as to several matters of fact, and that the railroad company excepted to the findings of the court in not holding that McCormick was in its employ; that he was district freight solicitor, whose principal duty it was to solicit freight for the defendant; that the Union Line was the through freight business of the defendant, and a bureau of the defendant for conducting its through freight business; that McCormick had an office in Wheeling, W. Va., as freight solicitor of the Pennsylvania Railroad Company; and that the Pennsylvania Railroad Company had no other office in Wheeling. This cannot amount to an estoppel. "The pleadings of a party in one suit may be used in evidence against him in another, not as an estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admissions home to him, the pleadings must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Perry v. Simpson, 40 Conn. 313; Tabb v. Cabell, 17 Grat. 160. It does not preclude or estop the petitioner on the ground of having taken an inconsistent position in judicial proceedings, for the reason that it does not appear to have obtained any advantage from it or injured the other party to this suit. Taken altogether, as a part of the petition, it only shows that the petitioner set up the Ohio county judgment as a defense in the Pennsylvania court, and that that court refused to find from the evidence offered in support of the answer certain facts, which, if found, as contended for by the railroad company, fall far short of establishing that said company is within the state of West Virginia in such sense as to make a debt due from it to a nonresident subject to condemnation by garnishment in the courts of this state. It is said that the agency of McCormick is admitted. Suppose it is; he is an agent, with an office in the city of Wheeling, whose business it is, not to operate a railroad in this state, nor to transact the ordinary business of the Pennsylvania Railroad Company here, but to solicit freight for it.



The answer does not admit that the railroad company is a West Virginia corporation, or is doing business within the state as a foreign corporation, nor that the debt due from it is liable to garnishment in this state. True, it says that the justice's court is a competent tribunal, having jurisdiction of the subject-matter. That is a conclusion of law rather than an admission of fact. It also says the proceedings affecting jurisdiction are regular. That, too, is largely a conclusion of law. Treating these admissions as evidence on the questions of fact set up in the petition, eliminating from them the matters of law included, they do not overthrow the averments of the petition that the railroad company, and especially the debt due from it, are not subject to garnishment in this state, as insisted upon in its answer filed in the justice's court. The pleadings in the Pennsylvania equity cause are entitled to but little consideration here as admissions. Speaking of judicial admissions made in pleadings, 1 Am. & Eng. Enc. Law (2d Ed.) 720, says, "They are admissible in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instructions." The answer was filed by attorneys and sworn to by one of them, and there is nothing to show that it was prepared under instructions from anybody having authority to bind the railroad company generally. On the same page of the same book, in a note, it is said: "In *Boileau v. Rutlin*, 2 Exch. 665, it was held that pleadings in equity, as well as at common law, are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved and ultimately submitted for judicial decision." This is peculiarly applicable here, where it clearly appears that the railroad company against whom it is attempted to maintain this admission is struggling to protect itself against double liability for a great number of claims asserted against it in the courts of two different states. The record in the case relied upon was not made between the parties to the case in which the transcript of the docket of the justice is filed with the petition—the only one that can be considered here. Hence it is not the same suit, nor between the same parties; and for that reason is entitled to less weight than it would otherwise be entitled to. 1 Am. & Eng. Enc. Law (2d Ed.) 719, 720.

As the justice was without jurisdiction of the res (the real subject-matter) for two reasons: First, that the service of process was invalid, and not cured by appearance, although appearance was made; and, second, because the subject-matter itself is not in the state, nor subject to the process of its courts—the writ or prohibition prayed for ought to have been awarded by the court below. But it is insisted that, although jurisdiction was

not acquired, the justice had the power to consider whether he had jurisdiction, and to decide the question of jurisdiction; and that, if he did decide that he had jurisdiction, when in truth he had not, his action in so holding was not without jurisdiction, nor an act in excess of jurisdiction, but simply an error to be corrected on appeal, and not an act without jurisdiction, or in excess thereof, subjecting the court and the parties to the writ of prohibition. For this, *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327, and *Howland v. Railway Co.*, 134 Mo. 479, 86 S. W. 29, are relied upon. The *Sperry Case* is not applicable. It only holds that a court has jurisdiction to determine whether a judgment is valid or invalid. That is purely an exercise of jurisdiction, the parties being before the court, and the validity of the judgment being brought into the court upon the proper pleadings. The *Howland Case* does not sustain the contention, for it asserts that jurisdiction must be obtained, that is, power to hear and determine. It must have jurisdiction, not only of the person, but of the res, after which what is done by the court is merely the exercise of jurisdiction. Works on Courts and Jurisdiction, at page 634, says, "Prohibition will lie to prevent action where the court has not jurisdiction of the person, as well as in cases where there is an absence of jurisdiction of the subject-matter." It must have jurisdiction of the subject-matter. 16 Am. & Eng. Enc. Pl. & Pr. 1094, 1110. Writ lies for excess of territorial jurisdiction. Id. 1120. It is necessary for the defendant, as a general rule, to plead and show want of jurisdiction before applying for a prohibition. But omission to do this does not prevent its issuance, when the declaration shows that the cause of action did not arise *infra jurisdictionem*, or that its subject-matter is not proper for the judgment and determination of the court, or if the defendant was prevented by artifice, etc., from pleading want of jurisdiction. Bacon, Abr. (Ed. 1852) vol. 8, p. 232. The answer of the garnishee, setting up its nonresidence, was not controverted, so far as the record shows, and must be taken as true. That establishes a want of jurisdiction by showing that the subject-matter is beyond the territorial jurisdiction of the court. It is an utter want of jurisdiction, in defiance of which the justice went on and gave judgment. Had the subject-matter been within the territorial jurisdiction of the court, jurisdiction of it was not obtained, because there was no service upon the garnishee. What purports to be the return of service being void under the statute and decisions of this court, it could not confer any jurisdiction of the subject-matter, although the garnishee appeared and subjected itself to the jurisdiction of the court. Where the court has jurisdiction of the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an



error, and prohibition is not the proper remedy. Works on Courts and Jurisdiction, 634. But that is not the status of these matters. The return of service, as has been shown, is void on its face, and gives no jurisdiction of the subject-matter, even if the subject-matter were within the territorial jurisdiction of the court. It is not a mere irregularity. It is a statutory requisite of the return, for omission of which the statute says, not that the return is defective, insufficient, or invalid, but that "the service shall not be valid."

It is also objected that the prayer of the petition is defective because too general. The substance of it has been given in the statement of the case. It seeks the writ, as to all of the numerous cases mentioned in the list filed, as an exhibit with the petition. It can only go, of course, if at all, as to the one case, the record of which is exhibited, namely, that of *Rogers v. Snyder* and the railroad company. This court cannot presume that certain things appear, and certain defenses were made, in the other cases. They must be shown. After setting up and showing what has been done generally in these cases, including the particular case, the record of which is exhibited, it prays that Phillips and Rogers may be prohibited from proceeding in their said acts and proceedings. This, of course, embraces that particular case, although it is not specifically named in the prayer. The petition alleges that in doing the acts complained of the justice has acted without any jurisdiction, and that, if not restrained he will continue his unauthorized proceedings. Although general, and somewhat indefinite in its terms, the petition and prayer are, in substance and effect, sufficiently certain.

It is insisted that the decisions in the cases of *Mahany v. Kephart* and *Stevens v. Brown*, to which reference has been made, ought to be re-examined, and overruled in so far as they hold that the exemption laws of a foreign state have no extraterritorial force or virtue, and will not be enforced by the courts of this state. As tested by the great weight of American authority, these two decisions are right, and no good reason is presented why they should be overruled.

The court below sustained a motion to quash the rule and dismiss the petition for insufficiency of cause shown for the issuance of the writ. The judgment, therefore, stands as one upon demurrer. It must be reversed, for the reasons shown, but judgment cannot now be entered awarding the writ of prohibition. It is only held that the petition is sufficient, and that the court below erred in not so holding, and in quashing the rule and dismissing the petition. Hence, an order will be entered reversing the judgment, and remanding the case to the circuit court of Ohio county for further proceedings in accordance with the principles here announced and further according to law.

(52 W. Va. 410)

# BEATTY LUMBER CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)

## TELEGRAPH COMPANY—FAILURE TO DELIVER TELEGRAM—DAMAGES.

1. A condition upon a blank telegraphic message providing that the "company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any un-repeated message beyond the amount received for sending the same," is not valid and effective to excuse the telegraph company from liability for total omission to send or deliver a message.

2. A telegraphic message importing on its face a proposal to sell lumber is sufficient of itself to charge the telegraph company with notice of its importance, so as to call for prompt transmission and delivery.

3. Compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell lumber, as they are contingent upon its acceptance.

4. In answer to a telegram to a lumber company asking whether it could furnish certain lumber, and at what price, a reply telegram that it could furnish it at a certain price was delivered to a telegraph company for transmission, but was either never sent or never delivered. In an action for damages by the lumber company against the telegraph company, the measure of damages is not the difference between the cost of the lumber delivered at the point of delivery and the fixed price, but the difference between such price and the market value of the lumber at the time when delivery would have been made if the contract had been consummated.

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County, F. A. Guthrie, Judge.

Action by the Beatty Lumber Company against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Simms & Enslow and Flournoy, Price & Smith, for plaintiff in error. Payne & Payne and Brown, Jackson & Knight, for defendant in error.

BRANNON, J. Beatty Lumber Company brought an action against the Western Union Telegraph Company in the circuit court of Kanawha county, and recovered verdict and judgment for \$1,634.45, for which judgment the telegraph company sued out the present writ of error. The claim for damages by the lumber company is predicated upon the fact that it delivered to the telegraph company at Glade Station a telegraphic message for transmission to G. Elias & Bro., and that the telegraph company either negligently omitted to send or to deliver the said message. G. Elias & Bro. had sent a dispatch requesting the lumber company to quote price on certain lumber, and the lumber company, in response, delivered to the telegraph company for transmission a reply message reading: "Can deliver the four-sixteen stringers at Buffalo in thirty days for twenty-one sixty per thousand feet. Commence shipping in five days. Beatty Lumber Company."

A question debated in this case is whether

a condition written upon a blank message, reading, "It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message beyond the amount received for sending the same," is valid or void, in the eye of the law. This condition is found on all the blanks now used in telegraphy, coupled with a printed warning that it is safer, to guard against mistakes or delays, to have message repeated from the office of destination back to the originating office for comparison. The charge for this repetition is one-half the regular rate, in addition to that rate. Whether such a condition is valid has been the prolific source of elaborate and able discussion in England and almost every one of the American states, and in the federal courts, and there is vast conflict of opinion between the courts upon the subject; many courts holding such a condition utterly void to exempt the company from liability, and others holding it valid, or partly valid. It is a well-established rule that a common carrier cannot make any contract or stipulation with one dealing with it by which it can screen itself from liability for loss arising from its negligence. This court recognized this doctrine in *Brown v. Adams Express Company*, 15 W. Va. 812. It is because of that doctrine that so many courts stamp the above condition as void, but it must be said that the preponderance of authority holds such condition valid, certainly to the extent of excusing the company from loss for want of ordinary care. 2 *Thomp. on Neg. (2d Ed.)* § 2422; 2 *Sedgwick*, § 876. The subject is ably discussed in *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; holding that clause valid to excuse from error in transmission of a cipher dispatch. I shall not elaborate the subject here, for the reason that whether or not such a condition, as to mere error in transmission, or delay in transmission or delivery, is valid, it certainly is not valid to excuse total failure to send or deliver a message. See note, 36 L. R. A. 711, for cases. The condition above given excuses only for delay in transmission, and such a condition would surely not be widened to cover total failure to send a message. As to that clause excusing total failure to deliver, it can be said that even those courts which hold such a condition good as to mere error in transmission recognize that it is not good to forgive a total failure to deliver or to transmit. What has repetition of the message back from the office of destination to that of its origin to do with a total failure to send or deliver? This condition has no relevancy, except as to such failure or error as might be cured by repetition. It is only to errors preventable by repetition that such a condition logically applies. Repetition could not prevent either failure to send or failure to deliver. *Thomp.*

on *Negl.* § 2424; *Crosswell on Electricity*, §§ 525, 527. All authorities hold a company liable for gross negligence, willful misconduct, or bad faith or fraud. 2 *Thomp. on Negl.* §§ 2411, 2423; *Crosswell on Electricity*, § 510. The omission in this case is not one of mere inaccuracy in transmission, but either total failure to send or to deliver the message, and therefore we hold the clause no justification for omission of that character.

Another question debated in this case is whether the dispatch above quoted furnished warning to the company of its important import, so as to call upon it for diligence and care in prompt transmission and delivery. The law is, by the great weight of authority, that an enigmatical message, commonly called a "cipher message," or one which, though not such a message, is yet one so obscure that it is not intelligible to the telegraphic operator, does not render the company liable, in case of omission of the company to send or deliver, for full compensatory damages, but only for nominal damages; that is, the amount paid by the sender. The reason is, there is nothing on the face of the dispatch to warn the company of the importance of the message and to spur it to diligence, and thus we cannot say that the parties contemplated any special damages from omission of that duty required of the telegraph company by law. 2 *Thomp. on Negl.* §§ 2469, 2472; *Crosswell on Electricity*, § 609. This subject was fully discussed in *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, and it was held that a cipher or obscure message will render a company liable to only nominal damage in case of default. I venture to say that this position is very doubtful, notwithstanding that I concede that it is law, upon a preponderance of authority. It would seem that a telegraph company receiving a message ought to presume, without information conveyed by the telegram or otherwise, that it is important, and that damage may ensue from its failure of duty. What right has it to ask whether it is important or not? *Crosswell on Electricity*, § 574. In the present case the message is plainly a commercial one. It plainly imports that it was an answer to an inquiry as to lumber, and that it proposed to sell and deliver lumber. Such a message affords no excuse for omission of duty by a telegraph company.

But the trouble facing the plaintiff in this case is that there was no finished contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummated contract. It only prevented one that might or might not have been made. Where one sends a dispatch to buy an article, and the dispatch is not sent, and the price of that article rises, or a dispatch to sell an article, and the price falls, we can see a ground for damage proxi-

mately traceable to the omission to send the dispatch. So we can where there is a subsisting contract, and the failure of the telegraph company causes a breach of that contract. In this case, however, we can only guess or surmise that there would have been a binding contract, had the dispatch been sent. In order to give compensatory damages, we have to surmise and conjecture—only surmise and conjecture—that, had the message been sent, there would have been an acceptance of the proposal which it made. To give compensatory damages, there must be actual loss, and the court must see that it comes from the wrongful act of the defendant; that, but for such act, there would not have been a loss. "Compensatory damages are such as measure the actual loss, and are given as amends therefor." *Talbott v. Railroad*, 42 W. Va. 560, 28 S. E. 811. Therefore we must be able to say with legal certainty that, if that telegram had been delivered, there would have been an actual contract, for, if a contract had not ensued, the company would clearly not be liable. We everywhere come across the rule that damages must not be contingent and conjectural. I do not here mean a conjectural process of fixing the mere amount of damages, but I mean that we cannot fix damages upon a party as guilty of wrong upon a cause or basis resting on a contingency—upon an event that might or might not have happened. We cannot say that the proposal of the lumber company would have been accepted. "Speculative Loss. The plaintiff must, of course, prove that the loss for which he seeks compensation would have happened. Compensation will not be given for mere conjectural consequences. In *Hibbard v. W. U. Tel. Co.* [33 Wis. 558, 14 Am. Rep. 775], a telegram was sent by Hibbard to his agent, directing him to buy goods at a certain price, deliverable in June, at the seller's option. The message was not delivered, and the price the next day went up. After that it went down, and continued below the price mentioned in the telegram until after the period fixed for delivery. The agent did not buy the goods. It was held that only nominal damages could be recovered, as the plaintiff could only have made profit by selling the day after the purchase was made, and it was impossible to say that he would have done this. It depended upon too many contingencies. So, where the plaintiff telegraphed to a broker to buy oil on a margin, and the message was not delivered, it was held that the loss of the plaintiff was too uncertain for compensation, though the price of oil afterwards fluctuated. Where the plaintiff, an undertaker, failed to receive a message, 'Meet me at the depot prepared to arrange for shipment to I. of my mother-in-law's remains,' it was held that, since he lost only the possibility of making a profit, he could not recover. In *Western U. Tel. Co. v. Connelly* [2 Willson, Civ. Cas. Ct. App. § 118], a message to

the plaintiff in these words, 'If you want a place, come first train,' was delayed, and upon going to the place the plaintiff found himself too late. It was held that he might recover compensation for his time and expenses in going to the place, but that loss from failure to secure employment was too conjectural." This authority from 2 Sedgw. on Dam. § 888, seems applicable to this case. So does section 889, where we find this: "In many cases where a telegram is delayed or not delivered, it is impossible to prove that a bargain has been lost, because it does not appear that, had the message been duly transmitted, an actual gain would have ensued. The whole subject has been recently reviewed in its bearing on the contracts of telegraph companies by the Supreme Court of the United States. In *Western U. Tel. Co. v. Hall*, 124 U. S. 444, 454 [8 Sup. Ct. 578, 31 L. Ed. 479], the message was: 'Buy ten thousand, if you think it safe. Wire me.' The message meant that the person to whom it was addressed should buy ten thousand barrels of petroleum, if he thought it safe. Had it been delivered in time, the purchase would have been made at \$1.17 per barrel. On the delivery of the dispatch the price had risen to \$1.35, and no purchase was made. The court held that the plaintiff could recover only nominal damages." The opinion says that the only theory on which the plaintiff could show actual loss was on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th; that it was clear that, in point of fact, the plaintiff had suffered no actual loss, as no transaction was in fact made, and all that could be said to have been lost was the opportunity of buying on the 9th, and of making profit by selling on the 10th, the sale on that day being purely contingent.

In *Johnson v. W. U. Tel. Co.* (Miss.) 29 South. 787, 89 Am. St. Rep. 584, we find the law thus stated: "The damages for failure to deliver a telegram are too remote and uncertain to admit of recovery where, if it had been received, it only gave plaintiff an opportunity to make a contract for railroad construction, which he might or might not have made, the profits on which, if made, would have been subject to several contingencies." We find in *Western Union Tel. Co. v. Blanchard* (Ga.) 45 Am. Rep. 496, a report or reference to the case of *McColl v. Western U. Tel. Co.*, 44 N. Y. Super. Ct. 487, in which a man sent a dispatch as follows: "Can close Valkyrie and others, 22, 20 net, Montreal. Answer immediately." Held, that commissions which the sender would have earned as broker in effecting a charter of the two vessels if the message had been duly sent were not damages either actually contemplated or to be fairly supposed to have been contemplated by the defendant, and therefore not recoverable. The court said that, however strongly the plaintiff may have felt assured, acting as a broker, that the offer

telegraphed to his principal would be accepted, and that he would get his commission, yet there was nothing in the case placing these contingencies, in themselves uncertain and remote, within contemplation. The court said that the claim of the plaintiff was for a special and contingent loss. In *Smith v. Western U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, a party had bought stock of a New York broker, and had a deposit with him, and the broker was not to sell the stock, except in the event it so declined that its value, with the deposit made by the party, did not equal the amount paid therefor. A telegram was addressed to the purchaser in Kentucky by the broker, notifying him of the purchase of stocks, but was never delivered. The stock declined, and the broker sold the stock. Soon such stock increased. In an action against the company, the jury found that, if the purchaser had received the telegram, he would have ordered the stock sold when stocks first began to decline, of which he had notice, and thus have saved a large amount. It was held that he could only recover the cost of the message, and that the special verdict that the person might have sold had no effect; that "what a person might or would have done is not the proper subject of a special finding, and such a finding, though not objected to, will not be considered." In *North American Trans. Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061, in an action against the common carrier (a railroad company) for damages for failure to get employment, or contracts by which the party could have made profit, which damages were alleged to flow from a failure to make railroad connections, it was held there could be no recovery, because the contracts, as well as profits, which the plaintiff suggested he might have made, had he reached Dawson City, were contingent and uncertain.

The case of *Manville v. Tel. Co.*, 37 Iowa, 218, 18 Am. Rep. 8, is cited for the appellee. There the message was, "Ship your hogs at once." That was the last dispatch to make a bargain. Failure to send it prevented an actual sale. There was nothing contingent in that. It was not a mere proposal, which might or might not have been accepted. So, in *Thompson v. Tel. Co.*, 64 Wis. 581, 25 N. W. 789, 54 Am. Rep. 644. The dispatch read: "Send the horse to-day. Mock loads to-night." The failure there lost actual sale. It was not a mere contingency. In *W. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336, there was a failure to send a dispatch by agent to principal telling him that he had bought mules, which the principal could sell, which failure caused the loss of an actual sale which the plaintiff had already made. There was no contingency or uncertainty. So in *Hare v. Parkersburg*, 24 W. Va. 554, there was an actual contract by which the city purchased gravel of Hare, and after he had delivered a part of it the city rescinded the contract. Where was there any contingency about

that? An actual contract broken, and the loss certain, ascertainable.

Our conclusion, therefore, is that as we cannot, with legal certainty, say that a contract would have come into existence if the dispatch had been received, we cannot assert or find that any actual loss was inflicted upon the plaintiff, and therefore the recovery of compensatory damages was improper in the case. It is well settled that the bare infringement of a right, or the bare breach of a contract, though not accompanied by actual damage, gives a right to recovery of nominal damages; but for compensatory damages there must be actual, substantial, measurable loss. 1 Sedgwick on Dam. § 98.

In this opinion I have assumed that the profits which the plaintiff claims it could have made by the difference in the estimated cost of production of the lumber and the price which it was to receive for it is not conjectural or contingent or speculative. Such damages have often been denied by our courts. *Newbrough v. Walker*, 8 Grat. 16, 56 Am. Dec. 127; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980; *James v. Adams*, 8 W. Va. 568; *Hare v. Parkersburg*, 24 W. Va. 554. But as just stated, I have granted that such profits, if there had been a contract, would be ascertainable with legal certainty.

To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that *Elias* stated, as a witness, that his firm would have accepted that proposal if it had been received. This will not prove the fact. That evidence does not make the fact certain. The opinion of this witness months afterwards cannot go to that length. In *McColl v. W. U. Tel. Co.*, cited, the party to whom the telegram was addressed said that he would have accepted its proposal, but the court said this did not change the nature of the matter. So, in *Smith v. W. U. Tel. Co.*, cited, the jury found that, if the telegram had been received, the party would have sold his stock, but the court said, "What a person might or would have done in a certain event is not the proper subject of a special finding, and will not be considered."

The measure of damages has been hotly contested in this case, as well as the matter last considered. In view of what has been said as to contingent damages above, it may not be important to discuss the measure of damages, but it arises on the record. The plaintiff says that the measure is the difference between what the lumber would have cost it, delivered at Buffalo, and the price which its telegram proposed, and upon this basis the jury fixed the amount of damages. It was proven in the case that from the date when this lumber would have been delivered, as the plaintiff claims, lumber increased constantly in value, and was much higher at the time of the suit brought than then. The plaintiff did not have the lumber on its hands,

already manufactured, but intended to manufacture it from its timber then yet standing. The company did not lose one cent from labor done in executing a contract. We hold that under the evidence the company lost nothing, for the reason that its timber was worth more afterwards than at that time, and has ever since continued so, and that it could at any time have converted the timber into lumber and realized more money from it than it could have realized if it had consummated the contract. In short, the failure of the telegram to reach its destination, in all human probability, made money for the plaintiff. Certain it is that the plaintiff could have used its timber, and its sawmill in manufacturing the timber into lumber, and made money over what Elias & Bro. would have paid. Suppose the telegram had been received, and its proposal accepted, and then Elias & Bro. had afterwards countermanded the order, before the plaintiff had done any work. What damages could the plaintiff have recovered from them? Only nominal damages, as the plaintiff lost nothing thereby, as its timber was worth more than ever, and was convertible into lumber, which would have brought just as much as the price agreed, and more. Now, did not the failure of the telegraph company place the plaintiff in practically the same condition as it would have been if Elias & Bro. had made the order, and then countermanded it? It seems to me that this case assimilates itself to the law where, upon the sale of chattels the vendee breaks the contract by a refusal to accept the goods. If the plaintiff had gotten out the lumber and had been refused acceptance, it would have been in the same fix it actually was in, save the expenditure of labor. Where a vendee refuses to accept the goods, and the vendor retains them as his property, the measure of damages in a suit by the vendor against the vendee "where the title is not passed, is the difference between the contract and market price of the article at the time when and the place where it should have been accepted." 2 Sedgwick on Dam. § 753. In the leading case of *Masterton v. Mayor*, 7 Hill, 61, 42 Am. Dec. 38, commented upon in 1 Sutherl. on Damages, § 64, this doctrine that the measure of damages is the difference between the market value of the refused article, if an article of value, and contract price, is approved. Therefore, if that lumber would have brought in the market at Buffalo, at the time when it would have been delivered, as much as the figures named by the plaintiff in its lost telegram, it could recover only nominal damages, because it lost nothing. Or if it could have so manufactured that timber into that kind of lumber, or any lumber, within a reasonable time after the date of the lost dispatch, then it can recover only nominal damages, because it could not have lost anything from the telegraph company's fault.

Under these principles, it follows that the

plaintiff's instruction 1, telling the jury that the plaintiff was entitled to recover the difference between the price for the lumber proposed in its lost dispatch and the sum or amount it would have cost the plaintiff, delivered at Buffalo, was erroneous. The defendant's instruction that the plaintiff could recover only the amount paid for the lost message was correct, and should have been given. The court should have given defendant's instruction 3 that, as there was no contract, no profits could be recovered; and also No. 4, saying that recovery of profits between cost of production and the price proposed could not be allowed. The court properly refused defendant's instruction 5, telling the jury that if the plaintiff did not request to have the message repeated, and did not pay for repeating it, there could be no recovery.

For these reasons, we reverse the judgment, set aside the verdict, grant a new trial, and remand the case to the circuit court.

(53 W. Va. 388)

ALDERSON'S ADM'R v. ALDERSON et al.  
(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

PRINCIPAL AND SURETY—SALE OF PRINCIPAL'S LANDS—BANKRUPTCY OF HUSBAND—RIGHTS IN DECEASED WIFE'S ESTATE.

1. Where a suit is instituted by an executor to pay the debts of the estate out of the real estate of the testator—there being no personal assets; the estate being largely indebted, principally on account of indorsements and suretyship, for which security debts there are judgment liens against the principal debtor—and in the suit the lien creditors of the principal debtor have been convened, the principal debtor is not entitled to claim the benefit of section 7, c. 139, Code 1899, providing that no sale shall be made of his realty unless it appear to the court that the rents and profits of the real estate subject to the liens will not satisfy the same in five years. The principal debtor's land should first be subjected to the exoneration of the lands of the surety.

2. Where the remainder in the estate of a deceased wife is subject to the payment of the debts of the surviving husband, who has been duly adjudged a bankrupt under the United States bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), for which debts the estate of the wife was liable only as security or indorser, and the husband's estate by the curtesy has been subjected to sale, and the rents and profits of such curtesy estate sequestered to pay the liens thereon, it is the duty of the circuit court to retain the residue of the life estate of said bankrupt, or the proceeds thereof, after satisfying the liens decreed against the same, and administer the same, for the purpose of protecting and making whole the estate of the deceased wife and her devisees, entitled to the remainder after sale of such estate by the curtesy for the debts of said bankrupt, for which said remainders were decreed to be sold, and for which they were only liable as security or indorser for the bankrupt, instead of turning over such residue to the trustee in bankruptcy of said bankrupt.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by Mary P. Alderson's administrator against J. C. Alderson and others. From the decree defendant J. C. Alderson appeals. Modified and affirmed.

Miller & Reed and Simms, Enslow & Alderson, for appellant. John W. Harris and Mollohan, McClintic & Mathews, for appellees.

McWHORTER, P. S. Lewis Price, administrator c. t. a. of Mary P. Alderson, instituted in the circuit court of Greenbrier county his bill against J. C. Alderson, the husband of his testatrix, and others; alleging that the estate was considerably in debt, and no personal property left to pay the debts; that before her death the testatrix had joined with her husband in a coal lease for certain of her lands, in which the lessee had not developed or opened the mines on said land; that Alderson had given notice to the lessee, James Lang, as well as to plaintiff, that he claimed his wife's interest in the said lease, and curtesy in all real estate of which his wife died seised; alleging that Alderson was not entitled to curtesy in said lease, nor in the proceeds derived therefrom, nor in any other lands of the testatrix, in their present condition, as said lands, except probably a tract of about 190 acres in the Richlands, Greenbrier county, are undeveloped and timber lands, upon which no mines had been opened and no operation commenced at the death of the testatrix, and, as to that portion of the mineral land leased to Lang, said J. C. Alderson united in said lease, parting with any and all interest he may have had therein. Plaintiff asked the court to take charge of the administration of the estate of his testatrix under the will, and give him full and explicit directions as to the payment of debts for which the estate might be liable; and praying that said Alderson be required to discover any and all property he might own that was liable to the payment of the debts owing by him, and for which the plaintiff testatrix was bound as his indorser; that the real estate of J. C. Alderson be first subjected to the payment of all debts due by him, and on which his wife, M. P. Alderson, was indorser; that the will of his testatrix be construed, and the rights of the devisees and legatees thereunder be determined, and also the rights of J. C. Alderson, the husband, in her said estate.

The defendant J. C. Alderson filed his answer, disclosing the land to which he was entitled, and interest therein; showing that he had large interests and holdings in several counties in this state and in other states. The court decreed in that cause that J. C. Alderson was entitled to curtesy in the real estate of which his wife died seised of an estate of inheritance, and including a life estate by the curtesy in the said interest of his wife in mineral lands described in the Lang lease, which included the rents, issues, and

profits arising from said interest by reason of said lease to land, from which decree the plaintiff appealed, and the decree was affirmed by this court. 46 W. Va. 242, 33 S. E. 228.

Plaintiff filed an amended bill at the March rules, 1898, in said circuit court, bringing in other parties, co-owners in certain lands with plaintiff's testatrix; praying that they be required to answer and disclose what their interests were, and by whom the legal title thereto was held. At the June rules, 1899, plaintiff filed his second amended bill, making the creditors of the estate of J. C. Alderson parties; stating that it was alleged in the original bill that said Mary P. Alderson was at the time of her death bound as security of, or indorser for, her said husband, to a large amount; that some of said creditors had filed their claims in said suit, which were allowed and reported to the court; that plaintiff was informed that there were others claiming to be creditors of said J. C. Alderson, for whose debts his wife's estate was not bound, who claimed the right to subject to the satisfaction of their claims the interest in her estate so adjudged in his favor; and denying that such creditors had any such right, except subject to the prior rights of the remainderman and those who were creditors of both Alderson and his wife; and alleging that, whatever interest said J. C. Alderson might have in his wife's estate under the said decisions, that interest must first be subjected to the payment of the debts of Alderson for which his wife's estate was bound; and further alleging that the defendant Thomas Tabb, as the owner of the legal title to the Raleigh county land under the deed of trust from Alderson and wife, of date December 28, 1893, must be brought before the court; that other creditors named claimed to have sued out and levied attachments since the institution of this suit upon the said interest of Alderson for the debts asserted by them in this suit; that the defendants Tabb and Smith, not parties to the original bill, and individual creditors of said J. C. Alderson, also claimed, as plaintiff was informed, to have sued out and levied attachments on the said interest; that the defendants Bank of Alderson, Feamster, Peabody Insurance Company, and J. N. Alderson claimed to be judgment lien creditors of said J. C. Alderson, and that the defendants Miller & Read claimed to be assignees of a certain portion of said interest; and prayed that the several attaching creditors, the said judgment lien creditors and assignees, and all others claiming to have liens upon the said interest or estate of said Alderson, might be required to present their claims in this suit; that the said several parties might be enjoined from the further prosecution of any suits brought by them to subject said interest or estate to the payment of their debts; that the court might ascertain and determine for what debts of the said J. C. Alderson the estate of said M. P. Alderson was bound, and the ex-

tent to which it was entitled to be relieved therefrom by the application thereto of the interest of said J. C. Alderson; and that such application might be made according to the respective rights of the parties to this suit.

In April, 1899, Thomas Tabb, for Annie J. Phœbus, filed his affidavit in the circuit court of Greenbrier county, and sued out attachments in several counties against said J. C. Alderson and C. L. Smith and the Kanawha Valley Bank, respectively; also sued out attachments in actions of debt against said Alderson, all of which designated the lessee, Lang, and the Sun Coal & Coke Company, as garnishees; and the said Phœbus filed her bill against said J. C. Alderson in said circuit court of Greenbrier county to enforce her claim against said Alderson, and praying that defendants James Lang and S. Lewis Price might be required to discover and disclose by answer, or as the court might otherwise direct, the moneys owing by them, and the property in their possession or under their control belonging to the defendant J. C. Alderson, and the enforcement of the attachment, and for general relief.

The defendant J. C. Alderson filed his demurrer and answer to the second amended bill of said S. Lewis Price, administrator, etc.; denying the rights of those creditors of his late wife, Mary P. Alderson, and himself, jointly, or those creditors of Mary P. Alderson on debts or obligations for which she was security for him, to any priority of the other creditors, also himself, in regard to respondent's estate by the curtesy in the estate of his late wife, except such as said creditors might acquire by some mode and manner prescribed by law; and denying that his said interests must be first subjected to the payment of his debts for which his said wife's estate was bound, to the exclusion of others of his creditors who might acquire proper liens on said estate.

The defendant S. W. N. Feamster also filed his separate demurrer and answer to the second amended bill, setting up his judgment as a valid and binding lien on the estate by the curtesy of J. C. Alderson in the land of his wife, and denying that the estate of his wife, by reason of her indorsement for J. C. Alderson, was entitled to any rights of substitution against the estate or interest of said Alderson, except in so far as she had paid such debts, and then only to any lien obtained by said creditors of J. C. Alderson, and averring that M. P. Alderson had paid no part of any debts for which she was the indorser or surety for said Alderson.

The defendant the Kanawha Valley Bank filed its answer, setting up its claim against J. C. Alderson and the estate of Mary P. Alderson, his indorser.

The defendant Annie J. Phœbus also filed her answer.

On the 17th day of July, 1899, the causes came on to be heard together, when the defendant J. C. Alderson appeared specially

and prayed oyer of the subpoenas in each of said causes, and moved to quash the said writs directed to the sheriff of Fayette county in each case, and also in each of said cases moved to quash the attachments therein issued. The court overruled the motions to quash said writs in each of said cases, and overruled the motion to quash the attachments in the case of Annie J. Phœbus against said Alderson, and sustained the motion to quash the attachment in the case of Tabb against Alderson, and dismissed the bill of said Tabb. And Miller & Read and J. N. Alderson and S. W. N. Feamster tendered their separate petitions in the cause of Phœbus against Alderson and others, which were filed by leave of the court, and the cause was referred to Henry Gilmer, special commissioner, with instructions to state and report, first, a settlement of the administration account of Mary P. Alderson, deceased, showing what had come or should have come into the hands of said administrator, belonging to the estate; second, the real estate owned by the testatrix at the time of her death, whether held in severalty or in connection with others, her interest, the location, etc., whether wild or improved land; third, the debts of the testatrix owing by her at the time of her death, and whether owing in the relation of principal or indorser, to whom owing, with the amount, dignities, and priorities; fourth, the debts of J. C. Alderson for which his wife was bound, and the order of priorities in which said debts should be paid out of the estate by the curtesy in the land of his deceased wife, in the event it should be held that the said estate by the curtesy is bound in the first instance for the payment of such of said debts as his wife was bound for as his surety or indorser; fifth, the liens, by attachment, judgment, or otherwise, against the estate by the curtesy of J. C. Alderson in the estate of his wife, and dignities and priorities in the event it should be held that said estate is not bound in the first instance for the debts of said Alderson for which his wife was surety or indorser; sixth, what royalties, if any, have been collected or should have been collected from the lessee, Lang, and others, under the lease on the interest of Mary P. Alderson's lands in Fayette county, by whom collected, when, and what disposition has been made of them; seventh, what rents have been collected since the death of Mary P. Alderson from the land of which she died seised, by whom, and what disposition has been made thereof, and any other pertinent matter that the commissioner might deem proper or be required to report by any party in interest.

On the 23d day of October, 1899, the special commissioner, Henry Gilmer, filed his report, to which several exceptions were filed. On the 13th day of November, 1899, John A. Preston, trustee in bankruptcy of J. C. Alderson, bankrupt, tendered his petition in

these causes, which he asked to be filed as his answer to the bills, to which answer the plaintiff replied generally, by which petition it appears that on the 11th day of August, 1899, a petition in bankruptcy was filed against J. C. Alderson by his creditors in the District Court of the United States for the District of West Virginia, and that on the 5th day of September following he was duly declared by said court a bankrupt; and praying that said trustee in bankruptcy be made a party to the original and amended bills filed by the administrator of Mary P. Alderson, and that his rights be ascertained and determined, so far as they rightfully might be, under the pleadings and proofs taken or to be taken in said cause; that the estate and assets of said bankrupt in the possession or under the control of the said court might be turned over to him to be administered under the orders of the bankruptcy court; and for further and complete relief.

The cause came on to be heard on the 24th day of November, 1899, upon all the papers formerly filed and read, the decrees, and upon the report of Commissioner Gilmer, the exhibits and papers filed therewith, and the depositions taken before said commissioner and filed as a part of his report, the exceptions of the plaintiff, administrator of M. P. Alderson, Margaret L. Price, Jennie S. Price, the Peabody Insurance Company, the Manufacturers' Fire Insurance Company, and the defendant J. C. Alderson to said report, and upon the petition of J. A. Preston, trustee in bankruptcy.

The court overruled the exceptions of all the parties to said report, and recited, "and it appearing to the court that the lien creditors of said J. C. Alderson and all the creditors of M. P. Alderson were convened according to law," and proceeded to decree as follows: "It is therefore adjudged, ordered, and decreed that the said report, as corrected herein, be, and the same is hereby, confirmed; and it appearing from said report and the proceedings in this suit, that the attorneys for J. C. Alderson, Miller & Read, and Simms, Enslow & Alderson, are by their assignments and the decrees of this court entitled to priority, to the several amounts set up before the commissioner and reported by him, against the fund now in the hands of J. A. Preston, receiver of this court, amounting to one thousand three hundred and seventy-six dollars and forty-five cents," and decreed to Miller & Read the sum of \$750, with interest, as the first lien on said fund; and to Simms, Enslow & Alderson the sum of \$500, with interest, as the second lien against said fund; and to the Peabody Insurance Company the sum of \$3,798.70, as the third lien against the real estate (including the royalties of the Lang lease which might thereafter accrue) of said J. C. Alderson, except that portion conveyed by J. C. and M. P. Alderson to Thomas Tabb, trustee,

by deed of trust, mentioned in commissioner's report, to secure Annie J. Phœbus; and decreed to Manufacturers' Fire Insurance Company against J. C. Alderson the sum of \$2,965.32, as the fourth lien against the real estate and royalties of J. C. Alderson, with said exception; and to the Bank of Alderson, for the benefit of S. W. N. Feamster, against said Alderson, the sum of \$994.80, as the fifth lien against said real estate and royalties; and to Joseph N. Alderson against J. C. Alderson the sum of \$150, as the sixth lien against the same. Said decree further recites the fact of the filing of the petition in involuntary bankruptcy in the United States District Court by the creditors of said J. C. Alderson, and his being adjudged a bankrupt, and the appointment therein of John A. Preston as his trustee in bankruptcy, and that the attachment liens of Annie J. Phœbus, the Kanawha Valley Bank, Clarence L. Smith, and the Commercial Bank of Wheeling, as well as the said judgment liens of Feamster and the judgment lien of J. C. Alderson, were each and all of them acquired and took effect within the four months next preceding the filing of the said petition in bankruptcy, and that the court had no further jurisdiction for the enforcement of said attachments and judgments; and the court did not pass on the merit of said claims against said J. C. Alderson, but left the parties to assert such rights as they might have in the said bankruptcy proceedings or elsewhere. It was further decreed that said Preston, receiver, pay over to said Miller & Read and Simms, Enslow & Alderson the sums decreed to them out of the funds in his hands from the estate of J. C. Alderson, and that the chancery suit of the Commercial Bank of Wheeling against said J. C. Alderson, pending in said court, be consolidated with, and thereafter be heard together with, these suits. It was further decreed that Annie J. Phœbus recover of the estate of M. P. Alderson the sum of \$9,583.84, for which debt she was bound as a surety of said J. C. Alderson, which was decreed to be the first lien on the interest of both M. P. and J. C. Alderson in what was known as the "Raleigh Land," conveyed by M. P. and J. C. Alderson to Thomas Tabb, trustee, by deed dated the 23th day of December, 1893, and was also a general lien, without priority, against the other real estate of M. P. Alderson, deceased; and decreed to other parties further sums against the estate of M. P. Alderson deceased; and provided that unless the said M. P. Alderson's administrator, or some one for the estate, within 90 days from the date of the decree, and unless the defendant J. C. Alderson, or some one for him, within the said time, should pay off the said recovery had against them, respectively, then the special commissioners named in said decree should proceed to sell said land and interests of the said M. P. Alderson's estate



and of J. C. Alderson, from which decree the defendant J. C. Alderson appealed to this court.

The first assignment of error is the overruling of the defendants' demurrer to second amended bill, claiming that the objects of the original bill were incompatible with the prayers of the second amended bill; that the original bill was brought to settle the estate of plaintiff's testatrix, and to exclude defendant J. C. Alderson from curtesy in said estate, and could not be turned into a general creditors' bill against said Alderson, when his wife's estate was not a lien creditor of his, and had not at that time been compelled to pay one cent for said Alderson, as his surety or indorser; that no execution had been returned on any judgment *nulla bona*, nor was there any allegation in any of the bills that the rents, issues, and profits of defendant Alderson's real estate would not in five years discharge all of the liens against the same: that the said amended bill, on its face, showed no equity, as it did not allege that either M. P. Alderson, in her lifetime, or her estate, had, by paying any lien debt of said Alderson as surety for him, become entitled to be subrogated to any lien against his estate. The original bill was filed by the personal representative of M. P. Alderson, deceased, under the statute, to subject her real estate to the payment of her debts—she having left no personal estate—a large part of which debts she owed only as surety or indorser for her husband, J. C. Alderson, and because of his interest in the real estate sought to be subjected to the payment of such debts, as well as his liability for a part of the debts as principal debtor, he was a necessary party to the suit, and the plaintiff had a right to have the estate he represented to be protected, by having the interest of J. C. Alderson in the real estate of his testatrix first subjected to the payment of his debts for which the estate was bound as surety or indorser, and which the bill prayed might be done. It also prayed for a discovery from the said J. C. Alderson as to what property he owned which would be liable for his debts, and, in response, disclosed by answer his lands and interests in lands, whereby it appears that he has large holdings of real estate and interests in this state and elsewhere, besides his curtesy estate. From the record it appears that the larger amount of the indebtedness reported against the estate of M. P. Alderson were debts for which said estate was bound only as surety or indorser of appellant. So the relations existing between Alderson and his wife's estate was that of principal and surety, which is a subject of equitable jurisdiction; and the relation between Alderson, the life tenant by the curtesy, and the remaindermen, is also an equitable one; and a court of equity will protect, as far as it may, the remainder against the acts, de-

faults, or obligations of the life tenant. And the court having, in addition to the other grounds of equitable jurisdiction, these grounds, and having the whole estate and all parties to be affected by its administration properly before it as parties defendant, it was proper that it should dispose of all questions and equities arising between the parties, and, as far as possible, reimburse the remaindermen out of the estate of J. C. Alderson, to the extent that the remainder was taken to pay his debts. It would seem that the judgment liens against said Alderson could not be properly enforced against his real estate, or interests therein, in the absence of an allegation that the rents and profits would not satisfy the judgments in five years, or unless it so appear to the satisfaction of the court in some way in the cause, as provided in section 7, c. 139, Code 1899 (*Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102), as the sale is being made for the purpose of paying off the judgment liens. But the majority of the court hold that the theory of plaintiff's suit is that, under the facts appearing in the cause, equity has jurisdiction to administer the estate of Mrs. M. P. Alderson, and to protect the fee in the real estate thereof from all liabilities not primarily resting upon it, to the extent that such liabilities may be satisfied out of an interest in the same real estate owned by J. C. Alderson, who is a necessary party to this cause, and who is primarily liable for such indebtedness, and to adjust all equities between her estate and the estate of her said husband therein; that in such case the principal debtor is not entitled to have the benefit of the statute providing that his lands shall not be sold unless it appear that the rents and issues will not pay the debts against them in five years. The principal debtor's land should first be subjected, to the exoneration of the lands of the surety. That it is not a suit for the enforcement of judgment liens against the debtor's real estate; neither is it necessary that it appear that executions of the judgments be returned *nulla bona* before proceeding against the lands of the principal debtor. Certainly, if Mrs. Alderson had paid the judgments against her husband, and this had been a suit to subrogate the estate of Mrs. Alderson to the rights of the judgment creditors whose debts she had paid, the principal judgment debtor would have been entitled to the benefit of the provisions of the statute referred to, in relation to the renting of his lands, instead of sale thereof, in case the rentals would pay the debts in five years.

And it is assigned as error by the defendant that the court decreed a sale of the curtesy estate of said Alderson in the lands of which his wife died seised, alone, when the record of the suit formerly before the court showed that he was the owner of other valuable lands, and without ascertaining

whether or not the rents and profits of said lands would pay the debts as the statute requires. This assignment is met by what has just been said.

It is contended by appellant, also, that the court erred in refusing to quash the attachments sued out against the estate of J. C. Alderson. This is wholly immaterial in this cause, as the said attachments were rendered null and void by the United States bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Foster's Code of Bankruptcy, § 260. Bankrupt Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]: "All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as part of the estate of the bankrupt unless the court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid." The court ascertained that said attachments were sued out and levied within the four months next preceding the filing of the petition in bankruptcy against the said J. C. Alderson, and very properly held that it had no jurisdiction for the enforcement of said attachments and the judgments recovered within said time, and declined to pass upon the merits of said claims against said Alderson, and left said claimants to assert such rights as they might have in the said bankruptcy proceedings or elsewhere.

A cross-error is assigned that the court erred in directing the residue of the life estate of the said J. C. Alderson, or the proceeds thereof, after satisfying the judgment liens decreed against the same, to be turned over and paid to John A. Preston, trustee in bankruptcy of said Alderson, to be distributed under the orders of the bankruptcy court, instead of retaining and administering the same for the purpose of making whole the estate of Mrs. M. P. Alderson and her devisees entitled to the remainder after such life estate for the debts of J. C. Alderson, for which said remainders were decreed to be sold, and for which said remainders were only liable as security for J. C. Alderson. It is well said by appellees' counsel: "The effect of this ruling is to compel the remaindermen to permit their remainders to be sold to pay the debts of the life tenant, sacrificing their fee for the protection of said life estate, for debts primarily those of the life tenant. In other words, the fee of the remainder is sold and

lost forever, the debts of the life tenant are paid, his life estate is cleared, freed of incumbrances, and turned over to him or his creditors, who go their way rejoicing, leaving the remaindermen but the memory of an estate they should have enjoyed, and the satisfaction of knowing they have paid the debts and saved the estate of J. C. Alderson. Having jurisdiction to ascertain the debts of J. C. Alderson for which Mrs. Alderson's estate was liable, and having both estates—life and remainder—before the court, it should have granted full and complete relief, adjusted all equities between the estates, and made the estate of Mrs. Alderson whole, so far as possible, out of the life estate of J. C. Alderson." The circuit court having taken jurisdiction of said parties, matters, and interests before the filing of the petition in bankruptcy, and the trustee in bankruptcy having filed his petition in the nature of an answer in the cause, asking to be made a party to the suit, and submitting himself to the jurisdiction of the court, the court had a right to proceed in the cause according to the principles of equity, so far as not to violate the terms of the bankrupt act. This it did, observing the liens valid under that act, and abating those invalid as procured by attachments and judgments within the period of four months prior to the filing of the petition in bankruptcy. This disposes, also, of the assignment that the court erred in entering any decree of sale in the said cause after the adjudication in bankruptcy of said Alderson. See *Mason & Hogue v. Warthen*, 7 W. Va. 532.

As claimed in the cross-assignment of error, the court should have directed the residue of the life estate of said Alderson, after the satisfaction of the judgment liens decreed against the same, to be retained for the purpose of administering the same to protect the estate of Mrs. M. P. Alderson and those entitled to remainder after such life estate, for the debts of said J. C. Alderson for which said remainders were decreed to be sold, and for which they were only liable as security for J. C. Alderson. In *re Price* (D. C.) 92 Fed. 987, 989. But after such disposition, if there should still remain a residue, the same would properly be turned over to said trustee in bankruptcy.

Appellant assigns as error the overruling by the court of his exception to the report of Commissioner Gilmer as to the equitable estate of Mrs. M. P. Alderson in lands sold by S. L. Price to said M. P. Alderson in her lifetime. The exception mentioned is as follows: "J. C. Alderson further excepts to the within report because it fails to report the estate of M. P. Alderson as the equitable owner of the interest sold by S. L. Price to her, as detailed in the evidence of witnesses Price and Preston, in the Fayette county lands. Price having sold the same to Mrs. Alderson by a written agreement, the destruction of said agreement could not revert the equitable title

in S. L. Price, which could not pass from Mrs. Alderson except by deed, J. C. Alderson joining therein, and because it fails to report the said sum of \$1,500 due by Price to Mrs. Alderson as a debt in favor of the estate against said Price." It appears from the evidence of John A. Preston that about the year 1887, 1888, or 1889, at the instance of Mrs. M. P. Alderson and S. L. Price, he wrote a paper between them, in the shape of a contract, which was not a deed; that after he wrote it she told him to take the paper and hold it; that the agreement purported to be the purchase by Mrs. Alderson of \$1,500 worth of lands of S. Lewis Price at not quite \$9 per acre, and, by calculation, made the purchase 171 acres; that the contract was never acknowledged before an officer, nor recorded, but remained in his possession all the time until he surrendered it or turned it over to Miss M. L. Price at the request of Mrs. Alderson; that Mrs. Alderson told him she wanted him to destroy the paper. He told her he did not like to do that unless he did it in her presence. She then said, "Well, you give it to Mag [Miss M. L. Price], and she will destroy it." Miss M. L. Price was present, and Mrs. Alderson then said to her, "Mag, when Johnnie brings you that paper, you destroy it." That in a short time he took the paper over and handed it to Miss Price, as Mrs. Alderson had directed him to do. S. L. Price testifies that there was \$1,500 paid by Mrs. Alderson; that his impression was that he had borrowed some money from her before that time—he thinks, \$1,000—and she afterwards paid him \$500. When asked what lands were mentioned in said agreement of sale, he answered: "Fayette land. Just so much of the Fayette land, at between \$8 and \$9 per acre, for part of my interest in my mother's estate. The land in Fayette was undivided, and was a tract of about 4,700 acres; and this was a portion of my interest in the 4,700-acre tract. The Lang lease is a part of this 4,700-acre tract." He stated that the land was never conveyed; that there was no deed from him to her, nor from her to him, and does not recollect whether the instrument was under seal or not; that when she was leaving she remarked to him that if she never came back he could have that land; and that he never repaid the \$1,500 to her. The legal title to the interest never passed to M. P. Alderson, nor to any one in trust for her, but is still vested in S. L. Price. There are no pleadings or allegations bringing the matter in question in this suit, and it could only be litigated therein upon a cross-bill, with proper averments bringing the matter directly in issue; making the said S. L. Price, the owner of the interest in fee, a party defendant to said cross-bill. The pleadings may be so amended as to raise the question of the rights of said J. C. Alderson to

curtesy in said interest, if he be so advised. It is apparent from the testimony of Thomas Tabb, taken in the cause on the 13th day of June, 1899, and called to the attention of this court, that there was a mistake in the calculation of the amount that should be recovered by Annie J. Phoebe against J. C. Alderson, and for which a decree was entered for the sale of the Raleigh lands; the amount as ascertained by the decree being \$9,583.84, as of November 24, 1899, the date of the decree. Witness Tabb, in his testimony, says: "The balance due as of December 1, 1898, was nine thousand five hundred and fifty-nine dollars and sixty-eight cents, of which sum four hundred and seventy-five dollars and forty-four cents was interest. So take the principal sum of nine thousand eighty-four dollars and twenty-four cents, with interest from December 1, 1898, and add to this four hundred and seventy-five dollars and forty-four cents, the interest which he owed on December 1, 1898, will make the exact sum he now owes." So that to add to the principal sum of \$9,084.24 the interest thereon from December 1, 1898, to November 24, 1899, \$534.45, to which add \$475.44, the interest owing up to December 1, 1898, as stated by Tabb, makes the sum of \$10,094.13 on the 24th day of November, 1899, which is the amount that should have been decreed, instead of the sum mentioned in the decree of \$9,583.84; and said decree is hereby amended and modified accordingly, and as so amended the decree is affirmed, except as to the disposition of the residue of the estate of J. C. Alderson after paying all the recoveries against him, which shall be disposed of as hereinbefore indicated; and this cause is remanded to the circuit court of Greenbrier county for further proceedings to be had therein according to the principles governing courts of equity.

BRANNON, J. (concurring). The right of a creditor against his debtor is one thing—that of a surety against his principal another, for many purposes. If a surety, after payment of the debt, seeks subrogation to the lien, claiming just the creditor's right, it may be that he would have to rent his principal's land, if it would pay the debt in five years. As to that, I do not say. This is not a case of subrogation. It involves another right of the surety as against the principal—the right to have the principal pay the debt, though the surety has not paid a cent. A surety, after the debt is due, may file a bill *quia timet* against the principal debtor to compel such payment, to escape danger, and may enforce any lien of the creditor against the principal's land. *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172; *Watson v. Wigginton*, 28 W. Va. 575. I do not think the surety can be compelled to wait five years before being exonerated.

(117 Ga. 599)

**EQUITABLE LOAN & SECURITY CO. et al. v. WARING et al.**

(Supreme Court of Georgia. April 8, 1903.)

**CONTRACT—VALIDITY—POWERS OF COURT—UNWISE CONTRACTS—INCAPABLE OF PERFORMANCE—FRAUD—FORFEITURES—JOINT TENANCY—ABOLITION—INVESTMENT ASSOCIATION—LOTTERY—MATURITY OF CERTIFICATIONS—REDEMPTION.**

1. The power of the courts to declare a contract void for being in contravention of a sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.

2. The authority of the lawmaking power to interfere with the private right of contract has its limits, and the courts should be extremely cautious in exercising the power to supervise private contracts which the lawmaking power has not declared unlawful.

3. The courts are not authorized to declare a contract void merely because it may be unwise, or even foolish. Folly is not in all cases fraud.

4. The people of this state, as *parens patriæ*, have the power, through the courts, to protect persons of unsound mind, or under other disability, from the harmful effects of unwise or foolish contracts; but the power does not extend to such contracts when made by persons of full age, of sound mind, and laboring under no disability.

5. The possibility or probability of performance of many contracts known to the commercial world is dependent upon so many contingencies that it is only in an extreme case that a given contract can be said, as matter of law, to be so incapable of performance as to evidence a purpose to defraud.

6. The courts will always relieve an innocent party from the obligation of a contract which is the result of a fraud; but all contracts which are unreasonable, unwise, or even foolish, are not necessarily fraudulent.

7. The success of many legitimate business schemes, especially those relating to the handling and improving of sums of money, depends largely upon the honesty, wisdom, and business sagacity of those in charge of the scheme; and one who goes into such schemes takes the risks that are always incident to intrusting another with funds for improvement and profit.

8. While forfeitures are not unlawful, the law does not favor them, and all ambiguities in a contract are to be resolved against their existence; but where a contract in unmistakable terms provides for a forfeiture, and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture.

9. Joint tenancy, with its incident of survivorship, as it existed at common law, is abolished. While survivorship is not favored by the law of this state, and will never arise by operation of law, it is not prohibited, and, when a contract provides for it in express terms or by necessary implication, the law will allow the contract, to be enforced.

10. An investment association, which applies the principle of survivorship to the investments by subscribers, the survivorship depending upon default of the members, instead of death, is not prohibited by law.

11. The mere fact that an enterprise depends for its success, to some extent, on forfeitures and lapses, is not alone sufficient to render the scheme unlawful.

12. It would seem that, in order to render a scheme unlawful, contrary to public policy, and fraudulent, because it is dependent for success on forfeitures or lapses, it must appear that it is not only largely so dependent, but that it is beyond the range of all reasonable probability that the number of forfeitures or lapses neces-

sary to effectuate the scheme will occur in the time required.

13. An enterprise dependent for success upon forfeitures or lapses, even many forfeitures or lapses, is not, for this reason alone, inherently fraudulent.

14. In order to constitute a lottery, three ingredients are essentially necessary—consideration, prize, and chance.

15. When a number of persons are entitled, in any event, to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot of what portion of that number shall be paid at different times would not give the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by chance, that the elements of a lottery are present.

16. It is not to be presumed that people intend to violate the law, and the language of their undertakings must, if possible, be so construed as to make the obligation one which the law would recognize as valid. All ambiguities are to be resolved in favor of legality and against illegality. The contract is to be held illegal only when it will admit of no other construction.

17. While the construction placed upon a contract by one of the parties only is not controlling, still where a contract is capable of being construed either as legal or illegal, and either party, and especially the party upon whom the main obligation rests, has uniformly placed that construction upon the contract which would render it legal, this fact may be properly considered in determining the validity of the contract.

18. A corporation had authority under its charter to deal in stocks, bonds, etc., to negotiate loans, to loan money, to purchase, improve, and sell property, both real and personal, to guaranty the payment of obligations, and to issue investment certificates, to be paid for by the investor in monthly installments. A large number of these certificates were issued. The provisions of each certificate were, in substance, as follows: An obligation to pay the holder \$500 at the end of 14 years, in consideration of the payment by him of \$4 as a membership or initiation fee and installments of \$1.25 each month until the end of that period. The \$4 was given as compensation to the agent procuring the contract, and 25 cents of each monthly installment went to pay expenses of the company. Fifty per cent. of each monthly installment and all fines made a redemption fund; 30 per cent. a reserve fund. The holder was required to surrender the certificate, whenever called, upon the payment of its redemption value, which was declared to be the full amount paid in, with interest at 8 per cent. per annum, and its "proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent. per annum." Certificates were to be called for redemption in the order indicated by a multiple table, based on the figure 3, which appeared on the back of each certificate. The redemption fund was to be used to pay off certificates called before maturity, to pay certificates at maturity, to pay estates of deceased certificate holders who were not over 50 years of age at the date of the certificate the amounts paid thereon, with interest at 8 per cent., and its proportionate share of profits earned in excess of 8 per cent. per annum. The reserve fund was to be used and held for the protection of all live, outstanding certificates. The failure to pay an installment subjected the holder to a fine of 50 cents each month. If any installment or fine remained unpaid for six months, all payments were forfeited to the company, provided that the payment of 84 installments would entitle the holder to a paid-up certificate bearing 4 per cent. interest. Legal representatives of cer-

tificate holders who were more than 50 years of age at the date of the certificate were permitted to take a paid-up certificate of the character above indicated, or to continue the payment of installments. The entire assets of the company were to be liable for the payment of the certificates. The funds of the company could be loaned to certificate holders upon terms to be fixed by the directors. No part of the reserve or redemption funds could even be loaned to an officer or director. No officer or director or any member of their families could be a certificate holder. It was further provided in the certificate "that no statement made by any one, except as herein set forth, shall be binding on this company." At the time the certificates were offered for sale, the objects, purposes, aims, and expectations of the company were set forth in literature which was circulated by the company, and the statements therein were authorized by the company. *Held:* (a) That, properly construed, the certificate does not authorize the redemption of any certificate of a living person until it has earned at least 8 per cent. interest on the amounts paid in. (b) That the scheme of the company is not a lottery. The fact that the certificates to be called for redemption are determined by reference to a table of numbers, which, instead of being in numerical order, has an arbitrary arrangement based on multiples of the figure 3, thus making it possible in some cases for certificates to be redeemed before others of older date, does not give the scheme the characteristics of a lottery, or one in the nature of a lottery. (c) That it cannot be said, as matter of law, that the contract is incapable of performance by legitimate methods, or that its performance is so largely dependent upon forfeitures or lapses as to be fraudulent, or contrary to public policy. (d) That, if any statement in the literature of the company is at variance with what is contained in the certificate, what is stated in the certificate must control until it is reformed, or the contract therein contained is rescinded.

19. If the scheme described in the certificate above referred to was a lottery, or in the nature thereof, or was so impossible of performance as to be fraudulent, or opposed to public policy, as was contended by the defendants in error, the question as to whether a court of equity would, at the instance of those who knowingly went into the scheme, administer the assets for their benefit, is not now decided.

(Syllabus by the Court.)

The company issued certificates ("Class A") by which it promised to pay the holder \$505.54 on condition that he should pay \$1.25 monthly for 130 months, he agreeing to surrender his certificate for redemption at a value fixed by a sliding scale, by which, if redeemed one month after date, \$15 was to be received, if two months, \$18, and so on, the value increasing \$3 with each installment paid. Certificates to be redeemed were not selected in numerical order, but according to a table using multiples of 3, and under the operation of which younger certificates could be called in before those of older date. A cash payment of \$4, besides 25 cents per month for 130 months, was to be applied to expense account. Certificates not matured by the multiple table were, at the end of 130 months, to receive \$505.54 for \$166.50 paid in. On failure to pay any monthly installment a fine of 50 cents was imposed, and, if not paid by the succeeding month, the certificate lapsed, and the holder forfeited all payments and fines. The United States postal authorities held this to be a lottery, and the mails were closed against the company.

Retaining the scheme of lapses, and the device of a multiple table to determine what certificates should be redeemed, the company thereupon issued another form of certificate ("Class B"), substantially like the foregoing, except that it promised to pay \$500, instead of \$504;

the number of installments was raised to 168; certificates were to be redeemed out of the profits on payment to the holder of the total amount which he had paid in, with 8 per cent. interest thereon, together with his proportion of all fines and lapses. Holders of certificates not called in under the device of the multiple table during 168 months would pay in \$214, of which \$46 was deducted for expenses, leaving \$168 to be invested, and for this \$214 the company absolutely promised to return \$500, necessitating that it should earn 28 per cent. profit per annum, and paying the holder 133 per cent. or 19 per cent. per annum average interest.

The company issued a half million dollars of these certificates, "Class B." It had a capital stock of only \$2,500, and no other property except that paid in by the certificate holders, and the funds or property in which the certificate holders' money was invested.

*Held:* (1) "Class A" certificates constituted a lottery, and "Class B" was not essentially different therefrom, being in the nature of a lottery scheme, prohibited by the act of 1877 (Acts 1877, p. 112), as amended by the act of 1881 (Acts 1880-81, p. 62).

(2) A court of equity should afford relief to a litigant expressly asking aid against such a contract more readily than the postal authorities would volunteer to act on behalf of the public, which was not actively seeking protection.

(3) In a number of instances, where substantially similar schemes have been under review, the courts have held the same to be illegal, contrary to public policy, and void. Among many others, see *Horner v. U. S.*, 13 Sup. Ct. 406, 147 U. S. 460, 37 L. Ed. 237; *State v. Interstate Investment Co. (Ohio)* 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754 (where the effect of the table of multiples was involved); *Peltz v. Supreme Financial Union (N. J. Ch.)* 19 Atl. 668 (2); *State v. New Orleans Debenture Redemption Co. (La.)* 28 South. 586. The case of *Union Investment Association v. Lutz*, 50 Ill. App. 176, contra, is not a decision by a court of final resort.

(4) Such holding is not solely in the interest of the certificate holder, who desires to discontinue the illegal scheme, but also in pursuance of a sound public policy, and to prevent similar schemes from being launched.

(5) To have selected certificates for cancellation by the usual methods of lot would have involved the element of chance; to have selected them in numerical order would not have involved the element of chance; to select them by the device of the multiple table making older certificates mature after younger, and where even this order was interfered with by lapses, was essentially a selection by lot, and was within the prohibition of the act of 1877. *State v. Interstate Savings Investment Co. (Ohio)* 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754.

(6) The scheme here involved chance on chance, by which an early redemption was a return of the amount paid in with about 10 per cent. interest, and amounted to a small prize, if, later on, the scheme failed for want of lapses. To have the certificate redeemed at the end of the 168 months, secured principal and 133 per cent. profit, and was the greater prize, if the number of lapses proved sufficient to enable the plan to work out to the end of 168 months.

(7) In determining whether the scheme is possible without undue lapses, the courts must exclude from the calculation windfalls, extraordinary and improbable rises in value of investments, and consider the risks of business, current rates of interest, and the fact that, if such a scheme, without aid from undue lapses, were regarded as possible by men of ordinary business prudence, the enormous profits prom-

ised would attract millions of capital from the more useful channels of trade and commerce.

(8) The evidence discloses that out of \$240,000 total profits earned 49 per cent. of such profits, or \$119,000, was derived from lapses, and that, but for such lapses, the company could not have redeemed the certificates already called in, and on which about 10 per cent. interest was paid.

(9) There is an absolute promise to pay \$500 for every \$214 paid in on certificates which mature at the end of 168 months. This involves the necessity of the company earning enough on each \$168 to pay back the \$46 appropriated for expenses, together with 133 per cent. on \$168, equal to an average annual interest of 28 per cent. on the \$168 invested, and a dividend of 19 per cent. per annum to the certificate holder.

(10) A provision for incidental lapses does not render a scheme illegal. In legal and valid insurance contracts the element of a lapse is incidental, and the policy holder has at all events received value in actual protection by insurance during the premium term. In strict tontines the lapses are not necessary to the success of the scheme, for all can remain in to the end of the period, and get their share of the fund, whatever it may prove to be.

(11) Equity abhors lapses, and will relieve against forfeitures. *S. C. R. R. v. Augusta Co.*, 33 S. E. 36, 107 Ga. 182. A scheme largely depending on lapses for its success is illegal, and contrary to public policy, for the reason that the lapses do not represent earnings of the company so much as losses of those unfortunates who, having started, are unable to hold out to the date of maturity. Equity is unwilling that others should reap that which they did not sow.

(12) The guaranty to pay much for little appeals to that cupidity and desire to "get rich quick," which makes the scheme contrary to public policy, and calls for action by a court of equity to protect those who, tempted by the guaranty of \$500 for \$214 paid in, are blind to the fact that they may be among the lapsed. Equity will act all the more quickly because those who are financially the weakest are most likely to lapse, to the benefit of the stronger, who can continue to pay until the end of the term.

(13) The right to make contracts is not unlimited. *Civ. Code 1895, § 3668*. The same public policy which forbids lotteries and futures, and which protects the necessitous from usurious contracts, will in like manner protect those who have been induced by the promise of usurious profits to go into a scheme depending for its performance on lapses, in which many must lose in order that few may gain.

(14) The maxim "In pari delicto," etc., or that courts will not ordinarily interfere where parties to an illegal contract are equally guilty, does not apply here, because the parties are not on a parity.

(a) Nor does it apply where the contract is executory, and in course of performance, as here.

(b) Nor does it apply for the further reason that the defendant company really has no interest in the appropriation to be made of the fund by the court. It has been paid \$4, together with 25 cents monthly, for investing a fund. It is, in effect, the agent of the certificate holder, and the money in its hands is a trust fund, the real owners being the subscribers. Any holder, on proof of the insolvency of the agent, or the impossibility of the ultimate performance of the scheme without undue lapses, is entitled to have the illegal scheme discontinued, and the trust property placed in the hands of a receiver for distribution among the true owners.

(15) If the scheme continues in operation, each certificate holder must still pay, in order to avoid a lapse, with the forfeiture of all that

he has contributed. Equity will not force him to continue the illegal payments, nor to run the risk of a forfeiture by his withdrawal. Before the contract is finally executed, it allows a locus penitentiae to those who desire to have the scheme discontinued, and in aid of those seeking the discontinuance of the scheme the court will administer the trust fund for the benefit of the true owners. *McLaughlin v. National Investment Co. (C. C.) 64 Fed. 908*.

*Per Simmons, C. J., and Lamar, J., dissenting.*

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by P. Q. Waring and others against the Equitable Loan & Security Company and others. From an order appointing a receiver for the company, defendants bring error. Reversed.

Following is the opinion of Judge Lumpkin in the court below:

On January 30, 1894, the Equitable Loan & Security Company was incorporated, its capital stock being \$2,500. It began issuing what were called "investment certificates," the certificates first issued being designated as "Class A." Before the end of that year the Post-Office Department refused the company the use of the United States mails, holding that the certificates issued by it and the business conducted by it constituted a lottery scheme. After this the company began issuing another set of certificates, which it called "Class B" (setting forth a form thereof. See opinion of the Supreme Court, *infra*). On March 26, 1896, it obtained an amendment to its charter, conferring power, among other things, "to purchase, improve, lease, sell, dispose of, or use in any way it may see fit property of any description, whether real or personal." In March, 1897, McMillan and others filed their equitable petition seeking to have a receiver appointed, alleging, among other things, that the contracts were illegal, and impossible of performance; that the agents of the company who procured them to purchase these certificates made fraudulent representations to them; and that it was insolvent. On the preliminary hearing, the affidavits being conflicting, and the presiding judge not having before him such full light on all the questions involved in the case as he preferred to have before making a final adjudication, he permitted the company to give bond in lieu of appointing a receiver ad interim. The case was carried to the Supreme Court, where this ruling was affirmed as a proper use of discretion, as the case then stood. 102 Ga. 575, 27 S. E. 668. In 1898 it was referred to an auditor to report on all questions of law and fact, together with the evidence on which he based his findings. On December 16, 1899, the auditor filed his report. To this exceptions were filed by McMillan and others, and they came on for a hearing in 1900. Before any decision was reached, the plaintiffs withdrew, and dismissed their exceptions, thus leaving nothing before the court to decide. Under the law

of this state (Civ. Code 1895, § 4601) there being no longer any exceptions to the auditor's report, the court could do nothing but frame a decree based on it, which he accordingly did. Plaintiffs on the present hearing introduced evidence seeking to show, and contended, that some sort of agreement or settlement was arrived at between the plaintiffs in that case and the company, and that the withdrawal of the exceptions resulted therefrom. But with this the court had nothing to do. It will be seen that what was apparently a victory for the company was in fact a pro forma decree resulting necessarily when the exceptions were withdrawn, and nothing left for the court to decide. The court has in fact never passed upon any of the questions here presented, further than is involved in the fact that in the former case he preferred to have a full and complete investigation before passing final judgment, and therefore permitted a bond or bonds to be given in lieu of appointing a receiver pending the cause. It seems from the evidence in the present case that there has been a misunderstanding of this fact. The report of the auditor was favorable to the company, and this was printed and scattered. On this hearing counsel for some of the certificate holders, who object to the receivership, has urged in argument that he and his clients thought that the court had fully approved of and decided in favor of the company's contentions in the former case; and this has been brought forward as an argument why the court should now decline to appoint a receiver. On the other hand, counsel for the company urge that, if the court is in doubt as to the contentions of the parties in the present case, he should refuse the receivership as a matter of discretion; so that the court is put between two horns of an argumentative dilemma—the one being the contention that he should not appoint a receiver, as a matter of discretion, ad interim; and the other being that, because he did not do so before, certificate holders took it as a complete victory for the company. It may be stated, however, that the evidence in the present case is different from what it was then, and that the status is different.

In September, 1902, Waring and others (being holders of certificates of the company, on which, together with those of parties who have become plaintiffs, by order had been paid into its treasury some thirty-five or forty thousand dollars) filed the present equitable petition, seeking, among other things, the appointment of a receiver, to have the scheme of the company declared illegal, to have judgment for what they might justly be entitled to recover, and to have proper disposition of the fund. This petition stated that it was filed "on behalf of the petitioners and of all other holders of certificates of the company." The defendant resists the appointment of a receiver, and a number of certificate holders, representing quite a con-

siderable amount, have joined in the objection: The hearing on the application for the appointment of a receiver occupied fifteen days; hundreds of affidavits were introduced; the books and records of the company were brought into court; experts on each side have had access to them, and have given testimony concerning them. The managing officers of the company were summoned before a commissioner, and their evidence taken, with full and thorough cross-examination, and argument of counsel on each side has been heard. There is no need for any further auditor to report to the court the facts of the case in order to arrive at a conclusion. If he is not in possession of the facts after this hearing, it is much to be feared he never will be; and no hearing could be of further service to him, so far as deciding the questions now raised is concerned. He feels that he ought to decide the principal legal questions made. Many questions have been raised, and many grounds of attack made upon the company. In the decision which the court will make he will endeavor to base his judgment upon the controlling questions of law, and, as far as possible, to avoid relying on matters of discretionary decision. If it is desired to except to his decree, it can thus be done, and a decision of the Supreme Court reached, which will not be a mere affirmance or reversal of a discretionary judgment, but will pass upon the correctness of the rulings of this court in regard to the law. Several of the points raised by the plaintiffs will be dealt with briefly before going into the main controlling questions in the case.

It was contended by the plaintiffs that the charter of the company, as originally granted, contained no power to invest in real estate; that the amendment which was granted in 1896 was not lawfully accepted by the stockholders of the company; and that such investments were injurious to the holders of certificates, and were illegal. Generally, the question whether an amendment to a charter of a corporation is legally accepted by the corporation or its stockholders is one in which the stockholders and the company alone are interested. If the stockholders are satisfied with and acquiesce in the manner of acceptance, certificate holders cannot set up for them that some one or more of them was absent, or that the manner of acceptance might have been objected to by them, unless there is something in the contracts between the company and the certificate holders, or in the relations between the two, which authorizes the latter to raise the question. There is not in this case.

It is contended by the plaintiffs that the officers of the company have been guilty of malfeasance and breach of trust in various ways. There have, no doubt, been some errors and irregularities in the affairs of the company and in the keeping of its books. For instance, it would have been better for



the secretary not to have sold notes belonging to him as an individual to the company of which he was an officer. Human nature is very weak, and it is not well for a man to be on both sides of a trade. But some errors are apt to occur in a company doing a considerable business, and the evidence does not disclose any such mismanagement or waste on the part of its officers as would require the appointment of a receiver at this time on that ground. Indeed, it may be stated, to the credit of the principal officers, that they have given opportunity for a thorough examination of their books and accounts, and have promptly furnished to the court, in the progress of the hearing, information desired. Upon the whole, the court is of opinion that the evidence does not indicate any personal dishonesty or speculations on their part in dealing with the assets.

The plaintiffs alleged and sought to prove that the agents of the company soliciting persons to purchase these certificates were guilty of making false and fraudulent representations, and that purchasers were misled thereby, and acted thereon. There was some proof indicating that an agent or agents of the company had at times given too free rein to imagination, and had been somewhat economical of the truth. Indeed, no evidence from these agents was introduced in denial of such contentions on the part of plaintiffs. If individual holders of certificates were induced to purchase them by fraudulent representations of the selling agents, while it might become ground for a rescission of the contract so far as they were concerned, it would not necessitate the appointment of a receiver for the entire assets of the company, unless it were shown that a receiver was necessary for the protection of the rights of such persons. There is some question, too, as to whether some of the persons asserting that they were deceived are not prevented from setting up such a claim by agreeing with the company that it should not be bound by the representations of such agents. If, therefore, the scheme of the company is legal, and its contracts valid, if any deception was practiced upon certain certificate holders, it would not require the appointment of a receiver.

It is contended that the company is insolvent, and that it cannot perform its agreements. In the ordinary sense of the term, solvency or insolvency is determined by a comparison of assets and liabilities. In certain classes of corporations, such as building and loan associations, a somewhat different meaning has been given to the term; or perhaps the word has been used for want of a better one. See *Towle v. American Building Society* (C. C.) 61 Fed. 447. It is urged here that, inasmuch as certificates have not yet matured, the company cannot be held insolvent. As it is the intention of the court to rest his decision upon other

grounds, he does not deem it necessary to enter into a discussion of the solvency or insolvency of this company as a separate question. In so far as the state of its assets is material to a decision of the legal questions decided, reference will be made to it hereafter. So, also, so far as necessary, consideration will be given later in this decision to the question of the possibility of performance of the contracts.

This brings us to one of the great controlling questions in the case: Is this scheme illegal, or contrary to public policy, as being a lottery, or in the nature of a lottery, or involving a similar scheme or device?

The Penal Code of 1895 of this state contains the following provisions:

"Sec. 406. If any person either by himself or his agent shall sell or offer for sale, or procure for, or furnish to, any person any ticket, number, combination, or chance, or anything representing a chance in any lottery, gift enterprise, or other similar scheme or device, whether such lottery, gift enterprise or scheme shall be operated in this state or not he shall be guilty of a misdemeanor.

"Sec. 407. No person, by himself, or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing."

It will thus be seen that the law of Georgia denounces as illegal not only a lottery, strictly so called, but also any gift enterprise, "or other similar scheme or device," "or other scheme or device for the hazarding of any money or valuable thing." It will not be necessary to set forth at length the definitions of a lottery given by various dictionaries, or to discuss the verbal differences in them. Perhaps as good a general definition as can be found is that given by Mr. Bishop (Stat. Cr. § 952), as follows: "Any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." Shrewd differentiation may escape from the definition; but a general statute like ours is aimed to reach the substance of the scheme, regardless of any mere variation in form, and to leave no loophole of escape by mere quibbling with words. *U. S. v. Wallis* (D. C.) 58 Fed. 942. A consideration of various definitions of the word "lottery," and of numerous decisions, indicates that three elements enter into such a scheme, and that if they exist it is a lottery, or "similar scheme or device," and condemned by laws against lottery, no matter what may be the particular form of words or cloak of phrases in which it may conceal itself. These elements are: (1) A consideration; (2) chance; (3) a prize, or some advantage or inequality in amount or value which is in the nature of a prize.

1. The consideration need not be great.



It may be in money or other thing of value. Sometimes the attracting of custom to one's business, or other benefit to the person conducting the scheme, is held to be sufficient, although no money is paid directly for the ticket, lot, or chance, but it purports to be given. In the present case money is directly paid by the purchasers of certificates, and there is no controversy as to the existence of the element of consideration.

2. Does chance enter into the scheme? What is chance? It has been defined to be "the unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune; \* \* \* an event resulting from an assumed fortuitous agency; an accident," etc. Standard Dictionary. The Century Dictionary, among other definitions, gives this: "Fortuity; especially the absence of a cause necessitating an event, or the absence of any known reason why an event should turn out one way rather than another, spoken of as if it were a real agency." Worcester defines it to be "absence of an assignable cause; accident; fortuity; fortune." In an opinion filed by Hon. Harrison G. Barrett, acting assistant attorney general of the United States for the Post Office Department, on December 5, 1900, he quotes the following: "Chance, in its original meaning, may be defined as that which determines the course of events in the absence of law, ordinary causation, or providence." Of course, in a certain absolute sense there is no chance. Everything in the universe acts according to some law. The card drawn at random from the pack, the fall of the dice, the ticket drawn from the lottery wheel, all obey some law. To Omniscience, the word "chance" has no meaning. But from the standpoint of humanity, these and many other things are results of chance or accident. An event which is the result of calculation, design, or the operation of known laws, does not occur by chance. An event which happens as a result of an unknown or undefined cause that to man is uncertain or not subject to calculation, is the result of chance. Is there or not chance involved in this scheme? The company issues certificates which are numbered in regular order as they are issued. The purchaser has no option as to the number placed on his certificate. He cannot select any particular number. He cannot foresee or calculate what number the certificate will bear. He sends in his application. The officer or agent of the company cannot select a number for him. Neither can he foresee or calculate in advance what number will fall to any particular applicant. The certificates are numbered just as the applications happen to reach the main office. Some are sent by mail; some have been sent in the past by the soliciting agents by telegram. If several applications arrive by the same mail, they are numbered in the order of their dates. If several bear the same date, there is no mode of selection, except

the accident of which one the official picks up first. Suppose one man should send an application by mail from Savannah, or any distant city, and the application of another should be sent by telegraph on the same day. The latter would get the earlier number. If both were sent by mail, and both reached the main office at the same time, it would be the merest accident which would receive the earlier number. If both were sent by telegraph, and both reached the main office at the same time, it would be the merest accident which would receive the earlier number. If one were delivered by a later mail, it would get a higher number. If one mailed an application from a neighboring town, say Decatur, and another on the same day mailed an application from Savannah, at a greater distance, the former arriving first would be first numbered. Thus it will be seen that the number which a purchaser gets is not the result of choice or selection of it, either by him or by the agent of the company, but depends on the accident of the time of arrival of his application, the number of applications which happen to arrive on a certain day, or the accident of the picking up of one paper instead of another by the numbering official, if several of the same date arrive at the same time. So that the number which a purchaser obtains is purely the result of chance, so far as he and the company are concerned.

What effect has this numbering, obtained by chance, on the selection of certificates to be redeemed, if the company has a redemption? If certificates are called for payment, those to be paid are to be selected, not by choice, but skipping about according to the use of a table containing a set of numbers, which are called "numerals," and another set of numbers called "multiples." Thus certificate No. 1 is first to be paid, then No. 3, then 9, then 2, then 6, then 18, then 27, then 4, then 12, then 36, then 15, then 45, then 54, and so on indefinitely, the distance between numbers to be paid increasing, so that after 100 comes 300, and then 900. When the numbers reach the thousands, they must be quite wide apart. There are now about 6,000 certificates outstanding. It will thus be apparent that whenever the company calls a number of certificates for redemption, whose certificates will be redeemed depends on chance. The holder of a certificate is not allowed to demand its redemption. The company is not allowed to redeem, by choice or by agreement with the holder, any particular certificate. But its redemption is made to depend on the chance of its number corresponding with a number in the multiple table. But it is said the company is not compelled under the contract to redeem before the end of 168 months, and that earlier redemption is a privilege, not a requirement. This feature of the contract will be referred to again later. For the present, it is enough

to say that the certificate provides that it shall be surrendered if called for redemption; that the avowed policy and governing principles of the company, as set forth in the pamphlets sent out by it, are "security, profit earnings, and speedy returns to investors"; that it has called in and redeemed numerous certificates in the past (several hundred of Class B at various times); and that the determination of the numbers to be redeemed is and was fixed by chance, as already shown. Indeed, it is the boast of the company that the selection is by chance (though that word is not used), and not by design or choice, for on the face of the certificate occurs this statement: "That, in order to prevent favoritism or partiality being shown by the company, certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof." In a letter from its president to W. M. Bent, dated May 30, 1902, he says: "We pay only as provided in the table on the back of each certificate, and cannot ourselves determine when any certificate will be paid." Thus the company holds out as its plan of action the use of chance, and actually uses it.

Another element of chance involved is from lapses or forfeitures by certificate holders who fail to keep up their payments of installments. This further introduces chance, both as to the amount on hand which may be divided, and also as to the numbers to be redeemed; for, if there is a lapse, and the lapsed number should otherwise be subject to redemption, it would drop out, and some other number would become subject, not from any selection or choice, but from the accident of the lapsing of one or more numbers, over which the holder of the redeemed certificate had no control. The element of new business would also add to the redemption fund which can be used to redeem other numbers, thus making the payment to them greater, and also increase the chance numbers in the redemption possibilities according to the table. If this scheme does not involve chance, it is hard to conceive one which does.

It is urged that the element of chance alone, unless connected with the element of prize, does not constitute a lottery, or similar scheme. This may be treated as correct, but the question of combination of chance and prize in this scheme will be spoken of later. The purpose now is to show that, if the element of prize does exist, the element of chance also coexists with it, thus making it a lottery scheme. In *MacDonald v. U. S.*, 12 C. C. A. 339, 63 Fed. 426, it is said that, "where the value of bonds in an investment company depends on their number, and the numbering is done by the secretary according to the order in which the applications happen to reach him, the result of a purchase of such bonds is so dependent on chance as to render their sale a lottery." In

*U. S. v. Fulkerson* (D. C.) 74 Fed. 619, it is said (page 628): "The element of chance is especially and clearly discernible in the fact that the numbers of the coupons which any particular applicant receives depend upon the order in which his application goes into the company, and that the determination of what coupons shall be paid is made to depend upon a device of numbers whose operations are such that it is utterly impossible for any one to know the result until the same has been accomplished." So it is here.

3. Does this scheme include an element of prize? The word "prize" has been defined by Webster as "that which is obtained against the competition of others; anything carried off as the result or award of a contest; the thing striven for; and hence anything offered to be competed for, or as the inducement to or reward of effort; that which is won in a lottery." One definition given by the Century Dictionary is "that which is won in a lottery, or in any similar way." Among the definitions of the word given in the Standard Dictionary are "anything to be striven for; also anything offered as an inducement to participate in a scheme of chance." As used in connection with anti-lottery laws, the word "prize" comprehends anything of value gained (or, correspondingly, lost) by the operation of chance, or any inequality in amount or value in a scheme of payment of money or other thing of value as a result of the use of chance. The gain need not be large to constitute a prize. If there are a number of purchasers of tickets, bonds, certificates, or whatever the thing sold may be called, who enter on equal terms, but in the payment by the company or manager the scheme includes the making of an inequality in amounts by the employment of chance, so that one gets more than another similarly situated, it is a lottery. The inequality may not be great, nor in favor of the person selected by chance. It may be against him. He need not lose all or gain all. Partial gain (or loss in the hope of gain) is sufficient to constitute a prize. That a scheme wherein inequality in payment or distribution is to result from chance, is a lottery, see *Dunn v. People*, 40 Ill. 465 (3). The fact that each gets something, or even gets the value of what he pays, will not save the scheme, or make it legal. In *Meyer v. State*, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17, it is said: "A merchant who gives to a designated class of customers an opportunity to secure by lot or chance any article of value additional to that for which such customers have paid, violates the provisions of section 407 of the Penal Code, which declares that no person 'shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing.'" A number of cases are reviewed by Mr. Justice Cobb in the opinion. In *U. S. v. Wallis* (D. C.) 58 Fed. 942, a similar rul-

ing is made, and it is also said that "the word 'lottery' embraces the elements of procuring through lot or chance, by the investment of money or something of value, some greater amount of money or thing of value." In *Ballock v. State*, 73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559, it is held that any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery is illegal under the laws relating to lotteries and lottery tickets; and that the fact that there are no blanks to be drawn, but all get something, and the scheme provides for the ultimate return of the entire investment, with interest, will not legalize it, if the time for such return to certain holders of bonds depends on chance, and the inducement for investment is the possibility of getting a bonus, which is to be determined in the same manner. See, also, *U. S. v. Politzer* (D. C.) 59 Fed. 273, 277-280. In *Horner v. U. S.*, 147 U. S. 449, 462, 13 Sup. Ct. 409, 37 L. Ed. 237, the same Austrian bonds which were involved in the Maryland case were considered. The Supreme Court of the United States rendered an interesting and learned decision, approvingly citing the decision of the Supreme Court of Maryland, and holding substantially the same doctrine. The following brief excerpts may be of interest: "It cannot be said that this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit, and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly cannot be said that it is not in 'the nature of a lottery,' and that it had no tendency to create a desire for other and more pernicious modes of gaming. \* \* \* In *Reg. v. Harris*, 10 Cox's C. C. 352, it was held that a lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what purported to be of the value of a shilling, and also to the chance of a greater value than a shilling, was an illegal lottery within the statute. In *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 190, there were holders of certificates, who subscribed money to be invested in funds, which were to be divided amongst them by lot, and divided unequally, that is, those who got the benefit of the drawings got a bond bearing interest and a bonus, which gave them different advantages from the person whose certificates were not drawn; and it depended upon chance who got the greater or lesser advantage. The scheme was held to be a subscription by a number of persons to a fund for the purpose of dividing that fund among them by chance, and unequally; and *Sir George Jessel*, Master of the Rolls, characterized the scheme as a lottery." In *State v. Interstate Savings Investment Co. (Ohio)* 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754, it is held that "contracts of investment, security debentures, or certificates which, by the device of a 'nu-

meral apart,' may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize, constituting a lottery, and are unlawful." See, also, *U. S. v. MacDonald* (D. C.) 59 Fed. 563; same case on review by Court of Appeals, 12 C. C. A. 339, 63 Fed. 426; *People v. Elliott* (Mich.) 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640; *U. S. v. Fulkerson* (D. C.) 74 Fed. 619; *In re National Indemnity & Endowment Co. (Pa.)* 21 Atl. 879; *State v. New Orleans Debutente Co. (La.)* 26 South. 586, 589; *McLaughlin v. National Bond & Investment Co. (C. O.)* 64 Fed. 908; *Peltz v. Supreme Chamber* (N. J. Ch.) 19 Atl. 668 (2), 671.

It is urged that the facts in the cases cited were not the same as in this case. It may be said, in general terms, that no two cases are precisely alike. But if the principle decided in the one applies in the other, it is sufficient as a precedent. The ingenuity with which schemes of chance are varied to avoid the statutes, or add new and alluring features, is little short of wonderful. As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful. In this company, Class A certificates having been declared by the postal authorities obnoxious to the lottery laws, and the mails closed to them, a change was made; but the scheme of calling in certificates issued according to chance, and dependent on chance numbers for redemption, was left in Class B certificates; and it will presently be shown that the inequalities existing under these redemptions constituted prizes, within the meaning of the lottery laws. A few illustrations of the exercise of the ingenuity which yet failed to avoid the law may not be uninteresting: Prize candy boxes. *Holoman v. State*, 2 Tex. App. 610, 26 Am. Rep. 439. Allowing purchasers of goods to a certain amount a guess at the number of beans in a globe, with an offer of a watch to the one making the nearest guess. *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171. Sale of clothes to a certain amount, payable in installments, with drawings entitling some to goods without further payments, though each eventually should receive clothes of the value paid. *State v. Moren* (Minn.) 51 N. W. 618. Selling tea; some envelopes containing tickets entitling the holder to a handkerchief, chicken, etc.; holder selecting his own envelope. *State v. Bonell* (La.) 8 South. 298, 10 L. R. A. 60, 21 Am. St. Rep. 413. A gift sale of books. *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723. Prize concerts. *Com. v. Thacher*, 97 Mass. 583, 98 Am. Dec. 125. And the list could be almost indefinitely ex-

tended. The word "lottery" must be construed with a view of remedying the mischief intended to be prevented, and to suppress all evasions for its continuance. *State v. Kansas Mercantile Ass'n* (Kan.) 25 Pac. 984, 11 L. R. A. 430, 431, 23 Am. St. Rep. 727.

It is said that the contract in Class B certificates does not require the company to redeem, but provides only that the holder shall surrender the certificate "for payment and cancellation whenever the same shall be called, before maturity," and that this leaves the company or its managers to determine when certificates shall be called in. As already noticed, several hundred have actually been called in. The following are a few extracts from the pamphlets sent out by the company to obtain custom, construing the contract and declaring the purpose of the company: "Its governing principles are security, profit earning, and speedy return to the investor." "The company is now calling its Class B certificates for redemption, and the following numbers have been paid" [giving a list]. "The chief attraction and most prominent feature of our plan is to call and *pay off certificates* [printed in red ink] as rapidly as our business will permit, at their then value, which value shall always be the full amount of the first payment and all installments paid on them, with 8 per cent. interest, and their proportionate share of all dividends or accumulations from fines, lapses (forfeitures) and interest earned in excess of 8 per cent. per annum. For the express purpose of thus *calling certificates for payment* [red ink] as early and as rapidly as possible a *redemption fund* [red ink] has been created to which is placed 50 per cent (62 1-2 cents) of each installment paid and all fines." "To *Guarantee* [red ink] our certificate holders the largest profit and quickest possible returns," no officer or director familiar with the inside workings of the company is allowed to hold certificates. Again, "thus rendering possible an early payment of certificates at a handsome profit above the rate of interest agreed upon." "Redemption Fund. Fifty per cent. (62 1-2 cents) of each installment paid and all fines shall be placed to a redemption fund which can be used for paying off and retiring certificates before their maturity." "All certificates pay their holders their equitable ratio of profit, whether called for redemption the 12th, 24th, 36th, or any other month." "Insurance companies kill the man and pay the policy: The Equitable Loan & Security Company kills the certificate and pays the man, thereby insuring a speedy return to living members." "A thorough knowledge of our plan will also show that it is absolutely perfect in point of security, profit earning, equity and a speedy return to the investor." These, and like statements, repeated again and again in various publications, show conclusively the announced policy and declared intention of the company,

and the claim that the scheme was safe, feasible, and practicable.

The certificates themselves state that the installments of \$1.25 per month on each, received from the holders, shall be divided into three parts; 50 per cent. going to a "redemption fund," 30 per cent. going to a "reserve fund, which shall be used and held for the protection of all live outstanding certificates," and 20 per cent. to the expense fund. Now, why name a fund the "redemption fund," unless it was intended to use it to redeem, or at least to convey that idea? The different things which it is stated in the fourth paragraph of the certificates that the redemption fund may be used to pay do not negative the idea that it is intended to be used to pay, not to hold for investment. If there is no difference between the "redemption fund" and the "reserve fund," why the division? And why provide only as to the reserve fund that it shall be held? In a letter from the president of the company to W. M. Bent, dated May 29, 1902, he says, "We redeem certificates each month." Thus by the terms of the certificates themselves, by the declared policy, and "governing principles" of the company, as stated again and again in print, and to some extent by its actual practice, redemption and "speedy return to the investor" are integral parts of this scheme.

The fact that no specific time or plan for the operation of the chance redemption or drawing has been determined upon at the time the ticket, bond, certificate, or whatever the token may be called, is sold, will not save the scheme, if it is otherwise tainted as a lottery scheme. *Thomas v. People*, 59 Ill. 160. Nor if the matter is dependent on the choice or selection of the managers. *State v. Shorts*, 32 N. J. Law, 398, 90 Am. Dec. 668. In the case of *State v. Interstate Co.* (Ohio) 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754, supra, the certificates in "Series A" provided that the first six months' payments were to be passed to the credit of the reserve and expense fund, and of subsequent payments 65 per cent. was placed to the redemption fund, 20 per cent. to the reserve fund, and 15 per cent. to the expense fund. "Not less than 20 per cent. of the total amount contributed to the redemption fund is applied every month to redeem," etc. "Regular redemptions. The company reserves the right to call in and pay this certificate at any time previous to its maturity \* \* \* The directors reserve the right to modify this method of redemption at such a time and in such a manner as will, in their judgment, be to the best interests of certificate holders." But it was held to be a lottery scheme, in spite of the use of this form of language. Note also the permissive form of language used in the case of *McLaughlin* (C. C.) 64 Fed. 908, supra, and that the certificate was "subject" to redemption by the company at any time before maturity, and that there was to

be appropriated to the certificate "its proportionate share of the reserve fund."

In the New Orleans Debenture Co. Case (La.) 28 South. 586, the certificate was "subject to redemption." Compare, also, the determination allowed in 40 Ill. 465, *supra*. If mere permissive forms of words would change the character of a scheme from a lottery to no lottery, why could not any lottery openly operate an agency in every county of the state by merely having printed on the tickets that the directors "may" call in the tickets or have drawings when they think sound business principles will authorize, actually calling in and redeeming some by a chance determination, and holding out as an inducement to buyers that this was a governing principle of the company? It is not the form of words used, it is the nature of the scheme, which determines its legality or illegality. Nor does the fact that the prizes in some of the cases cited are large make any difference. A scheme, if illegal as tainted with a lottery feature, would not become legal by reducing the size of its prizes. If so, all lotteries with small prizes would be legal. It is the element of gain or inequality arising from the use of chance which condemns a scheme, not the size of the prizes. To quote an expression from one of the sages of the law, "The office of the judges is to make such a construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief." *Magdalen College Case*, 11 Co. 71b. See, also, *Thomas v. People*, 59 Ill. 180, *supra*.

Is there inequality in distribution, resulting from chance? The secretary of the company has made an affidavit showing how he claims amounts paid on certificates heretofore redeemed since April, 1901, were arrived at. For the present purpose, we may assume his calculations to be correct. So doing, he says that each certificate which has been redeemed has received an amount equal to the first payment of \$4, plus the sum of the installments of \$1.25 per month, with interest for the average time at the rate of .93 per cent. per annum. Or that if the first payment of \$4, and the 25 cents per month, which went to expenses, be not considered, but only the \$1 per month paid into the redemption and reserve funds, on each certificate called in, there has been paid to the holder the \$1 per month, with 15.56 per cent. per annum, compounded quarterly, and that the basis for this calculation was the net assets appearing on the books of the company in April, 1901. On the trial the company introduced in evidence the affidavit of an expert accountant, showing what was called an "apportionment of profits"; that is, what any particular certificate would be valued at on August 31, 1902, on the basis of the books as they then stood, and therefore what the holder of such a certificate would be paid if it were called for redemp-

tion. His affidavit shows that, if a certificate were then or since called, there would be paid, by such calculation, the \$1 per month paid into the redemption and reserve funds, with 14 per cent. interest, compounded quarterly. So that, if these two affidavits be true and correct, those who have had certificates called in for redemption by the use of the chance device already explained, even including a redemption in August, received 15.56 per cent. on the monthly payment of \$1, compounded quarterly, while certificates redeemed after August 31st would have received payment at the rate of 14 per cent., compounded quarterly—a difference of 1.56 per cent. compounded quarterly; and the man who received this difference received it as a result of the mode of redeeming by chance. A small error in the entries on the books was afterward found, but as what would be taken off of one account would go to another, and there was a small increase of both assets and liabilities, it made no material change in the calculation.

Seeing this trouble, no doubt, the secretary of the company stated in another affidavit, in substance, that the valuation of assets appearing on the books was not correct, but much too small; that, taking estimates of certain real estate dealers and others, and considering the assets at a low estimate, an "apportionment" will show that the present value of a certificate would be fixed, by calculating interest on each monthly payment of one dollar into the reserve and redemption funds at the rate of 18.36 per cent., compounded quarterly, or perhaps slightly more. Suppose this is true; what then? In the first place, the value of certificates heretofore redeemed since April, 1901, has been determined with reference to a book valuation of that time. The books on August 31, 1902, showed assets on the basis of which the expert employed by the company calculated. Now, it being evident that the book valuation shows that certificates already redeemed received more than is left for any of the certificates still unredeemed, the book valuation is to be rejected entirely, and a new estimate made, although the company had printed and sent out as true the statement of August 31st, showing what it called its assets and liabilities. Very well. Suppose the new estimate, which the secretary says is low, be taken; what is the result? The certificates redeemed, even down to and including August, just before this suit, have been paid on the basis of 15.56 per cent. on the \$1 per month, compounded quarterly. Those still in, and which may now be redeemed, will get paid on the basis of 18.36 per cent. on the \$1 per month, compounded quarterly—a difference of 2.80 per cent., or nearly 3 per cent. on the \$1 per month, compounded quarterly. If the calculation of the expert employed, and whose evidence was introduced by the company, is correct, certificates which were redeem-

ed up to the filing of this petition obtained an advantage over those remaining unredeemed, by having their values fixed at a rate of interest  $1\frac{1}{2}$  per cent. higher, compounded quarterly. If the last calculation of the secretary be taken as true, those redeemed lost at the rate of nearly 3 per cent., compounded quarterly. It is a matter of indifference which is taken as true. Either one shows that those redeemed and those unredeemed are not equal. This inequality, being brought about by the chance method of redemption already described, makes a lottery feature. As the company seeks to show equality and repel the idea of prizes by using per cents., that form of expression is followed, so that it may appear by mere comparison of the affidavits introduced by the defendant that there is inequality, not alone in time of redemption, but also in amounts, between the redeemed and the unredeemed. One very significant expression is used by the secretary in seeking to explain why the calculation of the expert showed a less valuation for certificates unredeemed. After speaking of a real estate purchase, etc., since the process of redeeming began, he says that "that period [i. e., April, 1901] was nearer to the time of the great number of lapses following the McMillan suit." In other words, what falls in by the chance of lapses is paid out, at least in part, by a chance table.

Another thing which will emphasize the risk of loss is this: As will be remembered, the first payment of \$4 goes to the agent; 25 cents of each monthly installment is used for expenses; and only the \$1 remains to earn and build up. It will readily be seen that it will require several years, even at the rates of interest estimated by defendant and its expert witness, before the \$1 can earn back the primary \$4 and the 25 cents a month. To illustrate: The holder of a certificate on which the first monthly dues were paid in October, 1901, paid in \$4 to enter, and \$1.25 per month, aggregating to the end of August, 1902, \$17.75. According to the calculation of the expert, its value (or what is more resonantly called its apportionment of profits) on August 3, 1902, was \$11.79. Therefore, if by the multiple table that number should be reached for redemption, the owner would receive actually less than he had paid in by \$5.96. Again, the holder of a certificate on which the first monthly payment was made in May, 1899, paid the preliminary amount of \$4 and forty installments of \$1.25, making \$54. Its value is fixed at \$51.06. These are not isolated cases. The same is true of a large number of certificates. In fact, on certificates running back to January, 1899, the allotment is less than the amount actually paid in, regardless of interest. Similar results appear from the secretary's calculation of values on April 1, 1901. Suppose that by the multiple table the redemption number should fall on any one of these; is it not evi-

dent that the holder would get less than he paid in, regardless of interest, and suffer an actual loss? It is said that this has not happened, and perhaps not. But under the multiple table, the numbers subject to redemption rapidly get wider apart. Already, since redemption began in 1901, the skipping process has stretched from the beginning of the table to number 3,141; and it is apparent that in the course of time, by continuation of this process, a number or numbers will be reached, which, if redeemed, will not only pay the holder no profit, but will cause him actual loss. If the company honestly abides by its scheme, and continues to redeem according to the declarations quoted, it cannot prevent the result. It is no answer to this to say that the company may devise some way to meet it. Such a suggestion met with no favor in 59 Ill. 160, and 33 N. H. 329, 66 Am. Dec. 723, *supra*. There is another thing which seems to run through all the calculations of the company. If a certificate holder fails to pay his installments for one or more months, they seem to ignore him as a person to whom payment may have to be made, treating him as not "in good standing." In apportioning out the assets and determining the values for redemption, they include the amounts paid by him as assets, but leave him entirely out as a possible claimant. At least, this seems to be true. And in one affidavit of the expert he made a correction on account of some persons in this condition, who in fact paid their fines and dues, and returned to "good standing." By the terms of the certificates, a man does not lose all right, or his certificate lapse, until after six months' default. He can pay up, with the fines imposed for delay. So that to leave a number of such persons out of the calculation is to ignore quite an important factor.

It is practically admitted that the certificates belonging to Class A are illegal. But it is contended that those in Class B are so different as to avoid the illegality. There are several points of difference, and the certificates belonging to Class A are more clearly and plainly illegal. But in the opinion of this court the illegality is preserved in the certificates of Class B. In Class A the maturity value was \$505.54, maturing after 130 installments of \$1.25 had been paid. In Class B \$500.00 is fixed as the maturity value after 168 months. As will appear more fully later on, neither can be accomplished by the legitimate investment of money, nor without the aid of large lapses. As to calls for redemption before maturity, each uses the form: "That the holder shall surrender for cancellation this certificate when the same shall be called, upon the payment to him of its then redemption value." In Class A certain amounts are named if the certificate should be called at certain times. In Class B it states that "redemption value shall be the full amount of the first payment, and all installments paid hereon with interest on said

amount at eight per cent. per annum and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of eight per cent. per annum." One of these fixes the sum to be paid outright. The other fixes it by giving certain elements from which the minimum amount can be calculated, with the hope of 'more held out. It promises to pay certainly the amount fixed by the payments of the certificate holder, with eight per cent. interest, regardless of the time of call, and regardless of whether eight per cent. had been earned or not. It is suggested that the added words "and its proportionate share," etc., above eight per cent., indicates that it was not subject to call until more than eight per cent. had been earned. This does not seem to the court the proper construction. But in any event the multiple table does not select certificates according to what the payments on them have earned. It selects them by chance application of numbers. The difference between the two classes in this respect is one of degree, rather than of quality. One is worse than the other, but both are bad. Other differences need not be noticed.

Stripped of all technical lore, can any one seriously believe that the scheme of the company's business was merely to take the money of purchasers of certificates, invest part of it, and give them back what the part invested earned, or that this was held out to purchasers as the real scheme? Does any one believe that purchasers have turned in their money to this company, paid it \$4 for the privilege of starting, and one-fifth of all installments as expenses, simply for the privilege of letting the company invest the other four-fifths and give them back such profits as it made? Is it not plain enough to be seen that the real attraction was the appealing to cupidity, and the hope of getting large returns by the use of chance?

The contentions in regard to lapses, the impossibility of the scheme, and the insolvency of the company, may be treated together. It is an error, in dealing with these matters, to treat each as separate and distinct, instead of considering their relation to the scheme as a whole. The fallacy in this mode of treatment may be illustrated by a case of fraud. Considered separately, there is nothing illegal in a man's giving his house and lot to his wife as a home, though he may own nothing else. So, too, as a separate statement, there is nothing illegal about a man's owing debts. But, if the two be put together, it is fraudulent for a debtor to give away all of his property to his wife so as to defeat his creditor. In this case, where the real question is as to the legality of the scheme of the company, it will not do to segregate the elements of the complaint, and deal separately with each, without regard to the whole. To cite the law governing a plea of impossibility of performance, where filed to a suit on a contract confessedly legal, is

quite different from considering the nature and character of the promise, and the company's scheme of performing it, in determining whether the scheme is legal or illegal. Thus it is urged in behalf of the company that a provision in a contract for a forfeiture on failure to pay, or a "lapse," is not illegal. While forfeitures are not favored, and equity in proper cases grants relief against them, yet a provision in a contract for a forfeiture, or a lapse on failure to pay, does not per se render the contract illegal. But whether a number of certificate holders will or will not fail to pay, and how many will fail, and at what stage of the proceeding, and what amount of previously paid installments will thus be forfeited or gained by the company, necessarily involves an element of chance. While a forfeiture may happen without involving illegality in the individual contract, and accretions be added to the funds, yet if a company whose business is the issuing of bonds, certificates, or promises to pay, must depend for its ability to do so upon this chance element, it is an illegal scheme, fraudulent in law, and contrary to public policy. A company may contract with a certificate holder that a forfeiture of amounts already paid, or a "lapse," shall occur on a failure to make payments. But if a company's business is to promise large numbers of certificate holders to pay them certain amounts, and, as an essential element or ability to pay some of them the agreed amounts, it must depend upon the chance of lapses or failure on the part of others to keep their contracts, and consequent forfeiture of sums already paid in, the scheme is essentially one of chance. The mere existence of some good fortune or bad fortune, though involving an element of chance, does not necessarily render a business illegal, if chance is not an integral or essential part of it. Thus the seasons affect the farmer and the merchant. The success or failure of other merchants or dealers may affect one's collections, and his profits and losses. And many other illustrations might be given. Indeed, it may be said that all success in business is more or less affected by circumstances beyond the control of the individual considered, and therefore, in a loose and vague way, called chance. But in legitimate business the employment of capital or labor (physical or mental), or both, form the foundation, and their legitimate product the primary reward; and the element of chance is not the essential element of the enterprise. This is a wholly different thing from organizing or carrying on a scheme in which chance is a basis or essential element.

As sustaining a contrary theory, the case of *Union Investment Ass'n v. Lutz*, 50 Ill. App. 176, is cited by defendant's counsel. An examination of that case will show that the paragraph of the opinion dealing with this important subject embraces eleven lines, and cites one decision which involved quite a

different organization from a bond company dependent on lapses. Rapp's Harmony Society was a religious association, in which each surrendered his property into one common stock for the mutual benefit of all, during their joint lives, with right of survivorship, with provisions in regard to furnishing necessities to the member and his family, and with privilege to secede during the lifetime of the member. *Schriber v. Rapp*, 5 Watts, 351, 30 Am. Dec. 327. The Illinois decision does not consider the distinction pointed out above, nor does it refer to any chance or lottery feature in the mode of distribution. If it meant to hold that for a company to conduct a scheme in which it is dependent upon chance lapses or forfeitures for its ability to comply with its promises to pay some of its certificate holders, and where those called in for payment shall be fixed by chance, is legitimate business, it would be neither sound in principle nor sustained by authority, and would be in the teeth of decisions already cited. The court says, of the scheme then being considered, that "it applies the principle of joint tenancy to the investments by the subscribers, the survivorship depending upon default instead of death." The analogy invoked does not apparently exist. Death is a certainty, resulting from the operation of natural laws. The time may not be known, though it may be estimated with some probability by the use of mortality tables. Default or lapse is a mere chance, which may never happen at all. If the statement of the Illinois court be correct, such an attempt to apply to a chance event the principle of joint tenancy can have little weight in this state, where joint tenancy itself has been abolished. Civ. Code 1895, § 3142. This court does not believe that the Supreme Court of Illinois meant to hold any such doctrine. To do so would be out of consonance with the trend of its decisions.

The effort is made to analogize this sort of scheme to the business of insurance, and especial reference is made to tontine insurance. What has been said above indicates a wide difference. It would prolong this opinion beyond reasonable limits to enter into a full discussion of the methods of insurance, and the legality of lapses as incident thereto. Suffice it to say that outside of co-operative and assessment companies, where the insured are also insurers of each other, all respectable life insurance companies at this day are believed to lay aside from premiums paid on ordinary life policies a reserve, which, invested at some reasonable rate, will produce the amount of the policy within the time of the expectancy of the insured. Many states have laws fixing the rate of interest in calculating life insurance reserves or net value of policies. In this state 4 per cent. is used, except where a company has a cash capital fully paid up of not less than \$100,000, when the insurance commissioner may in his

discretion employ a rate of from 3 per cent. to 6 per cent. Civ. Code 1895, § 2049. The rate of interest which is employed in many states is 4 per cent., compounded annually. This is what is considered a reasonable insurance reserve, and a practicable rate of interest; not 14 per cent., 15 per cent., or 18 per cent., compounded quarterly, as this company uses in its calculations to figure out estimated results. A tontine policy has been defined to be "a policy of insurance in which the policy holder agrees, in common with the other policy holders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years called the tontine period, the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force." *Century Dictionary*. This is a modification based upon the original tontine, which was an annuity shared by subscribers to a loan, with benefit of survivorship. Lorenzo Tonti could hardly have foreseen that his plan of survivorship would be claimed as applicable to or as legalizing a company which maintains a redemption fund of 50 per cent. of monthly installments paid, which depends for its ability to carry out its promises on the chance of lapses, and which redeems, not by equitable division of all profits among the insured at the end of the tontine period, but calls some for redemption by the use of chance. No insurance company of any standing can probably be found which does any such tontine insurance. If it does, it is running a lottery, not an insurance business. The modern trend of legislation and decisions is rather in the direction of limiting than extending what is loosely called the "tontine" principle.

Judge Grosscup, in his charge in the *MacDonald Case* (D. C.) 59 Fed. 565, 566, makes use of the following language: "Take, for instance, the life insurance companies—those that proceed on the stock plan or on the assessment plan. They require of the member that he pay in a certain amount of money. That is the pecuniary consideration. That money is invested, or supposed to be invested, in securities, and, when the member dies, a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. That is the return. The man may have been insured but a month, and have paid in but a few dollars, and have received back \$5,000 or \$10,000. In such instances as that, a much larger sum has been returned than the consideration, but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable by, or dependent upon, chance or lot. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature, and not by the chances of lot." So also he deals with investment in real estate, which enhances in value. In *State v. Interstate Sav-*



ings Co. (Ohio) 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754, supra, it is said that "contracts of investment security, debentures, or certificates which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy, and unlawful." This was not a dictum, as insisted. It was a direct decision of a point involved in the case. The above is a copy of a headnote made by the court itself. Courts will use extreme caution in declaring a transaction void on grounds of public policy, and will not lightly infer such contrariety or such adverse public policy. But can there be any question that in this state there is a public policy, clear, certain, beyond doubt, against gaming in every form, or by any name, and against lotteries and lottery schemes or devices, by whatever name called, or under whatever verbiage covered up?

The enumeration of certain contracts as contrary to public policy in section 3668 of the Civil Code of 1895 is not intended to be exhaustive, but illustrative. Two citations will suffice to prove this to be true. See *Mercier v. Mercier*, 50 Ga. 546, 553, 15 Am. Rep. 694; *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 472, 473.

This company's capital is only \$2,500, of which about one-half has been paid in, partly in a desk and office furniture. It has issued hundreds of thousands of dollars worth of certificates; so that the capital is merely nominal, and furnishes no real security. The certificate holders must look to the amounts arising from the contracts or certificates. Class B certificates begin thus: "The Equitable Loan & Security Company of Atlanta, Georgia, hereby promises to pay to the order of \_\_\_\_\_, at its home office in Atlanta, Ga., five hundred dollars subject to the following express terms and conditions: 1st. That the holder has paid four dollars herefor and agrees to pay to the maker hereof at its home office, without any other or further notice, an installment of one dollar and twenty-five cents on the fifth day of each and every succeeding month hereafter, until one hundred and sixty-eight installments shall have been paid, time being of the essence of this contract, then this certificate shall become due and payable for its full face value." As stated above, the first payment of \$4 goes to the agent, and 25 cents per month of the installments goes to expenses, leaving \$1 per month of which 62½ cents goes to the redemption fund, and 37½ cents to the reserve fund. The redemption fund may be used to redeem, and, as already shown, the declared policy of the company is to make redemptions or "speedy returns to investors." The only fund specifically provided to be held in reserve is 37½ cents per month. In 168 months this would aggregate \$63. If the entire \$1 per month were held in reserve, it

would aggregate \$168. According to the sworn calculation of an expert, which has not been denied, \$1 paid monthly for 168 months (14 years), if invested as received at 8 per cent. (the highest legal rate in Georgia), and compounded annually, would aggregate, both principal and interest, at the end of the time, \$302.20, as against \$500 maturity value. It is perfectly evident that no rational or reasonably possible investment of or interest on either \$63 or \$168 can produce \$500 in the given time. Especially is this true when it is remembered that the entire amount is not received at the beginning of the period, but is paid in monthly installments, and therefore has an average earning capacity for only one-half of the whole time.

It is suggested that there is no real binding promise to pay \$500; that the naming of that amount is not a substantial part of the contract; that the company may redeem all of its certificates at any time previous to maturity, even to the last minute, at a less amount, and can thus at its option avoid ever having to pay the full sum. The error of this suggestion is twofold: In the first place, the certificates have been issued at various dates, running through several years. They, therefore, will fall due all along at different times. If the company adheres to its table, it cannot select to pay any particular certificates as they are about due, less than the full amount, on account of its redemption privilege before maturity. Nor can it select and call them before maturity, unless they happen to bear the tabular numbers for calling, or unless it can and will wind up and pay off all certificates when the first fall due, which is evidently not the purpose or scheme, for new certificates are continually being issued (though called by a different class name). The second error in this suggestion (though evidently not thought of in making it) is this: The very first thing in the certificate is a promise to pay \$500 at maturity. It is printed in large type—the most prominent thing in the certificate. It is true that it says that this is subject to "the following express terms and conditions," which are then printed in small type, and some of them in rather uncertain, if not ambiguous, expressions, as will be seen by reading them. But in one of its pamphlet publications, stated on its face to have been copyrighted in 1895 by its secretary, and therefore emanating, not from its soliciting agents on the road, but from headquarters, occurs this statement: "Twenty certificates purchased in the Equitable Loan & Security Company, if carried to maturity, will pay you Ten Thousand Dollars, yielding a clear profit of \$5,720.00." Beyond question the company held out, as part of its plan of operation, the paying of \$500 on some certificates. To hold that it printed its \$500 promises in bold type, and sent abroad its pamphlets construing and illustrating its plan, but never really intended any such thing, and that these statements are mere surplus-

age in the contract, and not to be considered in ascertaining the duties or the liabilities of the company, or the legality of the scheme, would look very much like branding it as fraudulent in its origin. This court prefers to give the company a more liberal and charitable view, and not to hold men of the character and standing of the president, ex president and others who have been connected with it, guilty of willful fraud. A scheme which, for its carrying out and distribution of payments, must rely upon the element of chance, may be illegal, but it is less reprehensible than if it were branded as fraudulent, misleading, and deceptive. The one may involve a mistaken notion of what the law will permit; the other would involve moral turpitude.

The only rational possibility for the company to ever pay off certificates as they mature at \$500 each, or any considerable part of them, depends on the chance element that a large number of certificate holders will fail to keep up their payments, and thus what they have already paid in will be forfeited. It is not necessary to appeal to conflicting evidence to show what part lapses play in this scheme. In one of the affidavits of the expert offered in evidence by the company, he says: "The books of the defendant show \$306,466.62 to the credit of the redemption fund, and \$221,912.40 to the credit of the reserve fund, making a total to the credit of the two accounts of \$528,379.02. In making up his statement, deponent did not consider these accounts as they appear on the books, but took instead the amount actually paid into these accounts by certificates in good standing (\$408,408.00). The difference in the two amounts shows the profits from lapses, to wit, \$119,971.00, which amount is included in total profit of \$243,709.82, shown on foregoing statement." In other words, out of \$243,709.82 stated as profits, and treated as such in determining the values of and ability to redeem certificates, this witness estimates \$119,971 as the profit from lapses. In a published statement dated February 28, 1902, it appears that prior to that time there was a "total amount paid on certificates that have lapsed (forfeited), \$153,659.00." In one of the pamphlets already referred to as issued by the company occurs the following: "We issue without a single forfeiture, but we know from experience and statistics that more or less of our certificate holders will lapse, and that accretions from fines will be an additional large source of profit, but from the very terms of our certificates every dollar realized from both of these sources must go to the credit of those who do not lapse, and not for the private profit of a few, thus rendering possible an early payment of certificates at a handsome profit above the rate of interest earned upon loans." Note the words, "thus rendering possible," etc. Do not lapses form an essential element, a *sine qua non*, of the scheme?

Of the cases relied on by counsel for the company, in *Chancy Park Land Co. v. Hart* (Iowa) 73 N. W. 1059, where a body of land, comprising a number of lots according to a survey, was sold, and various persons subscribed, and agreed that the lots should be divided or apportioned among them "in such manner as they might decide," and where they did hold a meeting and adopted a plan to assign the various lots by drawing slips from boxes, suggested by one of their own number, and not induced or caused by the promoters of the sale, took the lots so respectively assigned, and gave contracts therefor, it was held that there was no scheme of lottery on the part of the promoters of the sale, preventing a recovery of the purchase price. If the sellers had distributed lots of unequal value, by chance, it would have been different. *Wooden v. Shotwell*, 23 N. J. Law, 465; *Kohn v. Koehler*, 96 N. Y. 362, 43 Am. Rep. 628, and *Ex parte Shobert*, 70 Cal. 632, 11 Pac. 786, 59 Am. Rep. 432, are in conflict with the decision of the Supreme Court of the United States in the *Horner Case*, and are there expressly disapproved; and also in *Ballock's Case*, 20 Atl. 184, 8 L. R. A. 671, 672, 25 Am. St. Rep. 559, by the Supreme Court of Maryland.

From the foregoing discussion it will be seen that, by the evidence introduced by the company itself and its letters and published statements, the following things are established: (1) The payment of a consideration; (2) the use of chance; (3) prizes, consisting in inequality of payments, resulting from the use of chance; and this inequality is not in time only, but in amounts, and does not result merely from increase or decrease of assets from loans or investments (if, indeed, that would be legal where the certificates redeemed or subjected to this inequality are determined by chance), but primarily from the chance element of lapses and amounts arising therefrom. And from the same sources, together with the application of a simple calculation, it appears (4) that the business of this company is to issue a large number of certificates or promises to pay, and that depends, and must depend, for its ability to comply with them, upon the chance of many lapses or forfeitures. As matter of law, the court holds that such a business or scheme is illegal, and is contrary to public policy.

6. It is contended by the company that if the court should hold the scheme or plan of its operations to be tainted with illegality, as embodying a lottery feature or similar device, nevertheless plaintiffs and others who purchased certificates may be classed as participants criminals and in *pari delicto*, that is, equally at fault, and can have no relief in equity. A number of decisions have been cited on this subject, a review of all of which would require much time and be unnecessary. It may be said, generally, that where an illegal contract is executory it will not be enforced by the courts, nor can damages be

recovered for its breach. Wherever a party has to set up and rely on such a contract to sustain his claim, the courts will not aid him. So, too, an illegal contract will not be indirectly enforced, as, for instance, to furnish a measure of damages in a suit against a telegraph company for a mistake in sending a message. *Cothran v. Western Union Telegraph Co.*, 83 Ga. 25, 9 S. E. 836. While the decisions are not uniform on the subject, the weight of authority, including decisions of the Supreme Court of this state, is that one party to such a contract cannot generally have an accounting in equity against the other for the proceeds or profits of the mutual illegal venture. Nor, it has been said, will a court enforce equities in such illegal proceeds, where to do so would be substantially to enforce the contract. *Exchange Bank v. Loh*, 104 Ga. 446, 459, 31 S. E. 459, 44 L. R. A. 372 (though in fact the contract there was held to be legal, and what was said on this subject was perhaps unnecessary). In these and similar cases, whether specific performance, damages, injunction, or accounting for proceeds or profits between the parties was sought, it was a necessary part of the case to set up and rely on the illegal contract or illegal conduct of a party in *pari delicto*. So far as this may be sought, it cannot be granted. In *Ingram v. Mitchell*, 30 Ga. 547, 550, it is said: "The rule hitherto applied by this court, and perhaps by the English courts, is this: that whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover." In *Raleigh & Gaston R. R. Co. v. Swanson*, 102 Ga. 754, 28 S. E. 601, 39 L. R. A. 275, it is said that: "A party to such a contract cannot recover in an action which does not seek to disaffirm but to enforce it by suit for its breach." In *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98, it was held that: "Where a principal deposited money with his agents to be used in the purchase of futures in pork and grain, he could recover from such agents the amount so deposited, in an action for money had and received. He could not set up the illegal contract to recover profits realized thereunder, nor could the agents set up the illegal contract for the purpose of defeating a recovery by the principal of the money deposited with them, and which was held by them. It did not matter whether the money sued for by the principal was the identical money furnished by him, or whether the agents deposited the money in bank with other deposits of theirs, and used such money for filling margins for futures, and afterwards replaced them to the credit of the principal. The question is, whose money is it—the agents' or the principal's? Nor does this stand in the position of an executed contract, in which both parties are in *pari delicto*." See, also, *Tennant v. Elliott*, 1 Bos. & Pul. 8; *Farmer v. Russell*, Id. 298; *Cook v. Sherman* (C. C.) 20 Fed. 167, 170.

If an illegal contract is executed, and the parties are in *pari delicto*—that is, equally in fault—equity will not aid one against the other in recovering what has been paid, but will leave them where it finds them. If executed in part only, the rule cannot be stronger than if executed in full. But if the parties are not in *pari delicto*, the rule does not apply. "When both parties are at fault, and equally so, equity will not interfere, but leaves them where it finds them. The rule is otherwise if the fault of one overbalances, decidedly, that of the other." Civ. Code 1895, § 3937. In *Clark on Contracts*, 493, 494, occurs the following: "This rule is expressed in the maxim '*In pari delicto potior est conditio defendentis*;' that is to say, where the parties are equally at fault, the condition of the defendant is the better. \* \* \* There are some exceptional cases, however, to which this maxim does not apply—cases in which a man may be relieved from an illegal agreement. These may be grouped as: (a) Cases in which a *locus poenitentiae* remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered. (b) Cases in which the parties are not regarded as being in *pari delicto*, as (1) where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure, or (2) where the law which makes the agreement unlawful was intended for the protection of the party asking relief." In the case of *Raleigh & Gaston R. Co. v. Swanson*, 102 Ga. 760, 28 S. E. 601, 39 L. R. A. 275, the Supreme Court of Georgia quotes this authority with approval, and says that the exceptions stated by the author "are undoubtedly sustained by good authority." In *Clark on Contracts*, 500, it is said: "It is also held that the parties are not to be regarded as being in *pari delicto* where the agreement is merely *malum prohibitum*, and the law which makes it illegal was intended for the protection of the party asking relief." In 15 Am. & Eng. Ency. L. 1004, 1005, 1007, similar principles are announced, but even more strongly; and it is further said: "And when a contract is prohibited by statute, and a penalty imposed on only one of the parties for a violation of the statute, the parties are not necessarily in *pari delicto*, and, when equity requires it, the court may afford relief to the party upon whom no penalty is imposed."

In *Jones v. Golightly*, 2 Wm. Bl. 1073, it was held that money paid to a lottery office keeper as a premium for an illegal insurance of a ticket may be recovered. It is said that "the statute is made to protect the ignorant and deluded multitude, who in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." See the notes to that case. In *Browning v. Morris*, 2 Cowper, 790, 792, 793, it was held that a lottery keeper could not recover money paid by him, he being the principal offender.

Lord Mansfield said: "It is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office keeper." So, in Georgia, the punishment is placed upon the person selling or furnishing lottery tickets, not upon the purchaser. In *President v. Nahant Bank*, 3 Metc. (Mass.) 581, 585, 586, it is said: "To have decided otherwise would have given effect to an illegal contract in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent." There is no par delictum in the present case, either as matter of law or of fact. See, also, 1 Pom. Eq. Jur. § 403; 2 Pom. Eq. Jur. §§ 929, 941, 942; 1 Story, Eq. Jur. (13th Ed.) 300; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343; *Mount v. Walte*, 7 Johns. 434, 441 (insurance paid on lottery ticket recovered); *Parkersburg v. Brown*, 106 U. S. 487 (3) 1 Sup. Ct. 442, 27 L. Ed. 238; *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453; *White v. President*, 22 Pick. 181; *Bowditch v. New England L. Ins. Co.*, 141 Mass. 292, 295-296, 4 N. E. 798, 55 Am. Rep. 474; *Ford v. Harrington*, 16 N. Y. 285 (opinion of Bowen, J., concurred in by five of the other Justices, there being eight in all); *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Davidson v. Carter*, 55 Iowa, 117, 7 N. W. 466; *Bateman v. Robinson*, 12 Neb. 508, 11 N. W. 736 (2); *Reynolds v. Sprye*, 1 De G., M. & G. 658; *Sykes v. Beadon*, L. R. 11 Ch. Div. 197, supra; *Callaway v. Mayor*, 48 Ga. 311, where it is said: "It is hardly possible to conceive a case, except in certain instances of *pari delicto*, where a party illegally obtaining money cannot be made to pay it back." In *Branham v. Stallings* (Colo. Sup.) 40 Pac. 390, 52 Am. St. Rep. 213, the case was not between the company conducting the scheme and the purchaser, but the plaintiff was an organizer and active participant, and was in *pari delicto*.

7. A few words as to the pleadings. That there are some parts of the plaintiff's pleadings which are not well set forth, and cannot withstand a special demurrer, but will have to be amended, is quite clear—for instance, to copy an affidavit as a part of a paragraph of a petition is more rhetorical than exact; and there are other instances. There is also some contrariety of views among the pleaders on certain subjects. But this is not surprising. If holders of certificates thought the scheme illegal, there was an auditor's report for them. If some of them think the court has approved the plan, and now ask about redemption, they are met with a statement that the company is not compelled to redeem. If they say that it cannot pay the \$500 named in the certificate, the reply is that it is not bound to do so, but may pay less at any time before maturity. If the redemption fund is asked about, the answer is that the company "may" redeem before maturity but

need not. If they point to the statements of the company and its agents as to its basal principles, it is said that these are not in the certificate. Is there any wonder that the petitioners and interveners have brought their legal woes, and piling them in a sorrowful, if somewhat inartistic, mass before a court of equity, have asked such aid as equity could give? On a smaller scale, comparison may be made with the pleadings in 7 Johns. 434, supra; Civ. Code 1895, § 4833. If amendment is necessary, it can be made.

Among other things, the pleadings do make the points treated of in this opinion; allege that the scheme of defendants is fraudulent, unlawful, and contrary to public policy, that it is impossible now for defendant company to redeem its certificates at redemption value, and that it will be equally impossible for it to redeem its certificates at the maturity value; and they pray for a receiver, to have the amounts paid in by certificate holders determined, and for judgments for the sums which may be respectively due them, etc. That some may file a petition on behalf of themselves and others is rudimentary law. Civ. Code 1895, § 4842. Nor does the fact that some of the certificate holders have joined with the company change this. If so, there could never be a representative petition by bondholders, stockholders, or the like, if officers of the company attacked, or their friends, should see fit to buy some bonds or stock, and join with the company in the fight. What appeared at first blush to be a voluntary uprising of quite a lot of certificate holders was explained to a considerable extent by evidence which showed that the company or some of its employés conferred with a friendly certificate holder, and furnished a list of addresses to him, and that a circular letter was sent out setting forth an effort to wreck the company, and suggesting the signing of a blank form inclosed, authorizing an attorney to represent the signers in opposing a receivership, without any charge of fee against them. The attorney does not seem to have had anything to do with this, but on behalf of himself and some others bona fide objected to a receiver, and he was no doubt surprised at the amount of moral support which was offered him, unaccompanied by any fee. He is, however, in no way subject to criticism.

It is suggested that this is not a representative petition. But why not? A holder of a Class A certificate, and numerous holders of Class B certificates, are parties. By the terms of the certificates of Class B it is said that all the assets are liable; so that, if both were valid, Class C would be subordinate, or at least not superior, to Class B. But if the scheme is illegal, as has been held, the real classification is as to certificate holders or persons whose money has been paid to the company for certifi-

cates, and it is immaterial whether the illegality is classified as A, B, C, or some other letter. If an order of court is needed to declare this a representative proceeding, it can and will be granted.

8. Shall a receiver be appointed? Precedent on this subject is necessarily limited, because companies of this sort are modern inventions. In *McLaughlin v. National Bond Investment Co.* (C. C.) 64 Fed. 908, supra, it was held that a receiver would be appointed. In *Parkerson v. Brown*, 106 U. S. 487 (4), 1 Sup. Ct. 442, 27 L. Ed. 238, supra (not a case concerning a bond company, but one of illegal contract where the parties were not in pari delicto), there was a prayer for a receiver, but none was applied for; but it was held that equitable methods would be applied. See, also, *Peltz v. Supreme Chamber*, etc. (N. J. Ch.) 19 Atl. 668, 671, supra. In regard to this very company the Supreme Court has recognized that a receiver might have been appointed without error, but, under the facts as then presented, held that the requirement of bond was not an abuse of discretion. *McMillan v. Equitable Loan Co.*, 102 Ga. 575, 27 S. E. 668. The facts in the present case are far stronger than in that. Civ. Code 1895, §§ 4900, 4904; *Wolfe v. Clafin Co.*, 81 Ga. 64, 6 S. E. 590; *Cohen v. Meyers*, 42 Ga. 46; *Orton v. Madden*, 75 Ga. 83; *Albany Co. v. Southern Agricultural Works*, 76 Ga. 135, 2 Am. St. Rep. 26. If the preceding part of this decision is correct, here is a corporation, with a nominal capital stock of \$2,500, the visible portion of which in hand is in the shape of some office furniture, taken secondhand eight years ago, conducting a business which this court holds is illegal, and as a result of it in possession of several hundred thousand dollars of assets, arising from payments by many people, who, not being in pari delicto with it, are entitled to recover on account thereof, and which fund the company is not entitled *ex sequo et bono* to hold against them. Many of these payments are small, and to remand each of the persons who made them to a separate suit would be a practical denial of justice to them, would entail a great number of suits, and large amounts in costs. If the company is allowed to continue to operate and use the fund or assets in ways herein held illegal, these numerous parties are in danger of loss. It is said that most of the cases in regard to "investment" or "debenture companies" arose on criminal prosecutions for conducting lotteries or proceedings to forfeit charters. But it must be remembered that in criminal cases laws are construed strictly; and, if the schemes were lotteries to the extent of being criminal, it would certainly furnish no argument against a like holding in a civil case. The trouble with this scheme is not a mere excrescence which may be lopped off, and the wound covered

with a new letter of the alphabet. It is fundamental. To eradicate it is to eviscerate the scheme itself. Under our Code, if a charter is forfeited, after paying "debts" the balance is to be divided among the stockholders. Surely, it cannot be claimed that, if the scheme of this company's business is illegal, the sole remedy is to forfeit the charter, and give to its three or four stockholders payments made by the certificate holders. The public may also have a remedy. But this does not affect the rights of individuals to proceed for their protection.

Finally, it is urged that the appointment of a receiver will work injury. But the courts did not originate the scheme, nor is there anything in the charter indicating the use of chance or the like. If there is injury to the company from its methods, it cannot complain that it gets hurt. To those who wish to proceed in the hope of winning prizes by chance from the failure or misfortune of others, this chance will be lost. They cannot lawfully do so. But to the many whose small monthly payments represent days of toil and nights of waiting, and who would fall by the wayside (in the language of the company), "thus rendering possible an early payment of certificates at a handsome profit above the rate of interest agreed upon," something may be saved, and their little accumulations may be rescued from the coming "lapses." In surgery or in law, the knife always hurts, but on proper occasion it must be applied. As already stated, this decision does not quote affidavits introduced for the plaintiffs in cases of conflict. To do so would make the case much stronger. But the court deems it made out by the evidence and statements of the defendant company and its officers. It may be assumed that they thought they had gotten beyond the prohibition of the law; but the court cannot agree with them. It matters not how personally honorable may be the gentlemen connected with this company, or how mistaken they may be; the law must be declared. The legal principles involved ought to be, as they have been, fully decided, that others may not make the same mistake. Or, if it should be held to be a legitimate scheme of business, and violative of no public policy, to gather in by chance lapses and divide unequally by the use of chance numbers, to hold out as an inducement "handsome profits" to be thus derived and divided, and so to foster the spirit of gain by chance, it should be known that such is the law of this state; so that other companies which have been stopped in Ohio, in Pennsylvania, in Louisiana, and in other states may change the formula of their certificates, and, using words of permissive sound, may find protection beneath the three-pillared arch, and feel that they have

a guardian sentinel in him who stands with drawn sword in every impress of the great seal of Georgia.

Having accidentally omitted one or two things in the opinion filed January 3, 1903 (though its length might not indicate any omission), the court files this brief supplemental decision:

In addition to the authorities cited to show that section 3668 of the Civil Code of 1895 does not, and does not intend to, enumerate all contracts contrary to public policy, see *Central R. R. v. Murphey*, 113 Ga. 514, 516 et seq., 38 S. E. 970, 53 L. R. A. 720; *Sessions v. Payne*, 113 Ga. 956, 39 S. E. 325; *Berry v. Cooper*, 28 Ga. 543 (4); *Hutchinson on Carriers* (2d Ed.) § 250. In the first case cited, and other like cases, where a contract has been included in a bill of lading, seeking in whole or in part to exempt the common carrier from the effects of the negligence of itself or its servants, the shipper, though signing the contract, could recover for damages, as such, accruing from negligence of the carrier, notwithstanding such limitation, and the bill of lading could of course be used in evidence. The public policy was against allowing the stipulation for exemption, and was in favor of the protection of the public. To hold that because the shipper signed the contract he would be in pari delicto would defeat the very end which the public policy sought to accomplish. And in the present case public policy is best subserved by allowing a recovery of their money by buyers of certificates rather than by enriching the company, or what the English courts call the "office keepers." They are not at all on a plane of equality.

After stating that the allotment made by the defendant's expert fixed the present value of many certificates at less than the actual amount paid in, it is stated that this is true of certificates running back to January, 1899. This is believed to be the correct date, and that all certificates issued since then are in the condition mentioned. But whether that date is exact or only approximate would not make the slightest difference in the principle announced, or in the illustration then being given. The point being made was to show that in the allotment or "apportionment" the present value fixed on a large number of certificates—including those issued during several years past—was less than the actual cash paid by the purchasers to the company, and if, under the multiple table, the number for redemption should reach one of these, there would be actual loss. Back of that time are quite a large number of certificates as to which the allotment or "apportionment" fixes values at more than the actual cash paid in, but less than such payments, with 8 per cent. interest, named in the certificate. If the redemption number should fall on one or more of these, they would get something above actual payments,

but not as much as 8 per cent. interest on them. Then there are some as to which the values fixed or estimated equal or exceed the amounts paid in with 8 per cent. interest. It is true that the company has made a calculation based on the \$1 per month which went to the redemption and reserve funds; but, besides this, the certificate holder has paid the preliminary amount of \$4, and 25 cents per month; and the valuations do not include these or make any reference to them. Besides, interest runs regularly according to date. The multiple table does not, but skips according to a sort of geometrical progression.

Candler & Thomson, Hoke Smith, H. O. Peeples, Rosser & Brandon, H. E. W. Palmer, and E. W. Butler, for plaintiffs in error. G. T. & J. F. Cann, Jno. L. Hopkins & Sons, Brown & Randolph, H. M. Dorsey, Arthur Heyman, J. D. Bradwell, and Tompkins & Alston, for defendants in error.

COBB, J. This case is here upon a bill of exceptions of the Equitable Loan & Security Company assigning error upon an order of the judge of the superior court of the Atlantic circuit placing its entire assets in the hands of a receiver for administration. The reasons for appointing the receiver were that the scheme of the company, if not a lottery, was, to say the least of it, in the nature of a lottery, and was therefore illegal; that the contracts evidenced by its certificates were impossible of performance by legal methods; that such contracts were contrary to public policy. The court did not base its judgment upon the grounds that the officers of the company had been guilty of malfeasance, misfeasance, or breach of trust. The court found that the officers of the company had not been guilty of any personal dishonesty or peculation in dealing with the assets of the company, but held that the scheme was illegal. The court also found that, if the scheme of the company was legal and its contracts valid, any deception which may have been practiced upon any of the certificate holders was not of such a character as to require the appointment of a receiver; that, while such certificate holders might have their remedy for a rescission of the contract, there was nothing in the evidence authorizing the appointment of a receiver on this ground. The court did not appoint a receiver on the ground of the insolvency of the company, and did not make any finding in terms on the question as to its solvency or insolvency. The court also found that the company, under its charter, was authorized to make investments in real estate, and that the certificate holders had no right to complain that the charter had been amended so as to authorize the company to engage in this business. It will thus be seen that the first question to be determined is whether the scheme of the company was illegal.

In order to fairly pass upon the question of the legality of the scheme, it is necessary to take into consideration the origin and history of the company. The original charter of the company was granted on January 30, 1894, under an order of Fulton superior court. It authorized the company to carry on the business of dealing in stocks, bonds, notes, and securities of every description, with a right to negotiate loans, charge commissions, and loan money upon collaterals, mortgages, or other security. It also authorized the company to issue investment bonds and certificates, to be paid for by the investor in monthly installments or otherwise, the plan to be fully set forth in the certificates or bonds. The amount of the capital to be employed was fixed at \$2,500, with the privilege of increasing it to \$100,000. By an amendment to the charter, granted March 28, 1896, the company was authorized to purchase, improve, lease, sell, and dispose of, or use in any way it might see fit, property of any description, real or personal; to execute notes, bonds, and other obligations, and to secure the same by deed of trust or other form of security, including the right to guaranty the payment of obligations of other persons, natural or artificial; to pursue the plan of national or other building and loan associations, should its directors see fit to adopt such plan of operation in whole or in part. This amendment to the charter was accepted by the company on March 31, 1896. Shortly after its incorporation, the company issued an investment certificate, which is styled "Class A." The following is a copy of one of such certificates:

"The Equitable Loan and Security Company, of Atlanta, Georgia, promises to pay to — of — or order, at its home office in Atlanta, Ga., Five Hundred and Five Dollars and Fifty-four Cents (\$505.54) upon the following express terms and conditions:

"1st. That there shall be paid by the holder to the maker hereof, at its home office in Atlanta, Ga., without any other or further notice, an installment of one dollar and twenty-five cents (\$1.25) on the Fifth day of each and every succeeding month hereafter until one hundred and thirty installments shall have been thus paid, time being of the essence of this contract.

"2nd. That the holder hereof shall surrender for cancellation this certificate, whenever the same shall be called, upon the payment to him of its then redemption value; the maker reserving the right to call and pay the same before maturity, under the following rules and regulations. Certificates paid before maturity shall be paid in the following order, to-wit: The first paid shall be number one, the second paid shall be number three, the third paid shall be number nine, the fourth paid shall be number two, the fifth paid shall be number six, the sixth paid shall be number eighteen, the seventh paid shall be number twenty-seven, the eighth

paid shall be number four, the ninth paid shall be number twelve, the tenth paid shall be number thirty-six, and so on, according to the table which is printed on the back hereof, and which table is hereby referred to and made a part of this contract.

"3rd. That the redemption value of this certificate, if paid prior to its maturity, shall be Fifteen Dollars if paid one month after date, Eighteen and  $\frac{25}{100}$  Dollars if paid two months after date, Twenty-one and  $\frac{11}{100}$  Dollars if paid three months after date, Twenty-four and  $\frac{18}{100}$  Dollars if paid four months after date, Twenty-seven and  $\frac{28}{100}$  Dollars if paid five months after date, Thirty and  $\frac{38}{100}$  Dollars if paid six months after date, and so on, the redemption value increasing Three Dollars with each installment paid, besides interest at the rate of four per cent. per annum on the redemption value of said certificate for the month next preceding the date of redemption hereof.

"4th. That of each and every installment paid as aforesaid, the maker hereof shall place twenty-five cents to a reserve fund, which shall be used and held for the protection of all live out-standing certificates issued by this company; and seventy-five cents to a redemption fund, which may be used as follows: (a) For paying certificates issued by this Company in the order and manner that they shall mature. (b) For paying off and retiring certificates prior to their maturity according to the terms hereinbefore stated. (c) For paying the heirs, executors, or administrators of any deceased holder hereof the sum that installments paid by such deceased may have contributed to the redemption and reserve funds, provided said certificate is in full force at death of holder and satisfactory proof of such death is furnished the maker hereof within sixty days after death occurs; and the remaining twenty-five cents and all transfer fees, shall be used for the expenses of said Company.

"5th. That a failure to pay any one of said installments when due subjects the holder hereof to a fine of fifty cents, which, together with the omitted installment, must be paid by the fifth day of the next succeeding month, and if said installment and fine are not paid within the said time, then this certificate shall be null and void, and of no value, and the holder hereof forfeits all payments and fines; provided, however, that this company will reinstate said certificate at any time within three months after such forfeiture, upon the holder hereof first paying all dues hereon, together with fines assessed at the rate of fifty cents for each payment in default. If this certificate shall, according to the plan of redemption herein stated, become payable after it shall have been forfeited, and before its reinstatement, then it shall be entitled to payment the next month after its reinstatement. And provided further, that after sixty monthly installments shall have been paid in the manner herein

provided, and all other stipulations herein shall have been fully complied with by the holder hereof, and such holder shall thereafter default in any subsequent installment, the maker agrees to issue to such defaulting holder a new certificate which shall bear the next unsold number, for an amount equal to the payments made on such defaulted certificate, less the amount deducted for expenses, which new certificate thus issued shall be non-assessable and shall bear interest at the rate of four per cent. per annum, and shall be payable in its regular order as per plan of redemption herein stated; provided application for such new certificate shall be made to the home office of the Company and the old or defaulted certificate surrendered within three months after such defaulted certificate shall be cancelled on the books of the Company.

"6th. That all receipts from fines shall be paid into the redemption fund.

"7th. That the contributions to the reserve and redemption funds may be loaned to the holders of certificates issued by this Company upon terms and security to be accepted by the Board of Directors; provided that not more than one hundred dollars can be loaned on account of any one certificate, and no loan can be made for a longer time than five years.

"8th. That after the reserve fund shall have reached the sum of One Hundred Thousand Dollars, the interest earnings therefrom may, at the option of the Board of Directors of this Company, be applied to the redemption of certificates then in force issued by this Company. And when the reserve fund shall have reached the sum of Two Hundred Thousand Dollars, then fifty per cent. or any other portion of all the further current contributions thereto, may be applied to the redemption of certificates in force in like manner with the interest thereon, when the Board of Directors shall so authorize.

"9th. That no transfer of this certificate shall be valid or binding on the maker hereof until such transfer has been made in writing hereon, and the same duly recorded on the books of the Company at its home office; and for each transfer a fee of One Dollar must be paid before a transfer will be made.

"10th. That each and every transferee of this certificate accepts it subject to all the stipulations herein.

"11th. That no statement made by anyone except as herein set forth shall be binding on this Company.

"12th. That no part of the Reserve, Redemption or other fund shall ever be loaned to any Officer or Director of this Company.

"13th. That no part of the Reserve or Redemption fund shall be loaned, except (A) upon improved real estate within the incorporate limits of the city in which it is located, and then not in excess of 50 per cent. of its cash market value; (B) Upon Govern-

ment, State, County or City Bonds that have never defaulted the payment of interest; and this provision can never be changed except by the consent of every holder of live Certificates issued by this Company in Class 'A.'

"In Witness Whereof, this Company has caused this Certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary. [Dated and signed.]"

The following is a copy of the table referred to in the certificate, which appears upon the back of the same:

**Table Referred to in the Body of this Certificate.**

READ FROM LEFT TO RIGHT.				
Numerical Column.	No.	1st Multiple Col.	2d Multiple Col.	No.
Pay first	1	then	2	then
Then	3	then	4	then
Then	4	then	13	then
Then	5	then	15	then
Then	7	then	21	then
Then	8	then	24	then
Then	10	then	30	then
Then	11	then	32	then
Then	12	then	39	then
Then	14	then	43	then
Then	16	then	49	then
Then	17	then	51	then
Then	19	then	57	then
Then	20	then	60	then
Then	22	then	66	then
Then	23	then	69	then
Then	25	then	75	then
Then	26	then	78	then
Then	28	then	84	then
Then	29	then	87	then
Then	31	then	93	then
Then	32	then	96	then
Then	34	then	102	then
Then	35	then	105	then
Then	37	then	111	then
Then	38	then	114	then
Then	40	then	120	then
Then	41	then	123	then
Then	43	then	129	then
Then	44	then	132	then
Then	46	then	138	then
Then	47	then	141	then
Then	49	then	147	then
Then	50	then	150	then
Then	52	then	156	then
Then	53	then	159	then
Then	55	then	165	then
Then	56	then	168	then
Then	58	then	174	then
Then	59	then	177	then
Then	61	then	183	then
Then	62	then	186	then
Then	64	then	192	then
Then	65	then	195	then
Then	67	then	201	then
Then	68	then	204	then
Then	70	then	210	then
Then	71	then	213	then
Then	73	then	219	then
Then	74	then	222	then
				676



Numeral	Column	1st Multiple Col.	2d Multiple Col.
	No.	No.	No.
Then	76	then 228	then 684
Then	77	then 231	then 693
			then 702
Then	79	then 237	then 711
Then	80	then 240	then 720
			then 729
Then	82	then 246	then 738
Then	83	then 249	then 747
			then 756
Then	85	then 255	then 765
Then	86	then 258	then 774
			then 783
Then	88	then 264	then 792
Then	89	then 267	then 801
			then 810
Then	91	then 273	then 819
Then	92	then 276	then 828
			then 837
Then	94	then 282	then 846
Then	95	then 285	then 855
			then 864
Then	97	then 291	then 873
Then	98	then 294	then 882
			then 891
Then	100	then 300	then 900
		and so on.	

A large number of these Class A certificates were issued. The Assistant Attorney General of the United States for the Post-Office Department having given an opinion that the scheme indicated in these certificates was a lottery, by an order of the Postmaster General the mails were closed against the company; and, under the usual rules of the department in such cases, all letters addressed to the company were stamped as fraudulent and returned to the writer. An appeal was made to the department to reverse this ruling, but the department adhered to the same, and the Postmaster General refused to rescind the order closing the mails to the company. There were at the time the present case was instituted only 70 of these certificates outstanding, and the holder of only one of them is a party to the present proceeding. It is not necessary to determine whether the scheme indicated in this class of certificates was legal. From the evidence it appears that the officers of the company, so far as they were able to do so, protected the holders of these certificates, notwithstanding their condemnation by the Post-Office Department; and that all the holders, except the number above referred to, have been settled with upon terms which were, so far as the present record discloses, entirely satisfactory to the holders; and that the company has in hand a fund derived, entirely from receipts and investments from this class of certificates, which can and will be used, as far as practicable, in settlement with the holders of these certificates. The evidence further shows that the funds derived from this source have never been mingled with other funds of the company, nor have other funds been used in any way in the settlement or discharge of certificates of this class. We will therefore not pass upon the legality of the scheme indicated in this class of certificates, and will eliminate from the discussion anything in reference to this class of certificates, except so far as their history may throw light upon the legality of the schemes indicated in certificates subsequent-

ly issued. The judge did not appoint a receiver on account of the illegality of these certificates. The reason he gave for the appointment was that he thought subsequently issued certificates were illegal. If the receiver had been appointed solely on account of Class A certificates, the order of appointment should and would have been limited in its operation to the fund in the treasury of the company which was set apart for the payment of these certificates. Whether there should be a receiver appointed for this fund, alone, has not been passed upon by the judge, and will not now be passed upon by us.

Upon the refusal of the Postmaster General to rescind the order closing the mails against it, the company promptly ceased to issue certificates of the class above referred to, and did all that it was possible to do under the circumstances to protect those who had in good faith bought the certificates. The company then issued a certificate known as "Class B," a copy of which is as follows:

"The Equitable Loan and Security Company of Atlanta, Georgia, hereby promises to pay to the order of — of — at its home office in Atlanta, Ga., Five Hundred Dollars, subject to the following express terms and conditions:

"1st. That the holder has paid Four Dollars hereof and agrees to pay to the maker hereof at its home office, without any other or further notice, an installment of One Dollar and Twenty-five Cents on the fifth day of each and every succeeding month hereafter, until One Hundred and Sixty-Eight installments shall have been thus paid, time being of the essence of this contract then this Certificate shall become due and payable for its full face value.

"2nd. That the holder hereof shall surrender for payment and cancellation this certificate whenever the same shall be called, before maturity upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all installments paid hereon, with interest on said amount at the rate of Eight per cent. per annum, and its proportionate share of all dividends or accumulations from fines, lapses and interest earned in excess of eight per cent. per annum.

"3rd. That, in order to prevent favoritism or partiality being shown by the Company, Certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

"4th. That of each and every installment paid as aforesaid, the maker hereof shall place Fifty per cent. and all net receipts from fines to a redemption fund, which may be used (a) For paying off Certificates prior to their full maturity term, according to the terms above set forth. (b) For paying Certificates in the order and manner that they shall ma-

ture at the end of the full term. (c) For paying to the legal representatives of any deceased holder hereof the full amount of the first payment, and all installments paid hereon, with interest at the rate of eight per cent. per annum and its proportionate share of all dividends or accumulations from fines, lapses and interest earned in excess of eight per cent. per annum, Provided, this Certificate is in good standing and legal and sufficient notice of such death is furnished the maker hereof within sixty days after death occurs, or fines will be enforced as provided for in section 5th hereof; and provided further, that if the holder hereof at the date of this Certificate was more than fifty years of age, that the said legal representatives of such deceased shall not have the right to surrender this Certificate for payment upon conditions above set forth, and the maker hereof cannot be required to pay the same under this section hereof, but will issue in lieu hereof a paid-up Certificate for the amount of installments that have been paid hereon, with four per cent. per annum interest, according to the provision regulating paid-up Certificates in section fifth hereof, or this Certificate may be continued as though death had not occurred; and thirty per cent. to a reserve fund which shall be used and held for the protection of all live outstanding Certificates; and the remaining twenty per cent, and all transfer fees shall be used for the expenses of the Company.

"5th. That a failure to pay said installments when due subjects the holder hereof to a fine of Fifty Cents each month for each and every installment in arrears, and if any installment or fine shall remain unpaid for six months, then this Certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments and fines made hereon. Provided, that at any time after Eight-four monthly installments have been paid hereon the holder may surrender this Certificate, if it is in good standing, and receive for it a new, non-assessable and non-forfeitable Certificate for the amount of installments that have been paid hereon, with interest at the rate of four per cent. per annum, which new certificate shall bear the next unsold number, and shall bear interest at the rate of four per cent. per annum and be payable on or before the expiration of the tontine period from the time it is then issued.

"6th. That the entire assets of this Company shall at all times be liable for the full payment of all obligations incurred in its certificates.

"7th. That the funds of this Company may be loaned to the holders of certificates, upon terms and security to be approved and accepted by the Board of Directors.

"8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this Company.

"9th. That no transfer hereof shall be valid

or binding on the maker until it has been approved by the Directors and recorded on the books of the Company at its home office, and a fee of One Dollar paid for making such record. Each and every transferee hereof accepts this certificate subject to all the stipulations herein.

"10th. That no officer or Director of this Company, or any member of his or their families, can purchase or own this Certificate.

"11th. That no statement made by any one except as herein set forth shall be binding on this Company.

"In Witness Whereof this Company has caused this Certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary, this — day of — 189—. [Executed by the Company.]"

The multiple table referred to in this certificate is the same as that which appears upon the back of certificates of Class A. The scheme of the company as indicated in these certificates was approved by the Assistant Attorney General of the United States for the Post-Office Department, and from the time it began to issue these certificates the company had the same unrestricted right to the use of the mails as any other person engaged in a lawful business. Whether the certificates of Class A were legal or illegal, it is to be said to the credit of the company and its officers that they abandoned the use of the same as soon as the authorities of the Post-Office Department had declared them to be illegal, and did not issue any other form of certificate until the same had been approved by the law officer of that department. These facts indicate that it was the intention of the officers of the company at all times to obey the law of the land, and to heed the voice of its authorized officials.

Is the scheme of the company as indicated in certificates of Class B of such a character that it must be declared unlawful, violative of sound public policy, and calculated to defraud? Let us first look at the scheme as indicated by the certificate, independently of other evidence throwing light upon the character of the contract. The certificate is an obligation on the part of the company to pay to the holder the sum of \$500, subject to the terms and conditions named in the certificate. Is it reasonably probable that the scheme indicated by these certificates can be carried into execution? While it does not appear in terms in the certificate, the fact is, as admitted, that the \$4 paid by the certificate holder is allowed the agent obtaining the certificate as a fee, and that this sum does not go into the treasury of the company. Twenty-five cents of each monthly installment is set apart for expenses. It is therefore to be determined whether it is reasonably probable that the company can legitimately realize with the monthly installments of \$1, at the end of 14 years, a sum sufficient to pay the holder of the certificate \$500. Of

course, if the contract is considered as simply a contract to receive \$168 in monthly installments of \$1, and to pay the holder of the certificate 8 per cent. interest thereon, the contract is incapable of performance, for 8 per cent. upon \$168 paid in monthly installments would not of course realize the sum of \$500. But that is not the contract embraced in the certificate, taken in the light of the purposes for which the company was organized. The contract is to take the money paid to it in monthly installments and improve it according to well-known legitimate business methods, and guaranty to the certificate holder that at the end of 14 years the company will pay to him the sum of money named in the certificate, which the company considers by its guaranty as the legitimate earnings of the money of the certificate holder, turned over and over and over again during the period that it is in the hands of the company. If the company in the handling of this money was limited to investments of the money at 8 per cent. simple interest annually, then no person of ordinary intelligence would for a moment purchase one of these certificates, for it would be manifest, not only to a man of average intelligence, but to the man far below the average, that such a contract was an impossibility. The legitimate resources of the company under its charter, which may be called into exercise for the purpose of improving the funds belonging to its certificate holders, are far more numerous than loans upon simple interest at the rate of 8 per cent. per annum. The company is authorized to loan money at 8 per cent., and may contract for the interest to be payable annually, semiannually, quarterly, bimonthly, monthly, or in even shorter periods. Such transactions would be perfectly legitimate, and are not subject to the charge of being usurious. But suppose it should be said that interest payable monthly or for shorter periods is unusual, and that it is improbable that the company would transact business upon this plan. The reply is that it is legal, and is one of the legitimate resources of the company, and it cannot be said that it is impossible, or even improbable, that the company will realize funds from this source. Loans of money, with interest payable at short intervals of time, are not unusual in the business world. They are constantly made by banks and other moneyed institutions. In addition to this, the company has a right to purchase negotiable paper, and in the purchase is not restricted under the law of this state to discount at the rate of 8 per cent., and the proceeds that in all probability can be derived from this source of income would aid very much in the improvement of the fund placed under the contract in the hands of the officers of the company for improvement for the benefit of the certificate holder. The company is authorized to engage in the purchase of property, either real or personal, and experience has demonstrated

that wise and prudent business men make handsome profits in a business of this character. Indeed, there is scarcely any limit to the possible profits to be derived from such investments, wisely made. The company is also authorized to deal in stocks, bonds, etc., and to guaranty the payment of obligations of other persons, both natural and artificial. All of these methods of business are lawful, and if wisely adhered to are profitable, and this company has authority to engage in them. In addition to these, there are other resources of the company for the benefit of the persistent certificate holder who continues to the end. Under the terms of the certificate, if any member desires to discontinue payments of installments at the expiration of seven years, he may do so, taking a paid-up certificate, bearing only 4 per cent. interest; and the legal representatives of deceased members who were more than 50 years of age at the date their certificates were issued may take paid-up certificates of similar character. Another resource is redemption of certificates; still another is fines; and, lastly, lapses or forfeitures for nonpayment of assessments during the first seven years. The company holds out to the world that it will take the money of others and improve it in these various ways, and pay back at the end of 14 years a guarantied sum. Let it be conceded for the moment that all of the sources of profit above referred to are legitimate and proper; can it be said, as matter of law, that the scheme of the company is so far beyond possibility or probability of performance that those who engage in it are engaged in a fraudulent scheme, which should be branded as being contrary to a sound public policy? Have not legitimate financial institutions in the past taken the money of investors and improved it in such a way that the profits were far in excess of the profits intended to be realized under this contract? Are not sound financial institutions at this time engaged in lines of lawful and legitimate business where profits of this character are realized for investors who intrust their money to them? It has been said that the "power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Richmond v. Railroad Company*, 26 Iowa, 202. It will not do for courts to declare contracts void, simply because they are apparently unwise or even foolish. The authority of the lawmaking power to interfere with the private right of contract has its limits, and certainly the courts should be extremely cautious in supervising private contracts when the lawmaking power has not declared them to be unlawful. The possibility or the probability of one being able to perform many of the contracts known to the commercial world is dependent upon so many considerations that it is only

in an extreme case that the courts should hold that a given contract is of such a character that its performance is impossible or improbable, and that those who entered into it must have done so with a fraudulent intent. Of course, it is the duty of the courts to put their stamp of disapproval upon all contracts which are fraudulent, and for this reason calculated to deceive the confiding and the credulous. But all foolish contracts are not fraudulent, and it is not either the duty or within the power of the courts to relieve a person from a contract merely because it is in its terms unwise or even foolish. Taking the contract evidenced by the certificate under consideration, with all of the resources of the company which can be called into operation for the purpose of improving the funds intrusted to its care, we cannot say as matter of law that the contract is so unreasonable and incapable of performance as to be void because opposed to a sound public policy. The company may be able to comply with the contract. On the other hand, it may not. Contracts, although not exactly of a similar nature, but involving as much risk of loss, have been complied with. On the other hand, contracts involving less risk of loss than is apparent in this one have not been complied with. The success of the scheme of this company depends largely upon the honesty, wisdom, and business sagacity of its officers, and those who place their money in the hands of the company take the chances that are always incident to intrusting to another the handling and improvement of a sum of money.

In thus dealing with the question, we have assumed that the company had at its command all of the sources of income above referred to. It will, of course, be conceded that those resources which relate to the purchase and sale of property, the guarantying of obligations, and the loan of money at lawful rates of interest, are perfectly legitimate and proper, and persons engaging in business of this character lay themselves subject to no penalty or criticism. It is said, though, that the company relied upon lapses, and that lapses are based upon forfeitures, and that forfeitures are abhorred, and that contracts which depend for their performance entirely upon forfeitures are contrary to law and opposed to sound public policy. Forfeitures are not favored, and where a contract is ambiguous, and is incapable of being construed so as to provide for a forfeiture and so as not to so provide, the courts uniformly hold that they will construe the contract so as to avoid the forfeiture. But the law permits a man to make a contract which will result in a forfeiture; and, when it is clear from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture. The time of payment specified in a contract may be material, and by its terms failure to pay within that time may in-

volve an absolute forfeiture; and, if it does, this forfeiture will not be relieved against even in a court of equity. Mr. Justice Bradley, in *New York Life Insurance Company v. Statham*, 93 U. S. 30-31, 23 L. Ed. 789, in referring to the forfeiture of an insurance policy for nonpayment of premiums, says: "Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business." See, also, *Klein v. Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662. In *Union Investment Association v. Lutz*, 50 Ill. App. 176, it was held: An investment association which applies the principle of joint tenancy to the investments by the subscribers—the survivorship depending upon default of the members, instead of death—is not prohibited by law; and neither is such an association prohibited because the theory on which profit is promised is that one-half or more of the subscribers will fail to keep up their dues, and whatever money is paid in by defaulting subscribers will inure to the benefit of those who do not default. See, also, 26 Am. & Eng. Enc. L. (1st Ed.) p. 61. The mere fact that the business or scheme depends to some extent upon forfeitures or lapses will not be sufficient to render the entire scheme invalid. If the scheme is dependent largely upon lapses, and it is apparent that a sufficient number of lapses to effectuate it will probably not occur during the period provided for the maturity of the contract, the question would be altogether a different one. In such a case the scheme might be illegal. In *State v. Investment Company (Ohio)* 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754, it was held: "Contracts of investment security, debentures, or certificates, which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period without aid from lapses or appropriation from premiums on new business are fraudulent, contrary to pub-

lic policy, and unlawful." In the opinion, Davis, J., said: "A scheme which can succeed only by lapses is manifestly a scheme which will enrich some at the expense of others who embark in the same enterprise. It holds out the inducement that those who may be strong enough to survive will find their profit in the weakness, the misfortunes, and the discouragements which cause a larger number of their associates to fall by the way. Moreover, since the salvation of the company depends on these lapses, it necessarily tends to encourage and produce them. True enough, all of these certificates are nonforfeitable after 36 monthly payments, but that only signifies that a larger number must fall in the first three years, or that the whole scheme must fail, for the vice of the plan is not that some may fail, but that many must fail, in order that all continuing certificates shall mature." 60 N. E. 220, 52 L. R. A. 543-544, 83 Am. St. Rep. 754. See, also, *Peltz v. Financial Union*, 19 Atl. (N. J.) 663; *State v. New Orleans Redemption Company (La.)* 26 South. 586. If these authorities simply hold that where it is apparent that the scheme is so dependent upon lapses that it could not succeed without them, and where the number of lapses necessary to effectuate the scheme is beyond all reason, and would in all probability not occur, the scheme would be fraudulent. We will not now undertake to combat the proposition thus laid down. If, however, the holding goes to the extent that every scheme dependent upon lapses—even many lapses—is inherently fraudulent, we cannot recognize such a ruling as in the slightest degree sound. In a case where lapses are simply a part of the scheme, and it cannot be said with certainty they form even a large part of it, the court should not declare the contract invalid, as being opposed to a sound public policy, simply because the success of the scheme is in part dependent upon forfeitures and lapses. If this was the law, then not only would the business of life insurance in all of its branches be at an end, but many contracts in other lines of business would come under condemnation. If absolute forfeitures and lapses would not make the contract invalid, then, of course, partial forfeitures, such as result from the voluntary retirement of a member at the expiration of seven years, would not make the contract illegal. Nor would partial forfeiture resulting from the death of a member affect the legality of the contract. Considering as a whole the resources the company may resort to for the purpose of carrying out the contract, it cannot be said, as matter of law, that the contract is either fraudulent, or violative of the law of the land, or contrary to a sound public policy. It may be that the contract is unwise. It may be that it is a contract attended with risk—even great risk. But these are all questions to be determined by the investor, and we know

of no law which prohibits him from taking the risk of such a contract.

Our learned brother of the circuit bench held that the scheme was a lottery, or at least in the nature of a lottery. There are various definitions of a lottery, some of the broadest being as follows: "A scheme for distributing prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize; especially where such chances are allotted by sale of tickets." *Standard Dictionary*. "A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine until the same has been accomplished." *Bouv. Law Dictionary*. "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it." *Anderson's Law Dictionary*. "Any scheme for the disposal or distribution of property by chance among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a 'lottery,' a 'raffle,' a 'gift enterprise,' or by whatever name the same may be known." *Black's Law Dictionary*. Lotteries and similar schemes are prohibited by the law of this state. *Pen. Code* 1895, §§ 406, 407; *Meyer v. State*, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17. There are three essential ingredients in a lottery—consideration, prize, and chance. One of these ingredients is certainly present in the scheme now under review, that is, consideration. Are the other two present? If the element of prize exists at all, it is to be found in the second clause of the certificate, which is as follows: "That the holder hereof shall surrender for payment and cancellation this certificate whenever the same shall be called, before maturity, upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all installments paid hereon, with interest on said amount at the rate of eight per cent. per annum, and its proportionate share of all dividends or accumulations from fines, lapses and interest earned in excess of eight per cent. per annum." If this clause of the contract can be properly construed to mean that the company is compelled to, or even may, call for redemption any certificates before they have earned 8 per cent. interest per annum on the full amount of the first payment and on all installments paid, then there is an element of prize in the contract. But can the clause of the contract be properly so construed? It provides that the holder of a certificate shall surrender it before maturity, whenever the same shall be called, upon payment to him

of its then redemption value. This redemption value is then declared to be the full amount of the first payment and all installments paid on the certificate, with interest thereon at the rate of 8 per cent. per annum, and its proportionate share of profits earned in excess of 8 per cent. The certificate cannot be called until it has a redemption value, and that redemption value is fixed at a sum not less than 8 per cent., but it may be more than 8 per cent., provided a greater sum than this has been earned. Does the contract mean other than that the company may call for redemption those certificates which have earned at least 8 per cent. on the amount paid in? Is not this the real meaning of the clause? Do not the words "earned in excess of eight per cent." necessarily imply that there can be no call for redemption until at least eight per cent. has been earned? This seems to us a proper and reasonable construction of the contract. But suppose the clause is ambiguous. It is familiar law that if a contract is of doubtful meaning, and one construction would make it legal, and another illegal, the courts are bound to adopt that construction which will not impute to the parties an intention to disobey the law. It is not to be presumed that people intend to violate the law, and the language of their undertakings must be always construed, if possible, in such a way as to make the obligation one which the law would recognize as valid. This view of the matter is strengthened when we consider that it is the construction which the company has always placed upon this clause in the contract. The evidence in the present case shows that the officers of the company have construed this clause of the contract to mean that there was not to be any redemption until the certificate had earned at least 8 per cent. on the amount paid in. The secretary of the company testified: "A certificate is not eligible for redemption until it has earned 8% at least. If a man has not been in but six months, his certificate has not a redemption value until that sum has been earned, starting always with the \$1. No certificate was redeemed until its pro rata part of the assets of the company equaled the full amount paid to the company on account of said certificate, with interest thereon at the rate of 8% for the average time." If under the contract no certificate can ever be called for redemption until it has earned at least 8%, then there is no element of prize in the contract. If the affairs of the company are in such condition that some of the certificates have earned at least 8% upon the amounts paid in, then, under the contract, it is a question for the company to determine whether it is to the interest of the company to retire such certificates, either in whole or in part. The holders have all agreed to surrender their certificates whenever they are tendered this amount; and whenever the company is in a position where it can tender this amount, or more, it is simply a question as what shall be the policy of the company

—to retire a portion of such certificates at their then value, or to retain the entire fund to be used and improved for the benefit of the certificate holders. When the company determines that it is to the interest of all concerned that a portion of the certificates shall be redeemed, then the question arises as to how many of such certificates shall be redeemed, and how shall it be determined which certificates shall be called for redemption. The holders of these certificates place their money with the company for the purpose of increase and profit, and each investor thus placing his money with the company does so upon express condition that, whenever a point has been reached where his certificate has earned 8% or more, the company has the right to tender him the value of his certificate, and compel him to surrender the same. It might be more to the interest of all the certificate holders to continue to the end, but, by the very terms of the contract, every certificate holder has agreed with the company that it may settle with him at the value of his certificate at any time after it has earned 8%. This being the contract of each certificate holder, and it being foreseen that it would not be wise in all instances to redeem every certificate that had a redemption value, some method had to be adopted by which it would be determined who should be entitled to have their certificates redeemed if redemption was desirable, or who should be compelled to surrender their certificates if redemption at that time was undesirable. The whole purpose of the company was to make money for its certificate holders. Under the contract, it may come to a settlement with some of its certificate holders at any time when the assets of the company would authorize a settlement at a sum made up of at least the amount paid in, and 8 per cent. interest thereon. When it should have this settlement, was left to the discretion of the company. The number who should be entitled to such settlement at any given time was also left to the discretion of the company. The manner in which the number should be selected was not left to the discretion of the company, but was to be determined by reference to what is called the "multiple table," a copy of which is set forth above. When the company has determined how many certificates shall be called, a reference to this multiple table and the books of the company showing the outstanding certificates will show exactly what are the numbers of those certificates which will be then called. It can be determined as absolutely what numbers are embraced in a given call under the multiple table as if the plan had been adopted to redeem the certificates in numerical order. Some plan had to be adopted for ascertaining what numbers should be called when it was not desired to call all certificates that had a redemption value. Any plan adopted would be purely arbitrary, and any plan adopted would have some element of chance in it, using that word in its broad sense. If the plan had

been to pay certificates in their numerical order, there would have been the same element of chance as there is under the plan actually pursued, because the time at which the certificates shall be called would be governed in each instance by the order in which the applications reach the secretary and numbers are placed upon the certificates.

But let it be conceded that there is an element of chance; the scheme is not a lottery, or in the nature of a lottery, unless there is also the element of prize. We can see no element of prize in the scheme whatever. Certificates are called for redemption and matured at their own value, without reference to the redemption value of other certificates. It may be that the redemption value of a certificate will be the same as that of another certificate of another date, or it may be that its redemption value will be smaller or greater. But the holder gets no prize, in the sense that term is used in lottery law. Each holder receives a return of the money which he has paid in, together with what it has earned, and can be compelled to receive this at any time that the earnings are 8 per cent. or more. The company makes the contract to pay a certain amount at the end of 14 years, if in the management of the business it sees proper to retain the money during that entire period. It reserves the right to settle with each holder before the end of that period, at any time after the earnings of the company are such that his certificate would have the redemption value fixed in the contract; and it reserves the right to determine whether at such a time it will pay him, or pay another certificate holder whose certificate is ready for redemption, by a reference to the multiple table above referred to. It must be admitted that the plan of redemption by reference to the multiple table is unique, and may even be said to be "catchy," speaking colloquially, and was probably resorted to for the purpose of attracting attention. But it would never do for the courts to hold that unique and unusual methods make enterprises unlawful or contrary to public policy. After the most careful investigation and anxious consideration of this matter, we are unable to see in this contract anything which partakes of the element of prize. It seems to us that the contract is one of investment, where the investor relies upon the honesty, probity, and business sagacity of those in charge of the affairs of the company, and intrusts his money to them with the expectation of receiving satisfactory, and, it may be, large, profits at the end of the period fixed in the contract, but at the same time expressly undertaking to withdraw his money at any time the company is in a position to offer him as earnings on that money the minimum amount fixed as a redemption value of his certificate; and this, too, at a time when other certificate holders, whose certificates are of greater or less redemption value

than his, or, it may be, exactly equal with his, are not compelled to retire. It is said, though, that under the operation of the multiple table a certificate might be called at a time when it had not earned the amount necessary to make the redemption value. The secretary of the company testified: "We have never reached a multiple when the certificate has not earned 8% interest on the original \$4 and the \$1.25 paid in." Under the contract as we construe it, the company would not have a right to call for redemption a certificate which had not earned its minimum redemption value, and as the company by reference to its multiple table and the list of outstanding certificates, can tell, when it fixes the number of certificates to be called, exactly what will be the numbers embraced in the call, it is not to be presumed that the company will make a call that embraces a number which could not be lawfully redeemed. The evidence just referred to shows that so far in the operations of the company no certificate has been called which was not entitled to be redeemed under the contract as we have construed it. To make a lottery, as above stated, three ingredients must be present—consideration, chance, and prize. We find in this contract certainly the element of consideration, possibly the element of chance, but under no circumstances the element of prize. Chance alone will not make a lottery; and chance, even when coupled with consideration alone, will not make a lottery. When a number of persons are entitled, in any event, each to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot or chance or drawing of what portion of that number shall be paid at different times would not give to the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by lot, drawing, or chance, that the elements of a lottery are present. Corporations issue bonds, and reserve the right to call in for redemption a portion of the bonds before they are due. It is not unusual in such cases for the contract to stipulate that the numbers of bonds to be called shall be determined by lot or chance. Such a transaction as this has never been held to be a lottery, although there was the element of chance in regard to whose bonds should be called. It is not a lottery, because there is no element of prize. The value of the bond is not increased or diminished by the drawing. Each bond is paid its value at the time it is called—no more, no less—and the only question determined by lot is whether the bond of A. shall be called instead of the bond of B., or the bond of one number in preference to the bond of another number. Many schemes and devices have been held to be lotteries. From the briefs of counsel we select the following as a portion of the many cases that

might be found relating to this subject: *Meyer v. State*, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17; *McLaughlin v. Investment Co. (C. C.)* 64 Fed. 908; *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237; *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723; *Thomas v. People*, 59 Ill. 160; *In re National Indemnity Co. (Pa.)* 21 Atl. 879; *United States v. Poltzer (D. C.)* 59 Fed. 273; *Dunn v. People*, 40 Ill. 465; *Sykes v. Beadon*, 40 L. R. Ch. Div. 170; *MacDonald v. United States*, 12 C. C. A. 339, 63 Fed. 427; *United States v. Fulkerson (D. C.)* 74 Fed. 619; *Hudelson v. State (Ind.)* 48 Am. Rep. 171; *State v. Moren (Minn.)* 51 N. W. 618; *Ballock v. State (Md.)* 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559; *State v. Mercantile Ass'n (Kan.)* 25 Pac. 984, 11 L. R. A. 430, 23 Am. St. Rep. 721; *State v. Bonell (La.)* 8 South. 298, 10 L. R. A. 60, 21 Am. St. Rep. 413; *Reg. v. Harris*, 10 Cox, C. C. 352; *United States v. Zeisler (C. C.)* 30 Fed. 499; *United States v. Wallis (D. C.)* 58 Fed. 942; *State v. Shorts*, 32 N. J. Law, 398, 90 Am. Dec. 668; *Com. v. Thacher*, 97 Mass. 583, 93 Am. Dec. 125. We do not think it would be desirable or profitable to discuss in detail the facts of these numerous cases that have been called to our attention. Many of them are merely cases relating to general principles in reference to the law of lottery, about which there is no dispute. Some of them relate to investment companies, but none of these are, in our judgment, either in their facts or in their reasoning, close enough to the present case to be followed by us, even if they were decisions which were binding upon us as authority. In those cases where the facts were at all similar to those of the present case, there were some facts which, in our opinion, materially distinguished the cases from that which we now have under consideration. There was a union in each case of chance, prize, and consideration, or the contract was of such a character that it was so largely dependent upon lapses as to make it fraudulent and void. If in the foregoing discussion we have been so fortunate as to have clearly set forth what we understand to be the scheme of the contract involved in the present case, we feel perfectly safe in saying that a mere casual examination of the cases cited will be all that is necessary to differentiate every one of them from the one now under review, though it is not at all incumbent upon us to show that any distinction between the cases exists. The courts have in many cases made rulings which were intended to protect the public from being imposed upon by fraudulent devices in the form of investment companies, and it is proper that the strong arm of the courts should be used in cases where the scheme is fraudulent and calculated to deceive and defraud. But no case has been called to our attention where any court of last resort has ever held a contract like the one under consideration, understood as we

think it should be understood, and as the entire scheme requires it to be understood, to be unlawful or incapable of enforcement.

It was not insisted, as we understand it, that there was any infirmity in that clause of the certificate which provides that the legal representatives of a deceased certificate holder, who was not more than 50 years of age when the certificate was issued, should be settled with by the payment of all amounts which had been paid in, with 8 per cent. interest thereon, and its share of earnings in excess of that amount; and if the deceased holder was more than 50 years of age when the certificate was issued, and his legal representatives did not desire to continue the certificate as though death had not occurred, they should be settled with by the delivery of a paid-up certificate for the amounts paid in, bearing 4 per cent. interest per annum. Nor was it claimed that there was any infirmity in that part of the contract which provided that one who had paid for 84 months should be entitled to a paid-up certificate for such amounts, bearing 4 per cent. interest per annum. It might be that under the contract the legal representatives of a holder who was not more than 50 years old when the certificate was issued would receive the full amount paid in, with 8 per cent. interest thereon, at a time when this amount had not earned 8 per cent.; but as this payment would be due to him by the happening of the death of the certificate holder, which is an event coming in due course of nature, this would not make the scheme any more illegal than it would make every contract of life insurance fraudulent and void. Taking the contract as a whole, and viewing the same as it has been construed by the officers of the company, and in the light of the manner in which the affairs of the company have been administered, we find nothing in the contract that would justify us in condemning the same as illegal.

It is said, though, that the company issued literature which was calculated to impress the public and those who invested in the company with the idea that the business carried on was the business of a lottery, and that this literature was misleading, and did not set forth the character of the enterprise as now contended for by the company. We will set forth some of these extracts from the literature of the company. Certain circulars of the company sent to prospective investors contained the following statements: "The Equitable Loan and Security Co. is an established financial institution, whose governing principles are security, profit earnings, and speedy returns to the investor." "All certificates pay their holders their equitable ratio of profits, whether called for redemption the 12th, 24th, 36th, or any month after their issuance." "Insurance companies kill the man and pay the policy; the Equitable Loan and Security Co. kills the policy and pays the man, thereby insuring a speedy re-



turn to living members." "A thorough knowledge of our plan will also show that it is absolutely perfect in point of security, profit earnings, equity and speedy returns to the investor." "To guarantee our certificate holders the largest profits and quickest possible returns, no officer or director of this company, or any member of his or their families can ever own or purchase certificates, thus preventing those who are familiar with the inside workings of the company from speculating on delinquent investors and realizing any profits at the expense of prompt and persistent holders." "Twenty certificates purchased in the Equitable Loan and Security Company, if carried to maturity, will pay you Ten Thousand Dollars, yielding a clear profit of \$5,720.00." "The chief element and most prominent feature in our plan is to call and pay certificates as rapidly as our business will permit at their value, which value shall always be the full amount of first payment and all installments paid on them, with 8 per cent. interest, and their proportionate share of all dividends, accumulations from fines, lapses (forfeitures), and interest earned in excess of 8 per cent. per annum. For the express purpose of calling certificates for payment as rapidly and as early as possible, a redemption fund has been created," etc.

These extracts from the literature of the company contain a few of the many alluring attractions which are held out to prospective certificate holders. They embrace, we believe, those which are principally relied on in the present case to show misrepresentation and fraud in reference to the character of the company's business. It must be admitted that these declarations in the literature of the company evince a hopeful and sanguine spirit on the part of the officers of the company, and it is evidently their desire to impress the public and possible investors with this same spirit. Is what is said in this literature anything more than an effort to call attention to the character and business of the company in an attractive, enticing, and fascinating way? Are not such methods usual in the commercial world with those who have something to sell? Are they not permissible when not false or fraudulent? When these statements are read and understood, there is really nothing inconsistent with the plan of the company as we have held it to be. But suppose we are wrong in this, and that what is said amounts to misrepresentation and fraudulent misrepresentation. So far as the present case is concerned, it will avail the defendants in error nothing, for the reason that the court has not placed its order appointing a receiver on any such ground. On the contrary, it has distinctly held that if the individual holders of certificates were induced to purchase them by the fraudulent representations of the selling agent, or of the officers of the company, it might be ground for a rescission

of the contract, so far as they were concerned, but it would not necessitate the appointment of a receiver to take charge of the entire assets of the company, unless it was shown that a receiver for the entire assets was necessary for the protection of the rights of such persons; and that, if the scheme of the company is legal and its contracts valid, if any deception was practiced upon the certificate holders, it would not require the appointment of a receiver. So far as these misrepresentations may have been made by the agents of the company, it was not bound by them, if they were at all in conflict with what was stated in the certificate, because in the face of each certificate is a distinct stipulation that no statement made by any one, except as therein set forth, shall be binding upon the company. This language is broad enough to apply even to statements made by the officials of the company. The contract relations between the certificate holder and the company are absolutely controlled by the certificate, as long as it stands as evidence of the contract. Let it be conceded that the literature of the company which was sent out and authorized by it was calculated to impress upon those who read it that contracts of a nature not provided for in the certificate were intended, and that the applicants for certificates made their applications expecting to obtain certificates of a character indicated by the literature and different from those indicated by the certificates. When they received the certificates with the statement in them above referred to, and could see by a simple reading of the same that it was different from what was contained in the literature, they would be bound by the terms of the certificates after they became acquainted with what was contained therein, or a reasonable and sufficient time elapsed for them to acquaint themselves with its contents after the certificate had come into their possession. The certificate was the evidence of the contract. When it was delivered to the certificate holder, it was his duty to read it, and ascertain what was the contract relation that existed between himself and the company, and, if the literature of the company proposed a different contract, he could have, within a reasonable time, claimed a rescission and recovered back what he had paid, if the contract contained in the certificate was substantially and materially different from that proposed in the literature of the company. Certainly, he cannot come into court as a certificate holder, and claim rights under a contract not only not contained in the certificate, but directly antagonistic to the statements made therein, after having received and treated the certificate as evidence of the contract between himself and the company. The plaintiffs do not ask either a rescission or a reformation of the contract. They claim that they are holders of the certificates as issued, and as such only

do they pray for relief, and the relief asked for is not of a nature which the contract contained in the certificate would authorize. It may be that they have been deceived and defrauded and wronged by the misrepresentations of agents, or even of the officers, contained in authorized literature of the company. If so, they should not come into a court of equity endeavoring to use their position as certificate holders to enforce a contract not contained in their certificates, but their appropriate remedy was in due time to have applied for a rescission of the contract, and ask that the company be required to pay to them the sums which it and its agents had received from them as a result of the fraud which had been perpetrated upon them. Fraud on the part of the agents and officers of the company would be a sufficient ground upon which to base an application for a rescission of the contract; but fraud of the worst type would not authorize a court of equity, in the absence of a prayer for a reformation of the contract, to decree that the certificates issued providing a contract of one character should, on account of the misrepresentations made at the time they were issued or applied for, be declared a contract of an entirely different character.

It appears from the evidence that a large part of certificates of "Class B" are outstanding, and that the company has ceased to issue certificates of this class. At the time this suit was filed the company was issuing certificates known as "Class C." A copy of one of such certificates is as follows:

"In Consideration of the written application for this Certificate (a copy of which is on the back of this Certificate) and the statements and agreements therein contained, which are hereby made a part of this contract, the Equitable Loan and Security Company, hereby promises to pay to the order of — of —, at the Home Office of the Company, Five Hundred Dollars, subject to the following express terms and conditions:

"1st. That the holder hereof agrees to and shall surrender this Certificate for payment and cancellation whenever the same shall be called before maturity upon the payment to him of its then redemption value, which value shall be the full amount of all installments paid hereon, with a guaranteed profit of Eight per cent. per annum (which profit must be earned before this certificate shall be eligible for redemption) together with its proportionate share of all profits or accumulations arising from interest, fines and lapses in excess of Eight per cent. per annum.

"2nd. That of each and every installment paid hereon the maker hereof shall place Fifty per cent. and all net receipts from fines to a redemption fund, which may be used: (1st.) For paying off Certificates prior to their full maturity according to the terms herein set forth; (2nd.) For paying Certificates in the order and manner that they shall mature at the end of the full term; (3rd.) For pay-

ing to the legal representatives of the deceased holder hereof the full amount of all installments paid hereon with a guaranteed profit of Eight per cent. per annum together with its proportionate share of all profits or accumulations arising from interest, fines and lapses in excess of Eight per cent. per annum, Provided, this Certificate is in good standing and legal and sufficient notice of such death is furnished and this Certificate satisfactorily released and surrendered to the maker hereof within ninety days after death occurs; otherwise this Certificate can not be so surrendered, and all conditions will be enforced as provided for in section fifth hereof; (4th.) For paying all licenses and taxes: Thirty per cent. to a reserve fund which shall be used and held for the protection of all live outstanding Certificates; and the remaining twenty per cent. and all transfer fees shall be used for the expenses of the Company and such other purposes as the Directors may approve.

"3rd. That the holder has paid One Dollar and Fifty cents hereof and agrees to pay to the maker hereof at its Home Office, without any other or further notice, an installment of One Dollar and fifty cents on the fifth day of each and every succeeding month hereafter, until One Hundred and Sixty-eight installments shall have been thus paid, time being of the essence of this contract; then this Certificate shall become due and payable within thirty days from the date of said last payment for its full face value of Five Hundred Dollars.

"4th. That in order to prevent favoritism or partiality being shown by the Company, Certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

"5th. That a failure to pay said installments when due subjects the holder hereof to a fine of 15 cents per month for each month on every installment in arrears, and if any installment shall remain unpaid for six months, then this Certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments (including fines) made hereon; Provided, that at any time after eighty-four monthly installments have been paid hereon, the holder hereof may surrender this Certificate, if it is in good standing, and receive for it a new, non-assessable and non-forfeitable Certificate for the full amount of installments that have been paid hereon, with interest at the rate of 4 per cent. per annum, which new Certificate shall bear the next unsold number and shall bear interest at the rate of 4 per cent. per annum and be payable on or before the expiration of the tonline period, from the time it is then issued.

"6th. That no transfer hereof shall be valid or binding on the maker hereof until it has been approved hereon by the Secretary and

recorded on the books of the Company at its Home Office, and a fee of One Dollar and Fifty cents paid for making such record. Each and every transferee hereof accepts this Certificate subject to all the stipulations herein. This Company shall have a prior lien upon this Certificate for any indebtedness due said Company by the owner hereof as shown by the books of this Company.

"7th. That no statement made by any one except as herein set forth shall be binding on this Company.

"8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this Company.

"9th. That the funds of this Company may be loaned to the holders of Certificates, and otherwise invested, upon terms and security to be approved and accepted by the Board of Directors.

"10th. That no officer or director of this Company, or any member of his or their families, can purchase or own this Certificate.

"In Witness Whereof, this Company has caused this Certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary, this — day of —, 190—.

"Equitable Loan and Security Company,

"By —, President.

"—, Secretary."

The multiple table referred to in this certificate is the same as that set out above, except that at the bottom of the table appears the following: "If at any time any multiple number next in the regular order of redemption should not have to its credit a sufficient per cent. profit to permit of its redemption according to the terms of this certificate, payment may revert back to the lowest numeral and multiple numbers coming next in order, and on which the profit is sufficient to justify their redemption, and this process continued until the suspended multiple numbers shall have enough earned profit apportioned to their credit to render them eligible for redemption, according to their terms, when they may be called."

If the contracts contained in certificates of Class B are lawful, it follows necessarily that the contracts contained in certificates of Class C would be lawful. In fact, it was practically conceded that the issue in this case depended upon the validity of certificates of Class B. Upon the invalidity of these certificates the court based its order appointing a receiver, and we think it is evident that the judgment appointing a receiver of the entire assets of the company was not based upon the certificates of either Class A or Class C. The court based its decision appointing a receiver solely upon the ground that the scheme of the company was unlawful, and not upon the ground that the company was not carrying out in good faith the scheme authorized by the charter, and indicated by the contracts made with the certificate holders. We are constrained, for the

reasons above given, to disagree with our learned Brother in reference to the legality of this scheme. We have set forth what we believe to be the true interpretation of the contract. If the company is not keeping within the limits of its charter powers, or if it is not managing the assets in the manner provided in its contracts with the certificate holders, of course they have their appropriate remedy to bring the company within the limits of its charter and the scheme as set forth in the certificates. Whether the company has exceeded its charter powers, or whether it has managed the assets of the company in any improper way, it is not incumbent upon us to determine at the present time. The finding of the judge to the contrary precludes any inquiry into the subject, so far as the present case is concerned. In our opinion, the judgment must be reversed on the ground that the court erred in its interpretation of the contract, and, as upon this ground alone a receiver was appointed, the order appointing the receiver should be vacated, and the assets of the company restored to the possession of the officers of the company, to be administered by them in accordance with the charter, the contracts, and the law of the land.

From the view we have taken of the case, it is unnecessary for us to investigate the question whether a court of equity would under any circumstances take charge of the assets of a lottery company at the instance of one who knowingly went into the unlawful scheme. On first impression, it would seem to us that the purchaser of a lottery ticket was in pari delicto with the seller, and, if the scheme of the company was as the learned judge of the court below held, the holders of certificates would be in no better position than the purchasers of lottery tickets. Upon this question, however, we refrain from expressing any matured opinion. Certain it is, however, that if the scheme of the company was in the nature of a lottery, and a court would, at the instance of one who went into the scheme, take charge of the assets of the company, then every person who ever paid one cent into the company would be entitled to participate in the distribution of these assets, even though by reason of his default his certificate had been forfeited. The assets should not be administered for the benefit alone of certificate holders who are in. They obtain no rights under their certificates, because the contracts would be illegal. If they have any rights, they arise from the fact that they paid money into an unlawful enterprise, and the holders of certificates who have paid in and lapsed are just as much entitled to participate as those who have paid in and have not lapsed. If a court of equity will take charge of these assets, in order to prevent them from being used for this unlawful business, these assets should be returned to the true own-

ers of the fund—that is, the holders of certificates at the present time, and all persons who have contributed to the fund at any time. One reason why it appears to us that it is not the province of a court of equity to sell its hands in distributing a fund of this character is that after all persons who have ever contributed to the fund have been repaid the amount contributed, with lawful interest thereon, and even the costs of suit and of the receivership have been paid, there will probably be remaining a surplus in the hands of the court, and it would be necessary to determine to whom this surplus belonged. A court of equity would certainly not give this fund to the holders of the lottery tickets, as it were. If it did, it would encourage people to buy lottery tickets, and would be giving to those who bought the tickets a part of the profits of the illegal enterprise. If the fund remaining in the hands of the court was not given to the purchasers of the tickets, it would have to be divided among the operators of the illegal scheme; and it would certainly be an unusual spectacle for men who had been promoters of a lottery scheme, and who had had a fund raised by them taken from them by a court of equity, to wait around the doors of the court until the fund had been administered, to see how much a court of equity would return to them as the promoters of the scheme. At no time in the history of the court of chancery have persons in possession of a fund procured by unlawful means been known to wait around the doors of the court for the time to arrive when a portion of such a fund should be returned to them by the court, for the reason that the owner could not be found, and the court must make some disposition of it. The doors of a court of equity are closed against such persons, and should never open to admit a fund which would have to be so administered that a time would arrive when the lawbreaker loitering at the doors of the court in anxious solicitude as to the time and terms of the final decree must be sent for in order that the court might deliver to him a part of the fund remaining unadministered in its hands. The unadministered part of the fund in such cases cannot, consistently with any rule of law or equity, be paid to those who were enticed into the illegal scheme, and a court of equity has no right to confiscate even the property of a lawbreaker; and, at the end of litigation of the character indicated by the above reflections, the only course open to the court would be to call in the transgressor of the law, and deliver to him a fund which, according to the rules of law and equity, could not with propriety be delivered to any one else. However, as said above, we do not decide this question. These are simply some reflections growing out of the possibilities that might result from an attempt by a court of equity to administer

a fund which in its inception and growth is tainted and impure. It does now seem to us that the only court that should ever open its doors to him who would improve his fortune by methods not authorized by law is that court which has jurisdiction to punish offenders against the law. Of all courts, a court of equity should not be opened to the lawless, to settle controversies concerning their spoils. The lawless should neither be allowed to pass the threshold of such a court, nor permitted to linger around its portals in anticipation of a benefit to be derived from its decrees.

Having reached the conclusion that the individuals engaged in this enterprise are not subject to the criticism that they are the managers of a lottery, or promoters of a scheme which is unlawful, we are saved the necessity at the present time of deciding what would have been the rights of these certificate holders if their contentions had been sound.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness, and SIMMONS, C. J., and LAMAR, J., dissenting.

LAMAR, J. (dissenting). I cannot assent to the majority opinion, and have attempted in the headnotes to indicate as briefly as possible what I conceive to be the law applicable to this case, in which I am authorized to say that Chief Justice SIMMONS concurs. The reporter has been requested to incorporate in the official report the learned and able opinion of his honor, Judge J. H. LUMPKIN, of the Atlanta circuit, and this makes it unnecessary to go into any elaborate discussion of the authorities, or to set out at greater length the facts appearing in the record.

#### On Rehearing.

COBB, J. The application for a rehearing in this case is based upon numerous grounds. A rehearing is asked upon the ground that the case was heard by only five justices, and the judgment rendered was concurred in by only three. It is now asked that the case be reheard before a full bench of six justices. These facts alone furnish no sufficient reason for a rehearing. Under the Constitution and Laws, three justices may render a judgment in any case heard before less than six justices. Even if, under any circumstances, a litigant has a right to ask that his case be heard before a full court of six justices, the application must be made before the case is heard. The fact that one or more of the justices is absent, and the judgment is rendered by three justices only, constitutes no ground for a rehearing at the instance of a party. While it does not appear in the official report of the case, still the records of this court disclose that in the case of *Gilbert v. State* (Ga.) 43 S. E. 47, which was heard by four justices,

and the judgment rendered by three, the fourth dissenting, an application for a rehearing upon the ground above referred to was refused.

It is further contended that a rehearing should be granted for the reason that in the opinion of the majority it is recognized that the scheme is dependent, to some extent, upon the doctrine of survivorship, and that, as joint tenancy with its incident of survivorship has been abolished in this state, the ruling is unsound to the extent referred to. It is true that the common-law doctrine of survivorship among joint tenants was abolished by the Constitution of 1777. *Lowe v. Brooks*, 23 Ga. 325; *Carswell v. Schley*, 56 Ga. 101, 108. See, also, *Bryan v. Averett*, 21 Ga. 402, 68 Am. Dec. 464; *Harrison v. Harrison*, 105 Ga. 520, 31 S. E. 455, 70 Am. St. Rep. 60. The Code declares: "Joint tenancy does not exist in this state, and all such estates, under the English law, will be held to be tenancies in common under this Code." Civ. Code 1895, § 3142. It follows, therefore, that, whenever an instrument creates an estate which at common law would be held to be a joint tenancy, in this state the instrument would be held to take effect as to all its terms, except so far as it provided by implication for survivorship among the tenants, and such tenants would be held to occupy to each other, so far as this question is concerned, the relation of tenants in common. While the doctrine of survivorship, as applied to joint tenancies, has been distinctly abolished and does not exist in this state, there is no law of this state that we are aware of which prevents parties to a contract, or a testator in his will, from expressly providing that an interest in property shall be dependent upon survivorship. Of course, all presumptions are against such an intention, but where the contract or will provides, either in express terms or by necessary implication, that the doctrine of survivorship shall be recognized, we know of no reason why a provision in the contract or will dependent upon such doctrine may not become operative under the laws of this state. While this question seems not to have been distinctly passed upon by this court, there are numerous cases in which the doctrine of survivorship has been recognized as being operative. Among the cases on this subject, see *Rlordon v. Holiday*, 8 Ga. 79; *Benton v. Patterson*, Id. 146; *Dunn v. Bryan*, 38 Ga. 154; *Hooper v. Howell*, 50 Ga. 165; Id., 52 Ga. 316; *Parrott v. Edmondson*, 64 Ga. 332; *Olmstead v. Dunn*, 72 Ga. 850. At common law an estate in joint tenancy, with the incident of survivorship, was created in any case where lands or tenements were granted to two or more persons, to be held in fee simple, fee tail, for life, for years, or at will. The mere creation of the estate in two or more persons, without more, drew to it the incident of survivorship. See 2 Black. Com. p. 180. In Georgia the mere

creation of the estate in two or more persons never draws to it survivorship as an incident, and the presumption is in all cases that survivorship was not intended. But where, by express terms or necessary implication, a survivorship is provided for, the law of Georgia allows it to exist. This exact question has been passed upon in other states having statutes abolishing the doctrine of survivorship as applied to joint tenancies. In *Arnold v. Jack's Ex'rs*, 24 Pa. 57, the Supreme Court of Pennsylvania held that though survivorship, as an incident to joint tenancies, had been abolished in that state, it might be expressly provided for by will or deed; *Knox, J.*, in the opinion saying: "But conceding that the right of survivorship, as an incident of a joint tenancy, no matter how created, is gone, it by no means follows that this right may not be expressly given either by a devise in a will or by grant in a deed of conveyance. It may cease to exist as an incident, and yet be legally created as a principal." See, also, *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254; *Lentz v. Lentz*, 2 Phila. 148. In the case of *Taylor v. Smith*, 21 S. E. 202, the Supreme Court of North Carolina held that the act abolishing survivorship in estates in joint tenancy did not prohibit contracts making the rights of the parties dependent on survivorship. In the opinion, *Avery, J.*, said: "The act of 1784 (Code 1895, § 1326) abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personality; such as to make the future rights of the parties depend upon the fact of survivorship." See, also, 17 Am. & Eng. Enc. L. (2d Ed.) 650.

The remaining grounds of the application for a rehearing relate to matters which were fully discussed and carefully considered. Attention is called in the motion for a rehearing to the case of *State v. Hawkins* (Md.) 51 Atl. 850. Even if this case can be considered as antagonistic to the conclusion reached in the present case, we find nothing in the reasoning of the court which dissatisfies us with the conclusions we have reached. In addition to the cases cited in the original opinion on the question of what constitutes a lottery, we take this occasion to call attention to the following: *Hall v. Cox*, 1 Q. B. 198; *Regina v. Dodds*, 4 Ont. 390; *Regina v. Jamieson*, 7 Ont. 149; *Stoddart v. Argus Printing Co.*, 2 K. B. 474; *Dunham v. St. Croix Mfg. Co.*, 34 N. Bruns. 243; *United States v. Rosenblum* (C. C.) 121 Fed. 180.

While the differences of opinion among the justices of this court, as indicated by the opinions filed, still exist, so far as the merits of this controversy are concerned, we are all agreed that no sufficient reason has been given why this case should be reargued.

Application denied.

(132 N. C. 614)

**SNIDER v. NEWELL.**

(Supreme Court of North Carolina. May 12, 1903.)

**SEDUCTION — LOSS OF SERVICES — NECESSITY OF PROOF — PRESUMPTION — DEMURRER TO EVIDENCE.**

1. A demurrer to plaintiff's evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to him.

2. In an action for the seduction of plaintiff's daughter, a demurrer to plaintiff's evidence presents the question whether the plaintiff's testimony is sufficient to sustain a finding of such loss of service as is necessary to maintain the action.

3. It is not necessary that a father suing for the seduction of his daughter, who is a member of his household, should show actual loss of services.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by J. F. Snider against W. B. Newell. From a judgment of nonsuit, plaintiff appeals. Reversed.

Jones & Tillett, for appellant. Burwell & Cansler, for appellee.

CONNOR, J. This is an action prosecuted by the plaintiff for the recovery of damages alleged to have been sustained by reason of the seduction by the defendant of his daughter, whereby he "lost the services of his said daughter, and the reputation of his family was thereby greatly injured, and he suffered great mental anguish and humiliation." The defendant admitted that he had illicit carnal intercourse with the daughter, but denied that the plaintiff lost her services thereby, or suffered otherwise. The plaintiff introduced evidence tending to show that his daughter, when about 18 years of age, was seduced and debauched by the defendant; that he had repeated acts of sexual intercourse with her in the plaintiff's house, in which his daughter resided as one of his family; that such intercourse was had at night, the defendant going to the room of the daughter, entering through her bedroom window; that the plaintiff knew nothing of the defendant's conduct until it had continued about a year, when he charged the defendant with it, when he admitted the truth of the charge. The plaintiff testified that he was greatly shocked; that the matter greatly pressed on his mind, and he thought they were all disgraced; that the daughter was, prior to the sexual intercourse with the defendant, chaste, pure, and virtuous; that defendant is a married man. The defendant introduced no testimony, but moved the court to dismiss the action as upon a nonsuit. The court allowed the motion, the plaintiff excepted and appealed.

The judgment of his honor is based upon the conclusion of law that the plaintiff had not shown any loss of service, or any diminution of the daughter's capacity to serve him, and could not, for the other injuries alleged, maintain the action. The demurrer to the

evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff, but presents the question whether the plaintiff's testimony is sufficient to base a finding of such loss of service as is necessary to maintain the action. The plaintiff has alleged a loss of service, mental anguish, and mortification. We have been unable to find, after a very careful and diligent search, a case in England or America in which the declaration or complaint has failed to allege loss of service. The action at common law was trespass *vi et armis*, or trespass on the case *per quod servitium amisit*. *Briggs v. Evans*, 27 N. C. 16. The gravamen of the action was that the daughter was the servant of the plaintiff, and that by her seduction he lost her services. *Taylor, C. J.*, in *McClure's Executors v. Miller*, 11 N. C. 133, says: "It is characterized by a sensible writer as one of the 'quaintest fictions' in the world that satisfaction can only be come at by the father's bringing the action against the seducer for the loss of his daughter's services during her pregnancy and nurturing." In *Kinney v. Laughenour*, 59 N. C. 365, it is said: "The action for seduction does not grow out of the relation of parent and child, but that of master and servant and the loss of services. It is true that this is a fiction of the law." In *Hood v. Suderth*, 111 N. C. 215, 16 S. E. 397, *Clark, J.*, said arguendo: "It is true that at common law an action for seduction could technically only be brought by a father, master, or employer, and that damages were alleged *per quod servitium amisit* for value of services lost. This though in fact no services were lost, and even when a woman was of full age, and the father was not entitled to recover services of any one else. It was well understood that this was a mere fiction, and damages were awarded for wrong and injury done her." The question decided in that case does not arise upon this record. In *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459, there was an allegation of loss of service, seduction, etc., "thereby damaging said plaintiff, and for medical care, nursing, tendance," etc. The action was brought by the father. In *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268, the plaintiff alleged that her daughter was in her actual service, residing with her in New Berne, and being under 21 years old, and unmarried. In *Willeford v. Bailey* (at this term) 43 S. E. 928, there was an allegation of loss of service, abduction, etc., the action being brought by the father, the girl being under 21 years of age. *Nash, J.*, in *Briggs v. Evans*, supra, says: "It is but a figment of the law to open the door for the redress of his injury. It is the substratum on which the action is built. \* \* \* He comes into court as a master; he goes before the jury as a father." The case of *Anthony v. Norton*, 60 Kan. 341, 58 Pac. 529, 44 L. R. A. 757, 72 Am. St. Rep. 360, unmistakably

holds that "the action could be maintained on the bare relation of parent and child alone." It is one of the most striking illustrations of the conservatism of the profession and the bench that, although there has been a constant protest against the necessity for resorting to this "quaintest fiction" or legal "figment," the courts have not felt justified in abandoning it. We find most careful and accurate counsel in all of the cases alleging loss of service. Sir Frederick Pollock, in his work on Torts, pp. 222, 223, says: "There seems, in short, no reason why this class of wrongs [injuries in family relations] should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent but cumbrous fictions. But, as a matter of history (and pretty modern history), the development of the law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations not by openly treating them as analogous in principle, but by importing into them the fiction of actual service, with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person in loco parentis) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of the family, but whether he can make out a constructive 'loss of service.'" He discusses the question with his usual clearness and force, saying: "The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Sergeant Manning wrote more than 50 years ago: 'The quasi fiction of servitium amicit affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread among strangers.'" While, in a certain sense, "fictions have had their day," and are not to be permitted to hamper the courts in the administration of justice, we must be careful that we permit not ourselves, because we live in days of Codes of Civil Procedure, to conceive that we may altogether break away from the wisdom and experience of the past. As was said by the great Chief Justice Pearson in regard to estoppel: "According to My Lord Coke, an estoppel is that which concludes and 'shuts a man's mouth from speaking the truth.'" With this forbidding introduction, a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer the law as a system." *Armfield v. Moore*, 44 N. C. 161. Sir Henry Maine, in his great work on Ancient Law, tells us that a legal fiction is "a rude device, absolutely necessary in early stages of society; but fictions have had their day."

He says: "It is not difficult to see why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change, which is always present. At a particular stage of social progress, they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them—the fiction of adoption, which permits the family tie to be artificially created—it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first step towards civilization. \* \* \* To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of the law. But at the same time it would be equally foolish to argue with those theorists who, discovering that fictions have had their uses, argue that they ought to be stereotyped in our system." Pages 25, 26. He wisely concludes that it will be necessary to "prune them away."

However interesting and inviting this field may be, it is hardly proper to investigate it in the decision of this case. We are not called upon to say more than that courts should move forward, and yet cautiously, in dispensing with even "fictions." We must bear in mind that the law of procedure as well as substantive law is not a thing to be manufactured, but is the result of growth and careful conservative progress. While we find no difficulty in holding that "it is not necessary, in order for a parent to maintain an action for the seduction of his daughter, that he prove actual services or the loss thereof," it is sufficient that it be shown that the child is a daughter of the person suing, and residing in his family as such, or is elsewhere with his consent and approval. *Rogers on Domestic Relations*, § 839. We carefully refrain from advancing further than is necessary in this case. It would not require any considerable foresight to see a large yielding of suits for seduction brought by collateral relations upon the suggestion of loss sustained in social position, business relations, mortified sensibilities, etc. We have a striking illustration of this in *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, in which it was held that a husband, to whom a message had been sent notifying him of the sickness of his wife, could, in an action for failure to deliver promptly, recover, in addition to nominal damages, compensation for mental anguish. Since the decision of that case, we have suits for "compensation for mental anguish" brought by persons of almost every kind and degree of kinship, and we have good reason for thinking that "the end doth not yet appear." It is undoubtedly true that, as we come into a clearer view of social, domestic, and business relations, with their resulting rights and duties, the courts

will guard these relations, and protect them by appropriate remedies, both preventive and remedial. In doing so, the principles underlying our jurisprudence must not be violated, or sentimental emotions be made cause of actions; nor must we permit the tenderest and most sacred relations of life to become sources of profit and speculation. In the view which we take of this case, the plaintiff was entitled to maintain his action upon his allegation and proof. We find abundant authority, both in and beyond this state, to sustain this conclusion. In *McDaniel v. Edwards*, 29 N. C. 408, 47 Am. Dec. 331, Ruffin, C. J., says: "When the daughter is living with the father, whether within age or of full age, she is deemed to be his servant, for the purposes of this action, in the former case absolutely, and in the latter if she render the smallest assistance in the family—as pouring out tea, milking, and the like." In *Kennedy v. Shea*, 110 Mass. 150, Ames, J., said: "According to numerous decisions of the courts of New York, Pennsylvania, and some other states of the Union, this relation is sufficiently proved by the evidence that the daughter was a minor, and that her father had the right to her services." In *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, Branson, C. J., says: "Since it has been settled that the value of the services actually lost does not constitute the measure of damages when the action is brought by the father, it has been held sufficient for him to show that the daughter was under age, and lived in his family, at the time of her seduction, without proving that she had been accustomed to render service. It has been thought enough that the father was entitled to her services, and might have required them if he had chosen to do so." See, also, notes to this case, 53 Am. Dec. 338. In *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288, Spencer, J., says: "She was his servant de jure, though not de facto, at the time of the injury; and, being his servant de jure, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury." *Coon v. Moffet*, 8 N. J. Law. 583, 4 Am. Dec. 392.

The English cases are equally as clear upon this point. In *Fores v. Wilson*, Peake, N. P. Cases, 55, Lord Kenyon held "that there must subsist some relation of master and servant; yet a very slight relation was sufficient, as it had been determined when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant." In *Maunder v. Venn*, 1 Moody & M. 323 (22 Com. Law Rep.), it is held that it is not necessary to show any acts of service done by the daughter. It is enough that she lives in the father's family under such circumstances that he has a right

to her services. This case is singularly like the case before us. It is said in the course of the plaintiff's proof, a difficulty occurred in making out any acts of service of the daughter. It being, however, proved that the seduction took place while she was residing with the plaintiff, and forming a part of his family, Littledale, J., interposed, and said that: "The proof of any acts of service was unnecessary. It was sufficient that she was living with her father, forming part of his family, and liable to his control and demand. The right to the service is sufficient." Judge Cooley thus sums up the law: "The father suing for this injury in the case of a daughter, actually at the time being a member of his household, is entitled to recover in his capacity of actual master for a loss of services consequent upon any diminished ability in the daughter to render service. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received." *Cooley on Torts*, p. 221; *Pollock on Torts*, p. 27.

We thus see that, while the courts have protested against the rule of law requiring the allegation of the action upon which the action is based, they have wisely wrought out the substantial remedy by recognition of the relation, with all of its incidents, rights, and duties, of parent and child. It is difficult to conceive how a daughter who has been seduced and debauched as the testimony in this case shows can be said not to have had her ability to serve her father diminished; hence we place our decision upon the allegation and testimony in the record. His honor was in error in sustaining the demurrer to the evidence, and the case should have been submitted to the jury under proper instructions.

There must be a new trial.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

CLARK, C. J. (concurring in result). The opinion of the court holds, quoting *Rodgers' Domestic Relations*, § 839: "It is not necessary, in order for a parent to maintain an action for seduction of his daughter, that he prove actual services or the loss thereof." There are numerous authorities to maintain that proposition. It follows, therefore, that under our Code, § 233 (2), loss of services need not be averred, except when such loss is an element of damages. That section provides that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action"; hence none other should be stated. Nothing now needs to be averred which it is not necessary to prove. It can serve no purpose to make an unnecessary or untrue averment in any pleading under the Code, and, a fortiori, it cannot be a fatal defect to fail to make such averment.



The whole subject is summed up with full citation of authorities in the American & English Encyclopedia in the article "Seduction." It appears therefrom that the real causes of action, when brought by a father for the seduction of his daughter, are the wrong and injury done him in the ruin of his daughter, his wounded feelings and sense of dishonor, the stain and grief brought upon his family; and the jury can add exemplary damages as punishment to the defendant. Of course, in addition there can be compensation for loss of services, if any. The matter is thus summed up in a review of many authorities, but is stated in none better than in *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458: "As to the damages the parent may recover, the loss of service is a comparatively unimportant part, and he is entitled to recover for his wounded feelings and sense of dishonor, loss of the society of a virtuous daughter; and, in short, all that a father can feel from the nature of the loss." In *Lawyer v. Fritcher*, 54 Hun, 591, 7 N. Y. Supp. 912, Landon, J., says: "This artifice is properly termed a legal fiction, the real ground of recovery being for damages for the outrage perpetrated." So entirely is it an action for punitive damages for the tort, the wrong and injury and humiliation inflicted, that it is said in *Morgan v. Ross*, 74 Mo. 318: "It is believed that no case can be found in the books where the verdict in an action like this has been set aside upon the sole ground of awarding excessive damages." In *McClure's Ex'rs v. Miller*, 11 N. C. 133, it was held that the action was in truth to recover vindictive damages "for the disgrace and degradation" caused by the defendant, and hence abated on the death of the plaintiff (the father), which would not be the case if it were an action for loss of services. In many states by statute it has been made unnecessary to allege or prove loss of services when such loss is a fiction (as it is in most cases), and also authorizing the woman to bring the action herself when of age. *Stoudt v. Shepherd*, 73 Mich. 589, 41 N. W. 696, and other cases cited in Am. & Eng. Enc. Law, supra. In this state and others in which fictions have been abolished by the Code, the same result has been attained thereby. In *Hood v. Suderth*, 111 N. C., at page 221, 16 S. E. 400, it was held that the Code had abolished "the fiction of lost services in an action for seduction, which henceforward became upon 'a plain statement of the facts constituting a cause of action' in legal construction, an action for exemplary damages. It would be singular, to say the least, to retain the fiction that the action is based on the loss of services, and not for the wrong itself, when the Legislature has made the conduct complained of a felony." The same case held also that under another section of the Code (177) the woman, if of age, being the party in interest, can bring the action. In *Willeford v. Bailey* (at this term) 43 S. E. 928, it is again said:

"The action is really for the humiliation, the mental suffering, and anguish inflicted by the seducer, and for punishment to the seducer." In *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459, and *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268, it was held that the jury can allow the parent "punitive damages for the wrong done him in his affections and the destruction of his household." The action is really based, not on the relation of master and servant, which was a fiction, but on that of parent and child (*Terry v. Hutchinson*, L. R. 3 Q. B. 599); and hence, when the father is dead, it could be brought by the mother. *Abbott v. Hancock*, supra. By virtue of the parental relation, there is not necessarily any loss of services, and failure to allege or to prove, if alleged, that insignificant element of damages, does not deprive the parent of proving and recovering for the injury really sustained. When the action is brought by the woman herself, of course there can be no allegation or proof of loss of services by the father. When the female is under age, there are decisions (*Smith v. Richards*, 29 Conn. 232; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392) which hold that the girl herself may also maintain an action for the injury to herself, the action of the father (or mother) being for the injury to the head of the family, upon whom, in public estimation, rests the responsibility for the conduct of the children. In actions by the father (or mother, when the father is dead) it is hence admissible to show in mitigation of damages carelessness in exposing the daughter to the danger (1 Big. Torts, 151), or, in bar of the action, that he assented or connived at the seduction (*Rodgers*, Dom. Rel. § 839); but the father's conduct in this respect could not be set up in an action brought by the woman herself (*Cooley on Torts* [2d Ed.] 276). In *Scarlett v. Norwood*, supra, at page 286, 115 N. C., 20 S. E. 459, it was left an open question whether the infant daughter might not also bring an action for the injury done to herself, which is something distinct from the wrong and humiliation brought upon the parent.

A fiction is defined as a "false averment on the part of the plaintiff, which the defendant is not allowed to traverse, the object being to give the court jurisdiction." Maine, Anc. Law, 25; Best on Ev. 419, cited by Black, Law Dict. "Fiction." As it is "not necessary to prove loss of services," it is not necessary to aver what is not a part of the cause of action, under the reformed procedure, which, abolishing fictions and subtleties, requires to be averred and proved that which is the true ground of the plaintiff's action, and that only. When there has been actual loss of services, the complaint can so allege; but when there has been no real loss thereby the plaintiff is not required to aver such loss, much less to swear to it in a verified complaint. He should set out the truth,

the facts which constitute the real basis of his demand for damages, and upon which he expects to obtain a verdict. In *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757, 72 Am. St. Rep. 380, *Doster, C. J.*, holds in a very able opinion that under a statute similar to ours the courts are no longer driven to resort to the fiction—the subterfuge—that there has been a loss of services when there has been none, or it is of imponderable value, and that the action of seduction “can be maintained on the bare relation of parent and child alone.” This is straightforward, and in accordance with the spirit of the times, as evinced in our system of legal procedure, under which the real matter in dispute should be clearly and plainly stated, tried, and decided, leaving all outworn fictions to sleep in the limbo of things discarded by a practical age.

Many courts have deplored the “manifest absurdity,” as they style it, of basing an action for a great moral, social, and personal wrong upon a fictitious allegation that the father is a master, who, by reason of such wrong, has lost the services of his daughter (*Ellington v. Ellington*, 47 Miss. 351; *Cooley on Torts* [2d Ed.] 275; *Doyle v. Jessup*, 29 Ill. 462, and many other cases), and courts have solemnly sustained verdicts for thousands of dollars when no loss of services whatever has been proved. From that anomaly our statute and decisions have happily freed us. In *Doyle v. Jessup*, *supra*, *Caton, J.*, says: “It is beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages.” Sir Frederick Pollock, in his work on *Torts* (6th Ed.) 229, deplores that the English courts had not in the beginning “taken the bolder course, which might have been done without doing violence to any legal principle,” of resting this action on its true basis; and quotes with approval Sergeant Manning’s statement that the “fiction of loss of services affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn bread among strangers,” and adds that the enforcement of a just claim should not depend upon such a mere fiction. The law itself is beholden to deal in truth with things as they are, and not in falsehoods, fictions, evasions, or subterfuges; and the real status of this action under our Code cannot be better summed up than by Chief Justice *Doster* at page 347, 60 Kan., page 532, 56 Pac., 44 L. R. A. 757, 72 Am. St. Rep. 360, in *Anthony v. Norton*, *supra*, the whole opinion in which is well worth perusal, as follows: “If necessity ever existed for cloaking the real cause of action under the nominal disguise of another one, it no longer exists, and we hold accordingly. In this state a parent may maintain an action for the seduction of the daughter without averment or proof of loss

of services or expenses of sickness.” This goes straight to the mark, like the arrow of Robin Hood on the heath at Ashby de la Zouch. The Kansas statutes cited and relied on by him (Code, § 12: “There can be no feigned issues,” and Code, § 87: The complaint “must contain a statement of the facts constituting the cause of action in ordinary and concise language and without repetition”) are almost identical verbatim with our Code, §§ 135, 233(2). *Bouvier’s Law Dictionary*, “Fiction,” says: “As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Bentham, *Ev.* 300; 2 Pothier, *Ob.* (Evans’ Ed.) 43.” The Constitution and the Code in this state abolished all fictions in legal procedure in 1868. They have been dead 35 years. We cannot revive them, and there is no need to regret them.

(123 N. C. 644)

CAROLINA & N. W. RY. CO. v. PENN-  
CARDEN LUMBER & MFG. CO.

(Supreme Court of North Carolina. May 12,  
1903.)

RAILROADS—RIGHT OF WAY—CONDEMNATION  
—SPECIAL PROCEEDING—COMMENCEMENT—  
ISSUANCE OF SUMMONS—NECESSITY—RIGHT  
TO CONDEMN—CONDITIONS—BURDEN OF  
PROOF.

1. Code 1883, § 199, provides that civil actions shall be commenced by issuing a summons. Section 278 declares that the provisions of the Code of Civil Procedure are applicable to special proceedings except as otherwise provided, and section 279 prescribes the form of summons in special proceedings. Code 1883, § 1943, relating to the condemnation of railroad rights of way, declares that, in case the company is unable to agree for the purchase of any real estate required, it shall have the right to acquire title in the manner and by the special proceeding prescribed in the chapter. *Held*, that the words “special proceeding,” as used in section 1943, should be construed to have the same meaning as in other sections of the Code of Civil Procedure, and hence the “special proceeding” authorized for the condemnation of land could be begun only by the issuance of a summons as provided by section 279.

2. In a proceeding for the condemnation of a railroad’s right of way under Code 1883, c. 49, authorizing such condemnation on the filing of a map showing how the line of the proposed road was located on defendant’s land, with a profile showing the cuts and height of embankments on the proposed line of road, providing the petitioner intends to construct and finish the proposed line in good faith, and is unable to agree with the landowner for the purchase of the land at a reasonable price, the burden of proving the existence of such facts is on the petitioner.

Appeal from Superior Court, Caldwell County; B. F. Long, Judge.

Proceeding by the Carolina & Northwestern Railway Company against the Pennncarden Lumber & Manufacturing Company for the condemnation of a railroad right of way. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Edmund Jones, for appellant. C. E. Childs and Battle & Mordecai, for appellee.

CONNOR, J. This proceeding was instituted for the purpose of condemning a right of way over the lands of the defendant for the use of the plaintiff's railroad pursuant to the provisions of chapter 49, vol. 1, of the Code. The plaintiffs' attorneys issued on November 10, 1902, the following notice to the defendant: "You will please take notice that on the 20th November, 1902, at 8 o'clock p. m., a hearing in the above-entitled cause, upon the petition therein filed, will be had before J. V. McCall, clerk of this court, the same being a petition to condemn real estate for railroad purposes, owned by you. A copy of said petition, map, and profile of the same are herewith sent. J. H. Marion, C. E. Childs, Petitioner's Attorneys. Dated 10th day of November, 1902." The notice was served on George O. Shakespeare, general manager of the defendant, on November 10, 1902, by reading the same to him, and delivering a copy of the notice with a copy of the petition, map, and profile, by the sheriff of Caldwell county. The plaintiff on the same day filed in the office of the clerk of the superior court of said county its petition, in which it alleges its incorporation and organization; that the defendant is a corporation, and the petitioner is operating a railway over its own line from the town of Chester, S. C., to the town of Lenoir, in this state; that it is its intention and purpose in good faith to extend its line and to construct and finish a railroad from the town of Lenoir, through the counties of Caldwell and Watauga, to the Tennessee line; that it has duly complied with the terms and conditions of its charter in respect to the location and extension of said line of railway; that the defendant owns a tract of land in said county, a full description of which is attached, and marked "Exhibit A"; that a portion of the land is required for the purpose of constructing and operating said railroad which the plaintiff intends to build; that said portion of said land is fully described in a paper attached, marked "B," and a certain map, profile, etc.; that the petitioner has not been able to acquire a right of way over said land, or agree upon a price with the defendant. Accompanying the petition are the maps, etc. On the day named in the notice, November 20, 1902, the defendant, by its counsel, entered a special appearance before the clerk, and made a motion to dismiss the proceeding, for that no summons or other proper notice was issued from the court, and that no summons or proper notice was served upon the defendant, and that the court had not acquired jurisdiction. The clerk declined to allow the motion, and the defendant appealed to the superior court in term. The plaintiff's counsel objected to allowing the appeal at this time upon the ground that the order refusing the motion was inter-

locutory. The clerk intimating that he would proceed with the hearing, the defendant filed an answer, which the clerk held raised issues of fact, and transferred the cause to the civil issue docket.

The defendant, in its answer, demanded strict proof of the plaintiff's capacity to sue, etc.; admitted its own corporate existence, and that the plaintiff was operating a railway was alleged; and denied the remainder of the allegation of intention to build or extend its road. It admitted its ownership of the land sought to be condemned, and denied that no one else had any interest therein. The other portions of the petition were denied. For further answer the defendant averred that it was the owner of about 48,000 acres of timber land on the waters of Wilson's creek; that the proposed road would cross said land, and that said land was chiefly valuable for timber thereon; that said timber and the facilities for manufacturing the same had cost the defendant more than \$600,000; that for the purpose of utilizing this timber, and of supplying a large mill belonging to the defendant at Lenoir, N. C., a distance of 20 miles, it became necessary to construct a railroad from Lenoir to Wilson's creek, for which purpose, and for the further purpose of extending said road across the Blue Ridge Mountains to connect with a system of railroads of Tennessee, the Caldwell & Northern Railway was chartered and organized, and it has built and equipped a line of road from Lenoir to Collettsville, a distance of 10 miles; that it intends to build the said road up Wilson's creek; that said road is now a common carrier, and in daily operation to within about 4 miles to what is known as the "Gorge" of said creek; that the plaintiff's road extends no further than Lenoir, a distance of 14 miles away; that the said Caldwell & Northern Railroad Company now has a corps of engineers locating its line from Collettsville to the said gorge, and also has a force of hands at work in said gorge, grading its road; that almost the entire capital stock of the Caldwell & Northern Railroad Company is owned and controlled by stockholders of the defendant company; that, owing to the physical conformation of the country, there is no practicable line of railway except through the gorge of said creek, and, owing to the narrowness and almost precipitous sides of said gorge, there is room on the east side for only one track, without a vast and ruinous expenditure; that the defendant has already conveyed by deed to the Caldwell & Northern Railroad Company the right of way sought to be condemned by the plaintiff; that it is not necessary that the plaintiff should acquire a right of way through said gorge, as a line up and along John's river is entirely practicable to it, as short, if not shorter, than the proposed line up Wilson's creek; that the map or profile attached to the plaintiff's petition is not in accord with the statutory requirements.

The cause coming for trial at the regular term of the superior court, the defendant again entered a special appearance, and brought forward the exceptions taken before the clerk for that no summons or other proper notice had been issued, and that it was not in court by "due process of law"; that the court had no jurisdiction, etc. His honor overruled the motion to dismiss the proceeding, and the defendant excepted. The defendant thereupon moved the court to dismiss for that the map and profile are not a compliance with chapter 396, Pub. Laws 1893. The motion was denied, and the defendant excepted. His honor thereupon submitted to the jury the following issues: "(1) Does the map served with the notice on November 10, 1902, by the plaintiff on the defendant, show how the line of the road is located on the land sought to be condemned? Yes. (2) Does the profile served at the same time show the depth of the cuts and the height of the embankments on the land sought to be condemned, and at what points on the land such cuts and embankments are located? Yes. (3) Has the plaintiff been unable to agree with the defendant for the purchase of the land required for its proposed road? Yes. (4) Is it the intention of the plaintiff in good faith to construct and finish the proposed road as alleged in the petition? Yes. (5) Did the defendant, on November 17, 1902, execute to the Caldwell & Northern Railroad Company the deed of bargain and sale marked 'Exhibit X' for the easement or right of way in the land sought to be condemned in this proceeding? Yes."

The parties introduced testimony tending to establish their respective contentions upon the several issues. The defendant made a number of requests for instructions, some of which were given either as asked or as modified, and some denied. In the view which we take of the case, it is not necessary to set out or pass upon the rulings of the court below upon these prayers for instructions. The court charged the jury that the burden of proof was upon the defendant upon the first issue to show by a preponderance of evidence that the map does not show how the line of the proposed road is located on the defendant's land; that the burden was upon the defendant upon the second issue to show by preponderance of the evidence that the profile does not show the depth of cuts and height of embankments on the line of the proposed road on the defendant's land; that the burden was upon the defendant upon the third issue to show by preponderance of evidence that the petitioner was not, before this proceeding was begun, unable to agree with the defendant for the purchase of the land at a reasonable price; that the burden was upon the defendant upon the fourth issue to show by preponderance of the evidence that it was not, when this proceeding was begun, or

is not now, the intention in good faith of the petitioner to construct and finish the proposed line of road from Lenoir to the Tennessee line. To each of these instructions the defendant excepted, and assigned the same as error. Upon the coming of the verdict, the defendant moved for a new trial for the errors assigned. This being refused, the defendant excepted. The court rendered judgment remanding the cause to the clerk, with directions to appoint commissioners to assess the compensation which the petitioner should pay the defendant for the land condemned. The defendant excepted. The commissioners were appointed by the clerk, the defendant excepting. They made their report, to which the defendant also excepted. The report was confirmed. The defendant excepted, and from the final judgment appealed to this court.

It is not necessary for us to consider the exceptions to the proceedings subsequent to the judgment of Judge Starbuck, as we are of opinion that there are errors fatal to the proceeding in the record prior to that judgment. We will consider only two of the defendant's exceptions: (1) That there was no summons or citation issuing from the superior court; (2) that his honor was in error in placing upon the defendant the burden of proof upon the several issues submitted to the jury. We are aided in the decision of this cause by excellent, full, and well-considered briefs and arguments. The first exception presents the question whether the court has ever acquired jurisdiction of the person or the subject-matter in this proceeding. While there was some confusion incident to the change of our judicial system wrought by the Constitution of 1868 and the introduction of the Code of Civil Procedure in regard to the distinction between "civil actions" and "special proceedings," it is now well settled that with a few statutory exceptions, not necessary to be enumerated, every judicial proceeding known to our system of remedial justice is either a civil action or a special proceeding. It is equally well settled that, with the exceptions referred to, jurisdiction is acquired by the issuing and service made upon or accepted by the defendant of a summons. These propositions may at this time be regarded as beyond the domain of discussion. The summons is the substitute for the original writ in common-law actions and the subpoena in suits in equity. The action (or proceeding) is begun when the summons is issued as original process. *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396. The petitioner contends that this proceeding is neither a civil action nor a special proceeding. Section 1943 of the Code prescribes: "In case any company \* \* \* is unable to agree for the purchase of any real estate required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner

and by the special proceeding prescribed in this chapter." While chapter 49 of the Code is composed of several acts of the Legislature, it has its force and effect by virtue of its enactment in, and as a part of, the Code of 1883. Code, § 3876; *State v. Chambers*, 93 N. C. 600. The Code expressly provides that "civil actions shall be commenced by issuing a summons." Section 199. "The provisions of the Code of Civil Procedure are applicable to special proceedings, except as otherwise provided." Section 278. The next section (279) prescribes the form of the summons in special proceedings. Section 287. When the term "special proceeding" is used in section 1943, it must be construed to have the same meaning as in other sections of the Code. This is essential to an orderly and systematic procedure. In a proceeding to secure the right of drainage, commenced by a summons, *Smith, C. J.*, said, "Undoubtedly a case should be constituted between proprietors of adjoining lands before the appointment of commissioners." *Durden v. Simmons*, 84 N. C. 555. After reviewing the several statutes on the subject of procedure in such cases, he says: "This construction gives force to both acts, and produces harmony and consistency in their application to the classes of cases in which each was intended." Page 559. The Court of Appeals of New York has held that a proceeding to condemn land for railway purposes is a special proceeding. *Matter of Cortland & H. Horse Ry. Co.*, 98 N. Y. 336; 1 Enc. Pl. & Pr. 114. It is true that section 1943 of the Code provides that upon the filing of the petition, a copy thereof, with notice of the time and place when and where the same shall be heard, must be served on all persons whose interests are to be affected. This is not inconsistent with the general provision of the Code requiring that a summons issue as the original process giving the court jurisdiction. It is not easy to understand why the law should require that a summons must issue in a civil action involving the title to a cow or horse and in special proceedings; whereas that in the exercise of the right of eminent domain given by the state to a corporation, involving valuable rights of property, a simple notice, signed, as in this case by two gentlemen of the bar as "petitioner's attorneys," is sufficient. In all other proceedings jurisdiction is acquired by a command from "the state of North Carolina," issuing out of "our superior court"; whereas in this proceeding a simple notice or polite letter is addressed to the defendant. It may be that we should construe the word "notice," in harmony with the general provisions of the Code, to mean "summons," thereby conforming the proceeding from its inception to its conclusion to the general system of procedure. This construction harmonizes the statute with the underlying principle of our government "that

no man shall be deprived of his life, liberty or property, except by due process of law." "Due process implies correct and orderly proceedings, which are due because they observe all the securities for private rights which are applicable to particular cases." *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835. This construction of the statute is also in harmony with the well-settled principle that the authority to exercise the right must be strictly construed. "In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict, rather than a liberal, construction is the rule. Such statutes assume to call into active operation a power, which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which the owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legislature to private corporations." *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 490, 15 N. E. 601; *Lewis on Eminent Domain*, § 253; 7 Enc. Pl. & Pr. 468. It is true that in *Click v. Railroad*, 98 N. C. 390, 4 S. E. 183—being a proceeding instituted by the owners of land over which the defendant had built its track—the court said: "This is neither a special proceeding nor a civil action, as defined by the Code. It is a summary proceeding." The appellee's very accurate and learned counsel has shown to us by the original record in his argument that the names of the landowners were signed to the notice by the counsel. With the utmost deference to the learned justice delivering the opinion, we find no authority in the Code or any statute for calling the proceeding a "summary proceeding." As we have seen, the Legislature has called it a "special proceeding," and, we think, correctly so. Nothing is decided in that case in conflict with the question presented in this, because no objection was made to the notice or the form of the procedure; hence in the conclusion to which we have arrived we are not called upon to overrule the case. We are of the opinion that the proceeding authorized by section 1943 of the Code is a special proceeding, and that a summons should issue as in all other cases. The clerk should have allowed the defendant's motion, or at least have issued a summons retaining the cause until the return day. His honor was in error in refusing the motion.

The decision of this question puts an end to this proceeding, but among other exceptions there is one which may arise upon another trial in a proceeding properly begun, which, we think, should be settled. His honor put the burden of proof upon the defendant upon the several issues. In this he was in error. We presume that he was led to make this ruling by the peculiar language

of the statute. The exact question has been decided in New York construing a statute in the same language as ours: "That the court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petitioner, it shall make an order for the appointment of commissioners." The court said: "It is claimed on the part of the company, and the court at Special Term held, that this section cast upon the respondent the burden of proving that the lands were not required for any purpose stated in the petition, and that in default of such proof the petitioner was entitled to the order. The provision that the landowner may disprove the allegations of the petition gives color to this construction, but it seems to us contrary to the general intent of the act. The provision securing notice and a right of being heard to all persons interested, and requiring the court to hear the proofs and allegations of the parties, show that the Legislature intended that the landowners should not be deprived of their property except by a judicial trial, or investigation and determination of the right claimed by the corporation, and that this was to be a substantial protection, and not a mere matter of form." *Matter of N. Y. Cen. R. R. Co.*, 68 N. Y. 407. "When the allegations of the petition are controverted, such averment does not relieve the plaintiff of the necessity of making strict proof of its right to take defendant's property." *Rochester Ry. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008. The law is as held in these cases.

It would be a strange conclusion that the owner of land could not prevent the taking of his property unless he could disprove the allegations of the corporation seeking to take it by showing, for instance, that it did not in good faith intend to build its road, and other material facts, resting almost, if not exclusively, in the breasts of the agents of the corporations. This would be to give to the petitioner an advantage not accorded to other suitors; the general rule, with some exceptions, in regard to the onus probandi, being that the party holding the affirmative issue has the burden of proving it. We do not pass upon the sufficiency of the map and profile, but it appears to us from the testimony that they do not substantially comply with the requirements of the statute. The proposed right of way is through a narrow gorge of a creek in precipitous mountains. It is said that but one track can be laid. It is, therefore, very material that an accurate survey be made, and a map filed showing clearly and distinctly where the proposed road is to be located. The averments in the answer, in regard to which there is evidence, show that it is a matter of very great interest to the parties whose lands are to be affected to have a strict compliance with the statute in this respect.

Proceeding dismissed.

(123 N. C. 628)

# WIGGINS v. PENDER et al.

(Supreme Court of North Carolina. May 12, 1903.)

COVENANTS—WARRANTY OF TITLE—ACTION BY SUBSEQUENT GRANTEE—LIMITATIONS—EVICTION—HEIRS OF WARRANTOR—REAL ASSETS—DESCENT—DAMAGES—ATTORNEY'S FEES—NOTICE TO DEFEND.

1. Where the words "heirs and assigns" were used in the habendum of a deed in which the grantees were named, a warranty of title inured to a subsequent owner of the land in privity of title with the grantor in the deed, though the word "assigns" was not used in the covenant of warranty.

2. Where a grantor conveyed land with a covenant of warranty, and immediately thereafter the grantees executed a mortgage to the grantor to secure the purchase price, which contained a like warranty of title, such reconveyance did not extinguish the covenant in the deed, the warranty therein being only to indemnify the mortgagee against acts of the mortgagors.

3. The statute of limitations does not commence to run against an action for breach of a covenant of title until after eviction.

4. Where both plaintiff and his ejector claimed under a common grantor, a judgment in favor of such ejector, who claimed under a deed prior in date to that from such common grantor, under which plaintiff claimed, for possession and profits of the land, constituted a sufficient eviction by a person holding a paramount title to entitle plaintiff to sue for breach of a covenant of the title contained in the deed from such common grantor under which he claimed.

5. In an action for a breach of a warranty of title plaintiff is not entitled to recover attorney's fees in defending the action of ejectment, where he did not notify the warrantor to come in and defend the title.

6. Since an action for breach of a warranty of title against the warrantor's administrator is an action for damages only, to be satisfied from the real or personal assets of the warrantor, such suit is maintainable though no real assets descended to the warrantor's heirs.

Appeal from Superior Court, Edgecombe County; Winston, Judge.

Action by J. H. Wiggins against James Pender, as administrator of John Armstrong, deceased, and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

This action was brought to recover damages for the breach of a covenant of warranty, and was heard in the court below upon the following statement of facts agreed upon by the parties:

On the 18th day of December, 1876, John Armstrong, the intestate of the defendant Pender, executed to Preston Justice and D. R. H. Justice a deed for a certain tract of land lying in said state and county for the recited consideration of \$850. That the said deed contained the following covenant, to wit: "And the said John Armstrong and wife, Margaret, covenant that they are seised of said premises in fee, and have the right to convey the same in fee simple; that the same are free from all incumbrances; and that they will warrant and defend the said

¶ 5. See Covenants, vol. 14, Cent. Dig. § 262.

title to the same against the claims of all persons whomsoever." On the same day the said Preston and D. R. H. Justice reconveyed the said premises to the said John Armstrong by deed of mortgage to secure the purchase price, in fee, with all rights, privileges, and appurtenances thereto belonging, with usual power of sale in the event of default. That in the said deed of mortgage to the said Armstrong the said Justice warranted the title to the said land in fee simple for themselves, their heirs and assigns, to the said Armstrong, his heirs and assigns. The said land was thereafter sold under said mortgage in a foreclosure proceeding under order of the court, and the same was conveyed in fee simple by the commissioner of the court to the ancestor of the plaintiff, "with all privileges and appurtenances thereto belonging, to him, his heirs and assigns," without covenants of warranty; and thereafter said land was allotted and set apart to the plaintiff in the division of his father's estate. At April term, 1901, of the superior court, A. L. Parrish and wife, Maggie, brought their action against the above-named plaintiff to recover from him the possession of said land and the rents and profits thereof. That the said Maggie claimed said land by virtue of a deed by John Armstrong and wife prior in date to his deed to the said Justices, and in said action it was adjudged that the said Maggie Parrish was entitled to recover the possession of the land and the rents and profits thereof, for that the said Armstrong had only a life estate in the land at the date of his deed to the Justices. That the plaintiff was evicted and ousted from said land under and by virtue of said judgment, and has since brought this suit, and paid to the said Maggie the sum of \$250.44 as rents and profits of the land, and paid the further sum of \$18 costs of said action. That \$100 was a reasonable attorney's fee for defending said action against the plaintiff. John Armstrong died in July, 1885, and on the 10th day of July, 1885, Margaret Armstrong duly qualified as his administratrix, and the said Margaret died in 1892, and thereafter, to wit, on May 6, 1901, James Pender duly qualified as administrator de bonis non of said John Armstrong. The plaintiff brought this action on May 6, 1901. Maggie Parrish died in the spring of 1902, leaving a will, and one child, and on the 27th of October, 1902, A. L. Parrish qualified as executor of the will and as guardian of the child. It is agreed that the amount of damage which the court shall consider in the plaintiff's recovery, if the court be of the opinion that he is entitled on these facts to recover the same, is \$850, the purchase price of the land, and the sum of \$218.99, being the rent, profits, and costs up to April 15, 1901, when judgment was recovered against the plaintiff as above stated, and he was ousted, and the interest on \$1,068.99 from said date, and the further sum of \$50, paid as rent since said judgment, with interest thereon from De-

cember 5, 1901, and the further sum of \$100, reasonable attorney's fees, paid by the plaintiff in defending the title to the land in said suit.

Judgment was rendered for the plaintiff against the defendant James Pender, as administrator, alone, for the sum of \$1,166.99, with interest on \$1,068.99 from April 15, 1901, and costs, from which judgment the defendant appealed.

The following are the contentions of the defendant as appears from the case agreed: (1) That the plaintiff was not the assignee of the covenants contained in the deed from John Armstrong to Preston and D. R. H. Justice, and cannot maintain this action for the breach of same. (2) That the covenants contained in said deed were extinguished by the reconveyance of said land to John Armstrong by the said Preston and D. R. H. Justice, and no right of action accrued thereon to the plaintiff. (3) That any cause of action arising upon the covenants in said deed is barred by the statute of limitations pleaded in the answer. (4) That it does not appear from the "agreed statement of facts" that A. L. Parrish and wife recovered said land of the plaintiffs by reason of a paramount title. (5) That neither the costs nor attorney's fees incurred by the plaintiff in the suit of A. L. Parrish and wife should be included in the damages, for that no notice was given the defendant to defend said action. (6) That on the facts agreed the plaintiff is not entitled to recover.

The plaintiff also contended in his brief that it does not appear from the agreed facts that any real assets descended to the heirs of Armstrong.

Gilliam & Gilliam, for appellants. John L. Bridgers and G. M. T. Fountain, for appellee.

WALKER, J. (after stating the case). The argument in this case was confined to the first contention of the defendant, namely, that the plaintiff is not the assignee of the covenant contained in the deed from Armstrong to the Justices, as the covenant does not contain the word "assigns," and he cannot, therefore, maintain this action for a breach of the same. This important question was discussed with much learning and ability, but the other exceptions were not argued by counsel, though they were not abandoned, and it is, therefore, our duty to consider and decide them in connection with the exception just mentioned.

It is a mistake to suppose that the modern covenant for title is to be construed by the same rigid rule as the ancient warranty. The latter never existed in this state, and in England, by statute of 3 & 4 Wm. IV, the effect of warranty in tolling a right of entry was taken away, and the writs of *warrantia chartae*—when the warrantee was impleaded in an assize, and a voucher or vouchee to

warranty in a real action; by the help of which the party wishing to obtain the protection of the warranty might have defended himself or received lands of equal value in place of those he had lost—were abolished, so that the warranty of real estate, which had long been disused, has no practical operation; and, indeed, we are told by Blackstone that the covenant in modern practice entirely superseded it. 2 Sharswood's Blackstone, 303, and notes.

The defendant's counsel relied on the case of *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, but it will be seen by reference to Coke that in the passage quoted in that case, viz., "If a man doth warrant land to another without this word 'heirs,' his heirs shall not vouch; and, regularly, if he warrant land to a man and his heirs without naming assigns, his assignee shall not vouch," he referred to the ancient warranty, for in the very next passage he says, "But note, there is a diversity between a warranty that is a covenant real, which bindeth the party to yield land or tenements in recompense, and the covenant annexed to the land, which is to yield but damages, for that a covenant is in many cases extended further than the warranty." Coke, 384b. He further says that, even though the assignee is a stranger to the covenant—that is, not a privy in contract—he can, nevertheless, have an action on the covenant for a breach, because the covenant runs with the land. "In this case the assigns shall have an action of covenant, albeit they were not named, for that the remedy by covenant doth run with the land, to give damages to the party grieved, and is in a manner appurtenant to the land. See in *Spencer's Case*, before remembered, divers other diversities between warranties and covenants which yield but damages." Coke, 385a. And so it was resolved in *Spencer's Case* that: "If a man makes a feoffment by words sufficient to imply a warranty, the assign of the feoffee shall not vouch, but, if a man make a lease for years by words which imply a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant; for the lessee and his assignee hath the yearly profits of the land which shall grow by his labor and industry for an annual rent, and therefore it is reasonable when he hath applied his labor, and employed his cost upon the land and be evicted (whereby he loses all), that he shall take such benefit of the devise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee has bound him to. The principle does not depend upon tenure, but upon privy of estate. The question involved is whether the parties have sufficient mutual relation to the land which the covenant concerns, or, as it is commonly expressed in the cases, whether there is a privy of estate, which is considered necessary when there is no privy of contract. It will be seen that the necessary

relation is something different from the ancient privy of estate, and that in many cases the expression is used in a modern sense. \* \* \* The original and ancient warranty was a real covenant, the remedy on which was by voucher or writ of *warrantia chartæ*, and which bound the covenantor to replace the lands, in case of the eviction of the grantee, by others of equal value. The modern covenants of title, which are often spoken of as personal covenants because the action on them is a personal action, have taken the place of this. All of these are for the benefit of the land, and as loss suffered by breach of any usually, if not always, falls on the owner of the land, there would seem much practical advantage if the owner of the land, who suffers loss by a breach of any of them, could have his action against the covenantor. \* \* \* But, however it may be with covenants of *seisin* and against incumbrances (which are necessarily broken, if at all, when made), a covenant of warranty—that is, the covenant to warrant and defend—is always regarded as a prospective covenant, the benefit of which will run with the land to any successive grantee, and of which there will be no breach until eviction. \* \* \* This covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner during whose possession a breach occurs can sue any or all previous covenantors, even though the deed under which he himself claims has no covenant of warranty. \* \* \* In order that an assign shall be so far identified in law with the original covenantee, he must have the same estate—that is, the same status or inheritance—and thus the same *persona quod* the contract. The privy of estate which is thus required is privy of estate with the original covenantor; and this is the only privy of which there is anything said in the ancient books. In this case privy of estate is considered as something entirely different from tenure. Clearly, the presence of tenure is not necessary to enable covenants, either as to their benefits or their burdens, to run with the land." *Spencer's Case*, 1 Smith, L. C. (9th Ed.) 174, and notes.

It is said by Mr. Rawle, in his excellent work on Covenants, that: "In the earliest days of the law of which we have accurate knowledge, warranty, which, like homage, was a natural incident of tenure, passed with the transfer of the estate, and inured to the benefit of the owner for the time being. When, later, deeds were introduced, and the warranty was either express or was implied from the word of grant, 'dedi,' neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named. But while this was so as to warranty, it was not so as to certain covenants; and chiefly among these were the covenants for title, the benefits of which



passed with the land to the heir or the assign, though not expressly named. Just why or how this was so is nowhere stated in the old books with such precision as would preclude argument. In more modern times, amidst much differences of opinion, the doctrine has been variously supposed to depend upon privity of tenure, or privity of estate, upon the nature of the estate, upon the nature of the covenant, and upon the relation of the covenant to the estate; and the difficulty of the questions themselves is not less great than the practical importance of their results. But, whatever may have been the grounds on which the doctrine was originally based, it has been from the earliest times consistently held, both with regard to the ancient warranty and the modern covenants for title, that they run with the land to its owner for the time being; that is to say, the owner of the land is considered entitled to the benefit of all the warranties and covenants which the prior owners in the chain of title may have given." Rawle on Covenants (5th Ed.) p. 292, §§ 203, 204. He further says, quoting from Coke the passage above mentioned: "As respects the rights of the assignee, a distinction always existed between warranty and the covenants for title. Thus the warranty implied by the word 'dedi' could not be taken advantage of by the assignee of him who had received it, but, 'if a man make a lease for years by the word "concessit," or "demisi" (which implies a covenant), if the assignee of the lessee be evicted, he shall have a writ of covenant.' So with respect to the warranty and the covenant when expressed in words. 'Regularly,' says Coke, 'if a man warrant land to another and his heirs without naming assigns, his assignee shall not vouch,' but with respect to a covenant the rule is different, and the assignee could take advantage of it though not named." Rawle, *supra*, § 318.

We have the authority of Chancellor Kent for saying that the remedy by the ancient warranty never had any practical existence in this country, and the personal covenants have superseded the old warranty, the remedy upon them being by action of covenant against the grantor or his representatives to recover compensation in damages for the land lost by the eviction for failure of title. Upon eviction of the freeholder, no action of covenant lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of the value of his freehold. The covenant of warranty and the covenant of quiet enjoyment are not strictly personal, like the covenant of *seisin*, which is broken when the deed is delivered if the title is defective; but they are prospective in their operation, and an ouster or eviction is necessary to constitute a breach. These covenants are, therefore, in the nature of real covenants, and run with the land conveyed, and descend to the heirs, and vest in

assignees or purchasers. 4 Kent (13th Ed.) p. 471 (538) et seq.

It is said in *Minor's Institutes*: "Covenants which run with the land are those which affect the nature, quality, or value of the thing granted, where there is a privity of estate between the contracting parties—as a covenant to be answerable for the title. Covenants of this description pass with the land, and are binding on and in favor of the assignee, although assigns be not expressly named. The most important by far of covenants which run with the land are those which relate to the title." 2 *Minor, Inst.* p. 718. "Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions on them against the vendor and his real and personal representatives; and as to covenants relating to the land it seems that an assignee may maintain an action on the covenants, although the covenants were entered into with the original grantee and his heirs only." 2 *Sugden on Vendors* (9th Ed.) p. 89. "A covenant which has for its object something annexed to or inherent in or connected with real property—such as a covenant for quiet enjoyment, for repairs, for payment of rent—runs with the thing demised, and the assignee, though not named therein, is bound thereby, and entitled to the advantages of it." 1 *Leigh, Nisi Prius*, p. 620; *Sacheverell v. Froggatt*, 2 *Saunders, Rep.* 371; *Bally v. Wells*, 3 *Wils.* 25; *Tatem v. Chaplin*, 2 *H. Blk.* 133; 3 *Washburn on R. P.*, pp. 497-504. Certain covenants are appurtenant to the estate granted by the deed in which such covenants are contained, and bind the assignees of the covenantor, and vest in the assignees of the covenantee in the same manner as if they had personally made them. In England all covenants for title are considered as appurtenant to the land, and to run with it. But in this country the covenants for title considered as running with the land are those for quiet enjoyment, for further assurance, and of warranty. 2 *Devlin on Deeds*, § 940; *Myggatt v. Coe*, 142 *N. Y.* 86, 38 *N. E.* 870, 24 *L. R. A.* 850. In the case of *Bradford v. Long*, 4 *Bibb*, 225, the court says: "In this country the covenant of warranty is considered as only binding the party to give damages as a compensation for the loss of the land warranted; and such a covenant is in this respect more extensive than the ancient warranty, for the assign, though not named in the covenant, may have a remedy for breach of it;" citing *Coke*, §§ 386b and 385a, *supra*. "The covenant of general warranty is one that runs with the estate in reference to which it is made, and may be availed of by any one to whom the same may come by conveyance sufficient to transfer the title to the land." *Chandler v. Brown*, 59 *N. H.* 370. "It is of the nature of this covenant to partake of the estate in the land, and to pass with it by descent or purchase, so long as it remains unbroken."

*Ford v. Walsworth*, 19 Wend. 337. "It is a covenant incident to the estate, made for its security and protection, and beneficial to the person to whom the estate should come, but to no other." *White v. Whitney*, 3 Metc. (Mass.) 86.

The above authorities establish the proposition that the covenant of warranty is a covenant real, in the sense that it is annexed or incident to the estate conveyed by the deed, and runs with it inseparably for the benefit of all who may succeed to the title by purchase, and who sustain the relation toward the original covenantee of privies in estate, whether those who should succeed to the title as assignees who are expressly named as such in the covenant or not. *Lewis v. Cook*, 35 N. C. 193; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230.

In this state the warranty has been treated as a personal covenant annexed to the estate, and running with it as a safeguard and protection to the grantee and his heirs or the assignees or purchasers of the estate in question, and is not regarded strictly as a covenant real, within the meaning of the old law and the operation of the principles concerning real actions. A more liberal construction is given to it with the view of "meeting more fully the intention of the parties and the ends of justice." *Spruill v. Leary*, 35 N. C. 419; *Sutherland v. Stout*, 68 N. C. 449; *Markland v. Crump*, 18 N. C. 95, 27 Am. Dec. 230; *Blount v. Harvey*, 51 N. C. 189.

But in this case we think the covenant by a clear and necessary implication must inure to the benefit of the plaintiff as assignee, although the word "assigns" was not used in the warranty. The words "heirs and assigns" are used in the habendum, and the grantees are also named in the habendum, but not in the warranty. Can it be supposed that the grantor did not intend a covenant for the benefit of the grantee? Yet this must be true unless it is held that the covenant should be construed as made for the benefit of him who is named in the habendum. In *Herrin v. McEntyre*, 8 N. C. 410, this court held that, when the habendum in a deed is to a man and his heirs forever, he may recover for an eviction on a general warranty, though his name is not mentioned in the warranty, and though it is not stated in the clause of warranty to whose benefit it shall inure, for "it is the nature of a warranty to run with the estate, and," as Coke says, "though in the clause of the warranty it be not mentioned to whom, etc., yet shall it be intended to the feoffee." Coke, § 384. If it inure to the feoffee when not named in the warranty, why not as well, and with equal reason, to the heirs and assigns to whom the estate is limited in the habendum, when they are not named in the warranty?

We conclude, therefore, that the plaintiff can maintain this action for the breach of the covenant, unless barred of a recovery for some other reason set up in defense. The re-

conveyance of the land by mortgage from the Justices to Armstrong did not have the effect of extinguishing the covenant, but the mortgagee was entitled to the benefit of the covenant in the mortgage as an indemnity against the acts of the Justices in so far as necessary to protect the estate he held as security for the debt from any defect of title which might arise from said acts. There was no estoppel or rebutter, and when the land was sold the benefit of the original covenant passed to the purchaser. This subject is fully discussed in *Rawle on Covenants*, §§ 266, 217, and 218, and the cases are there collated. See, also, 3d Washburn on Real Property; *Resser v. Carney*, 52 Minn. 397, 54 N. W. 89; *Lewis v. Cook*, supra; *Markland v. Crump*, supra. "Where land is conveyed by deed of warranty, and the same premises at the same time are reconveyed in mortgage with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed." *Brown v. Staples*, 28 Me. 497, 38 Am. Dec. 504. Nor will they operate by way of rebutter to prevent circuity of action. *Haynes v. Stevens*, 11 N. H. 28; *Sumner v. Barnard*, 12 Metc. (Mass.) 459; *Hubbard v. Norton*, 10 Conn. 422.

The plaintiff's cause of action is not barred by the statute of limitations. It did not accrue until there was an eviction, which took place in 1901, and the statute does not commence to run until the right of action has accrued.

We are also of the opinion that it sufficiently appears in the case that there was an eviction by one holding a paramount title. It is admitted that Mrs. Parrish brought her action against the plaintiff and recovered judgment, and that by process issuing upon said judgment the plaintiff was evicted. Both parties claimed under John Armstrong, and Mrs. Parrish held a deed from Armstrong prior in date to the deed from him to the Justices, under which the plaintiff in this action claims. As the parties were estopped to deny the title of John Armstrong, the older deed of Mrs. Parrish was sufficient to show that she held the better title as between her and the plaintiff.

The next question in the case relates to the damages, and especially to the right of the plaintiff to have counsel fees which he paid out in defending the suit of Parrish v. Wiggins included in the recovery. The covenant of warranty is a contract of indemnity, and, while the usual rule is that the plaintiff recovers only the amount of the purchase money and interest, it is held by many courts outside of this state that he can recover also any amount he is compelled to pay as costs and expenses in defense of the title, so that he may be fully indemnified against any loss by reason of the breach of the covenant, provided always the cost and expenses so paid by him are reasonable. It seems to be

conceded in some of the cases that he is entitled to recover as a part of his compensation or damages the cost of defending the suit in which the judgment against him for the possession of the premises was given, and also that attorney's fees may be included when the warrantor has been notified of the suit, and requested or vouched to come in and defend the title; and it is held in the greater number of cases that he is entitled to recover attorney's fees whether the covenantor was notified or not. The reason for this rule, as gathered from the cases, would seem to be based upon the following considerations: If the covenantee defends the suit in good faith, and with proper diligence, what he does is for the benefit of the covenantor, and such expenses as are necessarily incurred by him are, therefore, inseparably connected with his claim of indemnity. It would be too much to require the grantee in a deed of warranty to decide at his peril on the validity of a title set up in opposition to that which the grantor undertook to convey. By the covenant the grantor agrees not only to warrant, but to defend, the title; and if the covenantee is compelled to make the defense, or suffer a judgment by default, he should recover in an action on the covenant, as it is a contract of indemnity, what he has thus been compelled to pay out. *Smith v. Compton*, 23 E. C. L. 106; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Rickert v. Snyder*, 9 Wend. 416; *Ryerson v. Chapman*, 66 Me. 557; *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767, 58 Am. St. Rep. 391; *Harding v. Larkin*, 41 Ill. 420. Whether these considerations should induce us to allow counsel fees as a part of the damages is a question we need not decide until it is actually presented in a case before us. While, as we have already said, it seems to be held in a majority of the cases that the covenantee may increase his damages by the amount of reasonable costs and counsel fees paid by him in defending the suit for the recovery of the land without giving notice to the covenantor, we prefer to adopt the rule which appears to us to be more in consonance with reason and right, and to recognize and enforce the just principle that a man should be heard before he is required to pay, or to have his day in court, or at least a chance to have it. We think that the covenantor was entitled to notice to come in and defend the suit, and that he should not be adjudged to pay any counsel fees without having had an opportunity to comply with his contract and defend the suit himself, or, if he desired to do so, to submit to a judgment, and save any additional costs and expenses, if he should discover that his title was so defective as to render useless further resistance to the suit. This view is well expressed in the case of *Chestnut v. Tyson*, 105 Ala. 163, 16 South. 726, 53 Am. St. Rep. 101: "If notice had been given to the appellants [covenantors], they might have thought proper to defend the suit, and em-

ploy their own counsel, or they might have come to the conclusion that the title of the plaintiff in the ejectment could not be successfully resisted, and they might, therefore, have determined not to incur useless expense in making a defense, and prefer to perform their covenants by paying to the appellees the amount of damages to which they might be entitled. Of course, this rule would not apply to such of the costs of the ejectment suit as would be adjudged against the defendant therein, though no defense was made, as upon default, for instance; and these, we apprehend, might be recovered on the covenant notwithstanding notice to the covenantor had not been given, since it is only the expense of defending the suit which he would have, upon notice, the election of incurring or not." *Crisfield v. Storr*, 36 Md. 129-151, 11 Am. Rep. 480. The rule we propose to adopt is the safest and best, as it is easy and convenient for the covenantor to give such notice, and, besides, important advantages might accrue to him from doing so. There is no hardship in the rule, as there would or might be if a contrary rule were laid down.

The appellant does not except to the allowance of the costs of the other suit in which plaintiff lost the land, but does except to the award of counsel fees as part of the damages, because no notice of the suit was given. As it does not appear in the case that any such notice was served on the defendant, this exception is sustained, and the judgment of the court below is modified accordingly.

The last objection to the plaintiff's right to recover upon the facts stated cannot be sustained. It is not necessary, in this case, that real assets should have descended to the heirs of Armstrong. They are not sued in the case for the breach; and in an action on the covenant, as distinguished from the ancient warranty, the plaintiff is not required to show that the heirs received real assets. The plaintiff is not trying to avail himself of the warranty by way of rebutter. The ordinary covenants for title are personal covenants in the sense that they are binding on the personal representative of the covenantor, and, though they run with the land, they are not strictly real covenants within the meaning of the ancient feudal law. *Carter v. Denman*, 28 N. J. Law, 260. This is like any other action on a covenant sounding in damages, and the judgment will be satisfied out of the assets of the covenantor, whether personal or real, in like manner as a recovery upon any other obligation. Under our present procedure the plaintiff merely recovers judgment for his damages, and he must obtain satisfaction, not by execution, but by a proceeding to have the assets of the intestate applied to its payment. There must be assets, it is true, before the plaintiff's claim can be satisfied, but the fact that no assets have descended to the heirs will not defeat the plaintiff's right to have a judgment against the administrator. If there are no personal or real assets, the plaintiff

will get nothing on his judgment. That is all.

There was error in the judgment of the court below as above indicated, and judgment will be entered in accordance with the principles stated in this opinion. Judgment modified and affirmed.

(132 N. C. 675)

**CAUDLE et al. v. LONG.**

(Supreme Court of North Carolina. May 19, 1903.)

**EJECTMENT—PROOF OF PLAINTIFF'S TITLE—SUFFICIENCY—DEFENDANT'S ACCEPTANCE OF DEED—ESTOPPEL—CONTENTS OF DEED—BURDEN OF PROOF.**

1. In ejectment plaintiffs introduced a deed from one L. to their father, dated September 21, 1860. They then introduced their mother's testimony that she and her husband moved on the land in 1860 or 1861; that he went to the war, and she moved with her children to her father's; and that her husband returned, and died at her father's house during the war. She also testified that one H. went into possession of the land soon after she moved off, and after him the defendant. She got crops off the land after her husband's death. *Held* that, as there was no evidence of possession for seven years after the deed from L., a nonsuit was properly allowed.

2. A defendant in ejectment is not estopped to dispute plaintiffs' title by having accepted a deed from their mother after their father's death, it not appearing that her dower interest was assigned.

3. The burden is on plaintiffs in ejectment, claiming that defendant is estopped to dispute their title by having accepted a deed from their mother after their father's death, to show that the deed covered their mother's dower interest.

Appeal from Superior Court, Union County; Robinson, Judge.

Action by Serena M. Caudle and others against John S. Long. Judgment for defendant entered on allowing a nonsuit, and plaintiffs appeal. Affirmed.

Adams & Jerome, for appellants. Rodwine & Stack and Armfield & Williams, for appellee.

**DOUGLAS, J.** This is an action in the nature of ejectment, in which the plaintiffs seek to recover lands admittedly in the possession of the defendant. The plaintiffs introduced in evidence a deed from Thomas B. Little to Solomon H. Mullis, dated September 21, 1860, and registered October 12, 1901. Plaintiffs then introduced Mrs. R. E. Phifer, who testified that Solomon H. Mullis "was my first husband, and we were married about 46 years ago. We moved to the land in 1860 or 1861, about the time my husband bought it. We made one or two crops. It was war times, and my husband went to the war, and I moved, with our two children, to my father's. My husband came from the war very sick, and died in my father's house during the war. We had two children—Hampton M. Mullis and Serena M. Mullis. Serena married—Caudle, her present husband, when she was only

17 years of age, and she has been married to him ever since. Hampton is now 45 years old. No crop was raised by us after my husband moved off. Jacob Helms went into possession of the land soon after we moved off, and after him the defendant, Long, went into possession, and has been in possession ever since. I do not know when they took possession. I got the crops off the land after my husband's death. After his death I married J. W. Phifer. After I married Phifer, the defendant, Long, came to me, and said he wanted to buy my interest in the land, and my husband and I made him a deed." Plaintiffs introduced deed dated January 8, 1873, and registered December 10, 1885. This was introduced to show that the defendant claimed under Solomon H. Mullis. The answer admits possession. Plaintiffs rested, and defendant moved to nonsuit, which was allowed.

As far back as *Taylor v. Gooch*, 48 N. C. 467, it was said that the rule that the plaintiff in ejectment must recover on the strength of his own title, either as being in itself good against all the world or good against the defendant by estoppel, was too well established in this state to be the subject of discussion. Hence we will look alone to the title of the plaintiffs. If they own the land, they must show it. If they do not own the land, it makes no difference to them who does own it, and the defendant may remain in possession until the true owner asserts his right. The plaintiff must show at least a *prima facie* title before any evidence is required from the defendant. In *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142, the different methods by which the plaintiff may show such *prima facie* title are thus stated by the court: "(1) He may offer a connected chain of title or a grant direct from the state to himself. (2) Without exhibiting any grant from the state, he may show open, notorious, continuous, adverse, and unequivocal possession of the land in controversy under color of title to himself and those under whom he claims for 21 years before the action was brought. (3) He may show title out of the state by offering a grant to a stranger without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession under color of title in himself and those under whom he claims for seven years before the action was brought. (4) He may show, as against the state, possession under known and visible boundaries for 30 years, or as against individuals for 20 years, before the action was brought. (5) He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. (6) He may connect the defendant with a common source of title, and show in himself a better title from that source." In support of these propositions, numerous authorities were cited by the learned justice writing the opinion, and we are not aware that their correctness has since been questioned. In the case at bar the only evidence of title in

the plaintiffs' ancestor Mullis, is the deed from Little, dated September 21, 1860, and there is no evidence of possession for the seven years necessary to ripen a title. Hence no prima facie case has been established.

The plaintiffs further contend that, as the defendant took a deed for the land from Mrs. Phifer, the widow of their father, Mullis, he is estopped to deny Mullis' title. This would be so if Mrs. Phifer had been one of the heirs or devisees of Mullis, but she had no interest in the land beyond her right of dower, which does not appear to have been assigned. Her deed to the defendant is not in the record, and hence we cannot tell what it purports to convey. It is argued that it conveyed only her right of dower, but, as that was a fact to be proved by the plaintiffs, we cannot assume its truth. If the defendant had held under a deed for one of the heirs or from the widow conveying her right of dower, he might hold as tenant in common with the heirs; but no such facts appear, nor is there proof tending to establish them. The mere existence of a deed is no proof of its contents. Where there is no evidence tending to establish a fact essential to the plaintiff's recovery, as in the case at bar, a motion for nonsuit is properly sustained. *Wittkowski v. Wasson*, 71 N. C. 451; *Spruill v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39.

The judgment of the court below is affirmed.

(132 N. C. 690)

DOGGETT et al. v. HARDIN et al.

(Supreme Court of North Carolina. May 19, 1903.)

EJECTMENT—DEFENDANT'S POSSESSION—NECESSITY.

1. Neither at common law nor under the Code will ejectment lie against a defendant who is not in possession.

Appeal from Superior Court, Rutherford County; E. B. Jones, Judge.

Action by E. H. Doggett and others against P. H. Hardin and others. Judgment for defendants entered on allowing a nonsuit, and plaintiffs appeal. Affirmed.

Eaves & Rucker, for appellants. McBrayer & Justice, for appellees.

DOUGLAS, J. This is an action apparently for the recovery of land, with damages resulting from its unlawful detention, although the exact nature of the relief demanded, and, indeed, of the plaintiff's claim, does not clearly appear in the pleadings. However, we will treat it as an action in the nature of ejectment, which in its origin and essential features is a possessory action. It is true this form of action has been long since adopted as the usual method of determining the title to land, but from its very nature it will not lie against one not in pos-

session. This is equally true whether the action is under the Code or at common law. Viewed simply as an action under the Code for the recovery of real property, it is evident that the land cannot be recovered from one who is neither in actual nor constructive possession. As there was no evidence tending to show that the defendants were in possession at the time of the bringing of this action, the motion for nonsuit was properly allowed.

Affirmed.

(132 N. C. 686)

FISHER v. OWENS et al.

(Supreme Court of North Carolina. May 19, 1903.)

DEED—ABSENCE OF SEAL—REFORMATION—NECESSITY OF PLEADING.

1. A sheriff's deed, relied on by plaintiff in trespass, but not effectual for want of a seal, cannot be reformed on the trial, where no equity therefor has been set up in the complaint.

Appeal from Superior Court, Transylvania County; Moore, Judge.

Action by W. O. Fisher against William Owens and others. From a judgment for defendants, entered on sustaining a motion to dismiss, plaintiff appeals. Affirmed.

H. G. Ewart, for appellant.

WALKER, J. This action was brought by the plaintiff to recover damages for cutting timber and removing the same from the land described in the complaint, which the plaintiff alleged belonged to him, and also to enjoin defendants from cutting and removing any more timber from the said lands. In order to show title to the premises, plaintiff introduced a grant from the state to Jonathan Zachary, issued in 1852, a deed from Jonathan Zachary to J. M. Zachary, and a deed from J. M. Zachary to Thomas Steen. The grant and the two deeds contained the same description. Plaintiff then introduced in evidence a paper writing purporting to be a deed from the sheriff of Transylvania county to himself, dated May 8, 1895, but acknowledged and recorded on the 30th day of November, 1901. The plaintiff alleged that this deed covered the land in dispute. There was no seal affixed to the name of the sheriff. The defendants objected to the introduction of this deed, but the court overruled the objection, and stated that the deed would be admitted "for what it is worth," and held that it was not sufficient to vest the title in the plaintiff, even if it covered the land. The plaintiff thereupon proposed to prove by the sheriff that the seal was omitted by inadvertence and mistake, and that he was willing then and there to affix the seal. The sheriff's term of office had expired, but he was collecting taxes in arrears under a special act of the General Assembly. The defendants objected to the evidence proposed to be introduced by the plaintiff, and also

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 65.

the affixing the seal of the sheriff to the deed; and, the objection having been sustained, the plaintiff excepted. The plaintiff introduced evidence for the purpose of showing that he had been in adverse possession of the land, which was called the "Steen Tract," but we think that, upon a careful examination of the evidence, the plaintiff failed to show any sufficient possession of the land in dispute to give him a standing in court as against the defendants. Even if the sheriff's deed could be regarded as color of title, plaintiff did not introduce any evidence of adverse possession under it. The paper called the "sheriff's deed" was dated May 8, 1895, and this action was commenced on the 7th day of June, 1901, or six years and one month after the said paper writing. So that plaintiff not only failed to show adverse possession, but, if he had shown that he had been in adverse possession of the land, it could not have continued for a sufficient length of time to have ripened his color of title into a good and perfect title.

Plaintiff assigns as error the refusal of the court to admit evidence that the plaintiff was in possession of the Steen tract, and the refusal of the court to admit the evidence of T. B. Reed and the boundary survey made by him. We have searched the record, and can find no basis for these assignments of error. It appears that the evidence of T. B. Reed was admitted. It is fully set forth in the case, and, so far as appears, there was no objection to it, and no ruling upon it, or any part of it, adverse to the plaintiff, except as to its sufficiency to show adverse possession. It seems that the court admitted all of the testimony offered by the plaintiff, except that which is hereinafter mentioned, and reserved its decision as to the legal effect or sufficiency of the evidence to establish plaintiff's case.

In passing upon the questions raised by the exceptions and assignments of error, we must necessarily be confined to what appears in the case, and, as there is nothing that we have been able to find which indicates that any such rulings as those set out in the assignments of error now being considered were made by the court, these exceptions must be overruled.

The decision of the case, therefore, must turn upon the correctness of the ruling of the court in regard to the paper writing signed by the sheriff. This paper writing cannot operate as a deed, because it had no seal; a seal being essential to its validity. This very question has been considered and decided by this court with reference to a paper writing in all respects like the one before us. *Patterson v. Gallihier*, 122 N. C. 511, 29 S. E. 773; *Strain v. Fitzgerald*, 128 N. C. 396, 38 S. E. 929. The counsel for the plaintiff, conceding this to be the law, contends that the seal was omitted by inadvertence and mistake, and that the sheriff should have been allowed to affix his seal to the paper nunc pro tunc. A sufficient answer to this contention is that no

such equity is set up in the complaint, and it cannot be considered without being specially pleaded in some way. *Patterson v. Gallihier*, supra. In one of the cases cited by the learned counsel for the plaintiff, it is said: "It has been settled, upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of equity, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief, accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law." *Inhabitants of Bernards Tp. v. Stebbins*, 109 U. S. 341, 8 Sup. Ct. 252, 27 L. Ed. 956. It will be seen, therefore, that if the plaintiff has any equity for the reformation of the deed, which the court will enforce under the facts and circumstances of this case (*Patterson v. Gallihier*, supra), he must obtain relief by a direct proceeding, and not in this collateral way. If the court had the power to require the seal to be affixed in this case, the exercise of the power was within its sound discretion. If the deed had been reformed by affixing the seal, under a judgment of the court in a case properly constituted for that purpose, and it related back to the day of its date, instead of taking effect at the time it became a perfect deed, the plaintiff would still be required to locate the land, and show that the timber had been cut from a part of it, which he has failed to do in this case. The evidence in this respect was too indefinite and uncertain to be submitted to the jury. *Hulse v. Brantley*, 110 N. C. 134, 14 S. E. 510; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251.

In no view of the case, therefore, was the plaintiff entitled to recover, and the court was right in sustaining the motion to dismiss. No error.

(123 N. C. 678)

#### MORROW et al. v. COLE et al.

(Supreme Court of North Carolina. May 19, 1903.)

**ADMINISTRATORS—SALE OF REALTY—FRAUD—SETTING ASIDE—INNOCENT PURCHASER—NOTICE—SUBMISSION OF ISSUE—INSTRUCTIONS—DAMAGE TO FREEHOLD—ADMINISTRATOR'S LIABILITY.**

1. In an action by an heir to set aside for fraud the administrator's sale of realty, a purchaser from the administrator's grantee requested the submission of an issue whether, if the sale was fraudulent, he "took his deed with knowledge of the same." The court refused this, and submitted an issue, numbered 4, as to whether the purchaser took title from the grantee "with knowledge of the rights of the plaintiff in said land." The record of the sale was regular on its face. *Held* error, as mere knowledge that plaintiff claimed as an

heir was not enough to put the purchaser on inquiry as to fraud.

2. In an instruction on this fourth issue, the court charged that if plaintiff's evidence had greater weight on the jury's mind, and led them to conclude that the purchaser had knowledge of plaintiff's rights, the issue should be answered "yes," otherwise "no." *Held* error, as this did not explain what constituted the rights of plaintiff.

3. At plaintiff's request the court gave her ninth special prayer, that where a party has an opposing claim he is put on inquiry, and presumed to have notice of everything which inquiry would disclose; and, if the jury should find that the purchaser had been informed that plaintiff claimed the land as heir, it was his duty to make full inquiry, and he would be presumed to have notice of everything which he might have discovered. *Held*, that the instruction on the fourth issue, taken in connection with this one, was error, as the purchaser might have come to the conclusion that plaintiff's rights had been disposed of by the administrator's sale.

4. The instruction on the fourth issue was also erroneous because assuming, as matter of law, that notice of plaintiff's rights would have resulted in a knowledge of fraud in the sale.

5. At plaintiff's request the court gave her third special prayer, that if the administrator instituted the proceedings for the sale for the purpose of divesting plaintiff of her title, and not for the bona fide purpose of creating assets with which to pay valid debts, then the proceeding and sale were fraudulent and void. *Held* that this, in connection with the ninth special prayer, was erroneous, as charging that the purchaser from the administrator's grantee was guilty of fraud and conspiracy on account of the administrator's misconduct.

6. The act of an administrator in procuring a witness in support of a claim against the estate, and in not making any defense thereto, will not necessarily render proceedings for a sale of land to pay the claim void, not being fraudulent as matter of law.

7. A tenant by the curtesy conveyed the fee to a purchaser, who later secured a deed under a sale by the wife's administrator which was fraudulent as to an heir. After this the purchaser committed injuries to the freehold. *Held* that, on setting aside the administrator's sale, it was error to enter judgment against the administrator for the amount of such injuries, he never having been in possession of the property, and it not appearing that he aided in or abetted the injuries complained of.

Appeal from Superior Court, Henderson County; Council, Judge.

Action to set aside for fraud an administrator's sale of realty, and to recover the same, brought by J. O. Morrow and another against G. H. P. Cole and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Issues were submitted to the jury as follows:

"(1) Was the sale of land described procured by fraud, as alleged?"

"(3) At the time of such conveyances, did the defendant Cole have full knowledge of the rights of Mary R. Morrow in the land so conveyed?"

"(4) Did P. H. Guice, one of the defendants in this action, take title to the land in controversy from Geo. H. P. Cole, with notice of the rights of the plaintiff Mary R. Morrow in said land?"

The court gave the following special prayers asked by plaintiff:

"(3) That if the jury shall find from the evidence that the defendant T. J. Rickman instituted the said proceedings in the superior court of Henderson county, for the sale of the land in controversy, for the purpose and with the view of divesting the plaintiff Mary R. Morrow of the title to said land, and transferring the same to J. A. Long, as claimant thereof, and Geo. H. P. Cole, as mortgagee of said Long, and not for the bona fide purpose of creating assets with which to pay the valid debts against the intestate, Mary R. Dunlap, and that said Rickman did obtain an order in said proceedings for the sale of said land, and sold the same pursuant thereto, and conveyed the said land to J. A. Long pursuant to said sale, then said proceeding and sale and conveyance were fraudulent and void as to the plaintiff Mary R. Morrow, and the jury should answer the first issue in the affirmative."

"(6) That if the jury shall find from the evidence that after it had been agreed between the said T. J. Rickman, as administrator of the estate of Mary R. Dunlap, deceased, and W. B. Reese, as administrator of Jas. H. Dunlap, deceased, to submit the question of indebtedness of the said Mary R. Dunlap, deceased, to the said Jas. H. Dunlap, deceased, said T. J. Rickman sought J. R. Byers and requested said Byers to go before the arbitrators as a witness in favor of the said W. B. Reese, as administrator aforesaid, and shall also find that said T. J. Rickman did not make any defense before said arbitrators, or offer any evidence, then such conduct on the part of said T. J. Rickman was a gross violation of his duty as administrator aforesaid, and rendered said proceeding instituted in the superior court of Henderson county for the sale of said land fraudulent and void as to the plaintiff, Mary R. Morrow, and they should answer the first issue in the affirmative."

"(9) That where a party has an opposing claim he is put upon inquiry, and is presumed to have notice of everything which a proper inquiry would have enabled him to discover. If the jury shall find from the evidence that Geo. H. P. Cole or P. H. Guice had been informed that the plaintiff Mary R. Morrow claimed the land in controversy as heir at law of her mother, Mary R. Dunlap, or that said land descended to said plaintiff on the death of her mother, then it was the duty of each of them to make full inquiry and investigation as to the validity of said claim, and they are presumed to have notice of everything which such an inquiry and investigation would have enabled them to discover; and if the jury shall find from evidence that the said Geo. H. P. Cole had received information of the claim of said plaintiff, they should answer the third issue in the affirmative. And if they find from the evidence P. H. Guice received such information, then

they should answer the fourth issue in the affirmative."

Merrimon & Merrimon, for appellants. Julius C. Martin, Geo. A. Shuford, and W. J. Peele, for appellees.

MONTGOMERY, J. The plaintiff's mother, at the time of her death in 1877, had title to the tract of land which is the subject of this action, and that title descended to the plaintiff at the mother's death, she being her only heir at law. The father of the plaintiff, who is now dead, became tenant by the curtesy upon the death of his wife in 1877. He afterwards married again, and he, with his wife, conveyed the land in fee simple, with warranty, to the defendant Long, who in exchange conveyed to the father of the plaintiff another tract of land. Long mortgaged the tract of land which he acquired by exchange from the father of the plaintiff to the defendant Cole, and when the debt fell due Cole demanded his money, and Long procured the services of Rickman to raise money on the land to pay the Cole debt. In the investigation of the title, Rickman found that Long got no title in the exchange with the plaintiff's father, and so informed Long and Cole. Rickman said he could perfect the title. The plaintiff alleged in her complaint that Rickman, Long, and Cole conspired to cheat and defraud the plaintiff, who was then Mary R. Dunlap, an infant under 21 years, and a resident of the state of South Carolina, out of her land, with the view of perfecting the title in Long and Cole, by causing the land to be sold under a proceeding to be instituted in the superior court of Henderson county, ostensibly for the purpose of creating assets with which to pay the debts of the plaintiff's mother, although she owed no debts whatever, which all the parties knew. The undisputed evidence shows that Rickman was appointed administrator of Mary R. Dunlap, the plaintiff's mother; that he immediately filed his petition in the superior court of Henderson county, in which he alleged that Mary R. Dunlap died seised of the land, leaving as her only heir at law the plaintiff, Mary R. Morrow, then Mary R. Dunlap, an infant about 12 years of age; that Mary Dunlap, the deceased, owed debts to the amount of about \$1,000, and that she left no personal estate whatever. The petitioner asked that service of summons be had upon said nonresident defendant by publication, as required by law. A summons was issued, and returned by the sheriff of Henderson county with the indorsement that the defendant (the plaintiff here) was not to be found in that county. Afterwards H. C. Johnson, a cousin of Rickman, was appointed guardian ad litem of the defendant in that proceeding, the plaintiff in this, and Rickman wrote the answer for the said guardian ad litem, in which he admitted all the allegations of the complaint. Johnson testified

that, relying upon representations made by Rickman and Long, he signed the answer. An order of sale was procured under which Rickman sold the land, and Long bid it in at \$500. The sale was reported and confirmed, and Rickman executed a deed to Long on November 29, 1890, the consideration recited being \$500. No cash was paid by Long. He simply passed his receipt to Rickman for the \$500, "to be credited for that amount on my claim against said estate, this being the amount of my bid for said land." Four months afterwards Cole foreclosed his mortgage against Long, and at the sale Maddrey, an employé of Cole, bid off the property, Cole as mortgagee executing a deed to said Maddrey. Maddrey afterwards re-conveyed to Cole. No money was paid by Maddrey. Afterwards Long conveyed the tract of land to Cole for the nominal consideration of \$25. On March 1, 1896, following, Cole executed a deed for said land to the defendant Guice. The complaint contains an allegation that Guice paid only a nominal consideration for the land, and took the deed with full knowledge of the plaintiff's right in said land, and of the said fraudulent proceeding instituted and conducted by the said T. J. Rickman in the superior court of the said county of Henderson for the purpose of bringing said land into sale and of depriving the plaintiff, Mary R. Morrow, of her said property. The plaintiff further alleges that the proceeding instituted by Rickman for the sale of the land, and the sale of the land thereunder, and the deed made by Rickman to Long, were fraudulent and void, and did not divest the title of the plaintiff in said land, but that she is still seised of the same, and entitled to the possession thereof against Guice, who is in the unlawful possession of the same. There was evidence against Rickman, Long, and Cole going to show the fraud alleged in the complaint, and the jury found in the affirmative the first issue—"Was the sale of the land described in the complaint procured by fraud as alleged?"

The defendant Guice was entitled to have an issue submitted to the jury, which he tendered, but it was refused. That issue was in these words: "If the sale was fraudulent on the part of Long, Cole, and Rickman, did Guice take his deed with knowledge of the same?" The word "notice" would have been a more appropriate word than "knowledge," and may be substituted for the word "knowledge" in the issue to be submitted on the next trial. Instead of submitting the above issue, his honor submitted one in the following words: "Did P. H. Guice, one of the defendants in this action, take title to the land in controversy from George H. P. Cole with notice of the rights of the plaintiff, Mary R. Morrow, in said land?" The jury answered that issue in the affirmative. It seems to us that the jury might have well understood that the sense of the issue which was sub-



mitted was that, if Guice had heard that the plaintiff was her mother's sole heir and had inherited the land, that would be sufficient to require him to investigate the proceedings in the superior court instituted by Rickman for a sale of the land, beyond looking to see whether the court had jurisdiction of the subject-matter of the suit and of the parties and the decree ordering the sale, before he could become a bona fide purchaser for value without notice. What if he did know that the plaintiff acquired her land through descent from her mother? The proceedings in the superior court instituted by Rickman were regular in all respects, and their inspection was a full protection to him, unless he knew or had notice of matters which if examined into would reasonably lead him to a knowledge of the fraud perpetrated by Rickman, Long, and Cole by means of the special proceeding referred to. The complaint, as we have said, alleged that he had knowledge of the fraud in the special proceeding. There was no evidence that he had any knowledge of the fraudulent character of these proceedings.

The court erred, too, in charging the jury on the issue which was submitted as to Guice's conduct. His honor said: "If the plaintiff's evidence has greater weight upon your minds, and leads you to the conclusion that he, Guice, did have knowledge and bought with knowledge of the rights of Mary R. Morrow, you should answer 'yes,' otherwise 'no.'" That did not explain to the jury what would constitute the rights of Mary R. Morrow, and, because taken in connection with the ninth special prayer asked by the plaintiff, he might have come to the conclusion, as he had a right to do, that the claims and rights of the plaintiff had been disposed of by the sale by the defendant Rickman, the administrator; and, further, because it assumes as matter of law that notice of her claims and rights would have resulted in a knowledge of a fraud charged in the complaint; whereas it should have been left to the jury as a question of fact, upon the evidence, whether or not Guice made proper investigation on account of any notice which he might have had; and it should also have been left to the jury to say whether or not as a matter of fact the notice, if any, which the defendant Guice had of the plaintiff's claim, was notice to him of the fraud of Rickman.

As we have said, there was evidence of the fraudulent conduct of Long and Rickman and Cole in the special proceeding under which the land was sold. But, in the giving of the third and ninth special prayers asked by the plaintiff, the court charged the jury, in effect, that Cole and Guice would both be guilty of fraud and conspiracy on account of the action and misconduct on the part of Rickman. The jury, of course, were authorized to find Cole guilty of fraud for his knowledge of

the fraudulent character of the proceedings in the sale of the land; but they could not do so because of anything Rickman did without their knowledge or consent. The giving of the sixth prayer requested by the plaintiff was erroneous as to Rickman. The matters therein set forth were not fraudulent as a conclusion of law, as his honor instructed the jury, but were matters which ought to have been left to the jury for them to say what the intent of Rickman was under the evidence. After the deed from Rickman, administrator, to Long, Long committed certain injuries to the freehold which greatly impaired the value of the property. Upon the verdict that the land had been damaged by Long, since the sale to him by Rickman, to the amount of \$250, his honor entered up judgment of his own motion against Rickman for that amount. There was no allegation in the complaint that Rickman was responsible for this damage, nor was there any evidence in the case that the damage to the property was the result of, or connected with, the fraud of Rickman and others. Long had been in possession of the property for a number of years under a deed from the plaintiff's father. Rickman had never been in possession of the land, and he had had no connection with it, but only with the title. There was no evidence that he aided or abetted Long in committing waste upon the property. He was only charged by the plaintiff with a fraudulent conspiracy with others to sell and pass title to the property to perfect the title of Long and Cole.

New trial.

DOUGLAS, J. (concurring in result only). I concur in the granting generally of a new trial with some reluctance. I do not think that Rickman is responsible for the damages awarded in this action, because the plaintiff has not lost title to her land. If she had lost her land as a result of Rickman's misconduct, then I think Rickman would be liable.

On the other hand, I do not see how the jury could have been misled by the form of the fourth issue, which was as follows: "Did P. H. Guice, one of the defendants in this action, take title to the land in controversy from G. H. P. Cole with notice of the rights of the plaintiff, Mary R. Morrow, in said land?" The court seems to think that the jury might not know what rights were referred to. It means, of course, the rights which the plaintiff is asserting in this action. There is nothing else to which it could refer. If the plaintiff had any rights in the land at the time Guice bought, and if he then had any notice, either actual or constructive, of such rights, he bought subject thereto. The opinion of the court says that Guice was entitled to the issue he tendered, as follows: "If the sale was fraudulent on the part of Long, Cole, and Rickman, did Guice take his deed with knowledge of the same?" To my

mind this is clearly error. It was not necessary that Gulce should know of his own knowledge that the proceedings were fraudulent. It would be enough if he had sufficient information to put him upon notice which would hold him liable, not only for such knowledge as he already possessed, but also for such further knowledge as he might have acquired by proper investigation. It is true the court says that "the word 'notice' would have been a more appropriate word than 'knowledge,'" but these words have different meanings, and "notice" was the only word that could properly have been used. As the issue tendered by the defendant was erroneous per se, there can be no error in its refusal.

The opinion says that Gulce "might have come to the conclusion, as he had a right to do, that the claims and rights of the plaintiff had been disposed of by the sale of the defendant Rickman, administrator." This cannot be so. The illegality of that proceeding is the basis of this action, and, if Gulce had the legal right to come to any such conclusion without further investigation, it would seem unnecessary to submit any issue to the jury as to him.

There is some important evidence that seems to have been overlooked by the court in its opinion. There is not only testimony tending to prove that Gulce knew that the land descended to the plaintiff as sole heir at law of her mother, but he himself testifies that he was told by Dr. Cole, from whom he bought, that "there had been some trouble about the title," but that he made no investigation whatever, as Dr. Cole told him that it was all right, and he (Cole) would stand between him and all danger. Knowing that the plaintiff had inherited the land, it would seem that he might have asked her if she still made any claim to it.

WALKER, J., concurs in the opinion of DOUGLAS, J.

(66 S. C. 57)

#### GARRIS v. THOMAS.

(Supreme Court of South Carolina. April 16, 1903.)

#### USURY—COLLECTION OF PENALTY—ABATEMENT OF RIGHT.

1. Acts 1877-78, p. 325, relating to usury, but nowhere empowering an executor, administrator, or heirs of the decedent to introduce the claim of their testator or intestate, gives no right to collect the penalty for collecting usurious interest to the personal representative, heir at law, or assign of a decedent.

Appeal from Common Pleas Circuit Court of Colleton County; Benet and Klugh, Judges.

Action by O. W. Garriss, executor of Wiley Smoak, against O. W. H. Thomas. From circuit decree, plaintiff appeals. Affirmed.

Howell & Gruber, for appellant. Griffin & Padgett, for respondent.

POPE, C. J. This action was instituted for two purposes, viz.: (1) That certain papers executed by Wiley Smoak in his lifetime, namely, a deed of conveyance to one F. W. Fairley of 105 acres of land, together with a lease of said land by F. W. Fairley to said Wiley Smoak, should be declared a mortgage of said lands by Wiley Smoak to said F. W. Fairley to secure the loan of the sum of \$203 by the latter to the former. The dates were all contemporaneous, and occurred on the 15th December, 1881. (2) That the assignment of said lease and a quitclaim deed of conveyance of said 105 acres by the executors, etc., of F. W. Fairley, deceased, should be delivered up for cancellation as a cloud upon the title to said lands. After testimony was taken before the master for Colleton county, in this state, the cause came on to be heard by Judge Benet, who by his decree adjudged that the papers which were made on the 15th December, 1881, by and between Wiley Smoak and F. W. Fairley, should be held as a mortgage to secure the payment of \$203, which same was loaned on 15th December, 1881, by said Fairley to said Smoak. To the decree of Judge Benet, so far as it adjudged the papers executed on 15th December, 1881, to be a mortgage only to secure the loan of \$203, there was no appeal. This question is therefore eliminated from this case. But there was left another and more serious question, which forms the subject-matter upon which there is still a contention between parties to this action involved in the present appeal. We should have stated that Wiley Smoak departed this life testate some time in the year 1887, and that F. W. Fairley died about 1887. The plaintiff in this action is the executor of the said Smoak. In about the year 1895 the executors of F. W. Fairley transferred for value the said lease and executed a quitclaim deed of conveyance for said 105 acres of land to the said defendant, O. W. H. Thomas, who is the defendant in this action. The lease shows that F. W. Fairley rented the lands to Smoak for \$24.36 for each year, and that on the lease F. W. Fairley indorsed thereon receipts of said \$24.36 each year as so much interest for each year. The executor of Wiley Smoak also made two payments thereon. The plaintiff set up in his complaint that it appeared that his testator had paid interest on said loan of \$203 at the rate of 12 per cent. per annum, which he claimed was usurious, and, if said payments of interest were held to be usurious, the debt of \$203 was wholly paid. Judge Benet in his decree held that the plaintiff, C. W. Garriss, as executor, could not plead usury as to the payments of interest by his testator, Wiley Smoak, which were received by Fairley in his lifetime; that the plea of usury was a privilege personal to the debtor himself. He therefore recommitted the case to the master to calculate the amount due, if any. The report of the master came on to be heard on

exceptions thereto by his honor, Judge Klugh, who decreed that the plaintiff testator's estate was due the defendant in the sum of \$138.38, with interest thereon from the 20th day of March, 1902.

From the decrees of Judges Benet and Klugh the plaintiff now appeals on nine grounds; but, as the appellant in his able argument admits that these nine grounds of appeal practically raise but two questions, we will not reproduce in this opinion the text of such nine grounds of appeal. We will state the two questions in the language of the appellant: "(1) Was Judge Benet in error in deciding that under the circumstances in the case Smoak's executor could not avail himself of the plea of usury, and in refusing to hold that the contract between the plaintiff's testator, Wiley Smoak, and F. W. Fahey, being for interest at the usurious rate of 12 per centum per annum, was null and void, and that all payments made by the said Wiley Smoak to the said Fahey should have been credited upon the principal sum of \$203? (2) That the debt having matured on December 15, 1885, and there being nothing in the contract fixing the rate at 12 per cent. per annum after maturity, Judge Klugh was in error in sustaining the master in calculating the interest at twelve per cent. from the date of maturity, December 15, 1885, to the date of the last payment on interest, December 15, 1892."

We will now examine these questions in their order. It is admitted on all hands that the act of our General Assembly approved 10th February, 1898 (22 St. at Large, pp. 749, 750), has no application to this contract, because it is expressly provided in said act "that this act shall not apply to contracts made before it goes into effect." The contract here sued upon was made 15th December, 1881. But the appellant urgently insists that the act of the General Assembly passed in the year 1877-78, at page 325, when properly construed, forces the conclusion that the plaintiff (appellant), though a party here in his representative character, can maintain this charge of usury as against his testator. It must be borne in mind that this interest, if the same was usurious, is an executed, and not an executory, claim. The language of the act of 1877-78 nowhere by its terms empowers an executor, administrator, or the heirs at law or assigns of a deceased person to introduce the claim of their testator or intestate. By several decisions of this court it has been held that it was the privilege of a debtor himself to charge usury; but in every one of the decisions it has been held that the provisions of the law which denounce usury make the punishment thereof a penalty, which, being a penalty or forfeiture, is personal to the debtor and lies with him; that it does not survive to his assignee or personal representative. *Allen v. Petty*, 58 S. C. 240, 36 S. E. 586; *Butler v. Butler*, 62 S. C. 165, 40

S. E. 138; *Bird v. Kendall*, 62 S. C. 178, 40 S. E. 142. In *Butler v. Butler*, supra, at the earnest request of the appellant, this court investigated anew the questions decided in *Allen v. Petty*, supra, and Chief Justice McIver, as the organ of the court, announced that *Allen v. Petty*, supra, must stand as properly deciding such questions. So, we must overrule this position of appellant.

2. We cannot sustain this exception. The charge of usury relating to payments made to the testator, Fahey, in his lifetime, could have been urged by Smoak in his lifetime, but the right does not survive to this personal representative, the plaintiff here. It was an executed payment in testator's lifetime. No objection was raised by him thereto. The right to object does not survive to the personal representative. The passage of the act of 1898, supra, is a virtual admission by the General Assembly that the law so stood prior to the date of that act. We cannot sustain the appellant here.

It is the judgment of this court that the judgment of the circuit court be, and the same is hereby, affirmed.

(68 S. C. 47)

#### WATSON v. SOUTHERN RY.

(Supreme Court of South Carolina. April 8, 1903.)

#### RAILROADS—CHILD ON TRACK—IMPUTED NEGLIGENCE.

1. Where a child seven years old is killed on a railroad track, there being no evidence as to his intelligence or capacity, the prima facie presumption is that he was incapable of personal negligence, and contributory negligence cannot be imputed to him, or to his parent or custodian, so as to prevent a recovery in an action by his administrator.

Appeal from Common Pleas Circuit Court of Abbeville County.

Action by Mose Watson, administrator of Eugene Watson, against the Southern Railway. From judgment for defendant, plaintiff appeals. Reversed.

J. Fraser Lyon, M. P. De Bruhl, and Frank B. Gary, for appellant. T. P. Cothran, for respondent.

JONES, J. This action was an action under sections 2851, 2852, Code 1902, for damages for death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant company. The defenses were (1) general denial; (2) that the injury was solely caused by the negligence of the deceased; (3) contributory negligence. The jury rendered a verdict in favor of the defendant. This appeal is from the judgment entered thereon, upon numerous exceptions to the instructions given to the jury.

All the exceptions, except those raising the question to be hereafter noticed, are overruled. Some of them are of no practical importance, some are based upon a misconception

tion of the requests and charge, and none of them show a case of reversible error, when the whole charge is considered.

The vital question in the case is presented by the fourth specification in the ninth exception and by the fifteenth exception, which complain of the instructions as to imputed negligence. A brief statement of the facts here is important to a correct understanding of the question. The evidence in behalf of plaintiff was to the effect that the plaintiff's intestate, Eugene Watson, was a child of plaintiff, about seven or eight years old; that on the 15th day of January, 1900, he was in company with an older sister and brother, whose ages are not given, and was attempting to cross a high trestle on defendant's railway, near the city of Abbeville, when defendant's train ran over him and killed him. The trestle was about 100 feet long. The older sister was with another person, and ahead of the deceased and his brother, who were crossing together, and she got safely over the trestle when she heard the coming train. She warned her brothers of the coming train, and they, being about halfway across the trestle, turned back. The deceased fell twice, and was helped up by his brother, and the third time fell, at which moment the train was very near, and the brother jumped from the trestle and escaped, but the deceased was run over and killed. There was some evidence in behalf of plaintiff tending to show that, if defendant kept a reasonable lookout, the peril of the deceased child must have been discovered in time to stop the train and avoid the killing. The evidence in behalf of defendant was to the effect that, as soon as defendant's servants discovered the presence of the children upon the trestle, they did everything that was possible to avert the collision.

The jury were instructed, in accordance with defendant's request, as follows: "If the jury believe from the evidence that the deceased at the time of the accident, as alleged, was in the company and care and custody of others of sufficient age and intelligence to appreciate the danger of trespassing upon the railroad track, and was thereby guilty of contributory negligence, then such contributory negligence can be imputed to the deceased, and contributory negligence to an extent which is one of the proximate causes of the accident will bar a recovery." The court further charged the jury: "It seems to me that if an adult person leads a child into a place of peril, and the adult person is a trespasser, then the rights of the child would be determined by the acts and knowledge of such adult person." There was no evidence that the parents of the deceased, for whose benefit this action was brought, had placed the deceased in the care and custody of any one. The charge, therefore, had reference to the testimony that the deceased at the time of the injury was in the company of his older sister or brother. The brother was helping

the deceased in the attempt to cross the bridge, and doubtless the charge was intended to be made applicable to the circumstances. The doctrine of imputable contributory negligence, as applied to a child of such tender years as not to be guilty of personal negligence, seems to have originated in this country in the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, wherein an action in the child's name was held to be defeated by the contributory negligence of the parents in permitting the child, two years old, to be in a public highway, unattended, when he was negligently injured by a traveler driving a team therein. This view has been followed in several states, but the great current of authorities in this country repudiates the doctrine, as will appear by reference to the citations pro and con in 7 Ency. Law (2d Ed.) 449, and note to *Chicago City R. Co. v. Wilcox*, 21 L. R. A. 78. This doctrine is also opposed by the leading text-writers. *Beach, Contrib. Neg.* §§ 38-48; *Shearm. & Redf. Neg.* 75; *Bishop Noncon. Law*, § 582; *Wharton on Neg.* § 314. We take the view that the negligence of a parent or custodian is not imputable to a child non sui juris. In this case the deceased was seven or eight years old, and there was no evidence whatever submitted as to his knowledge, intelligence, or capacity for observing care. In the absence of any such evidence, the prima facie presumption is that he was incapable of personal negligence. To impute contributory negligence to such a child would be to make him a tortfeasor by imputation, when he could not be such in fact. It would be visiting the innocent with the faults of the guilty. It would permit the child's protector to be authorized to destroy it. It would place the personal rights of the child at the mercy of any one by whose fault it is injured, provided the guilty one happens to have the co-operation of the child's custodian in the work of injury. Such a doctrine is an anomaly in the law. It is not defensible on any ground of agency, because a child non sui juris cannot appoint an agent; nor upon any ground which identifies the infant with its custodian, because the personal rights of the infant are not within the control of its custodian. The infant, having no volition, did not create either the relation of custodian, or the danger which results in injury. Nor is the doctrine defensible on any ground of public policy. There is some little plausibility in the view that the New York rule might have tendency to prevent depraved parents or custodians of children from exposing them to danger in the hope of gain by suits for damages, if the negligence of the custodian cannot be imputed to the child so as to defeat the same; but such considerations seem small in comparison with the reasons which make for the protection of infants against those who are not by law or nature their guardians. The view opposed violates all our conceptions of justice, and of those principles of the com-

mon law which protect the innocent from the guilty, which has tender regard for the rights and safety of the helpless, which will not excuse negligence merely because it co-operates with other actionable negligence in working injury to one without fault. There is a distinction, however, between actions by or in the name of infants for personal injuries, and actions by the parent for injury to the parent, resulting from injury to the child—as, for example, for loss of service of the child. In such latter cases the ordinary rule of contributory negligence prevails, and, if the parent's negligence has proximately contributed to the injury, he cannot recover, because he helped to bring about his own injury, and not because his negligence is imputable to the child. But the present action is under the statute commonly referred to as Lord Campbell's act, and is neither in the name of the infant, nor in the name of the parent or guardian, but is by the administrator of the infant, as designated by the statute, for the benefit of the parents. It has been decided that the right of action under this statute is a new one, and not a mere revival of the cause of action which belongs to the intestate. In *re Estate of Mayo*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. But the right of the administrator to recover depends upon whether the deceased, if he had lived, would have had a right to recover. *Mayo's Case*, supra; *Price v. R. R.*, 33 S. C. 556, 12 S. E. 413, 28 Am. St. Rep. 700; *Reed v. R. Co.*, 37 S. C. 42, 16 S. E. 289; section 2851, Code 1902. If, therefore, the intestate, if he had lived, could have recovered, notwithstanding the contributory negligence of his custodian, so, also, may the plaintiff administrator in this action recover, notwithstanding the negligence of the intestate's custodian, if he had one present at the time of the killing—provided, of course, that the death was proximately caused by the defendant's negligence.

For the reasons stated, the judgment of the circuit court is reversed, and the case remanded for a new trial.

(66 S. C. 37)

# STANDARD OIL CO. v. CITY OF SPARTANBURG.

(Supreme Court of South Carolina. April 13, 1903.)

## LICENSE TAX—CONSTITUTIONALITY—ESTOPPEL.

1. An ordinance requiring dealers in oils to pay a license of \$250 per year, and providing that this license shall not apply to dealers handling oils on which the license has been paid, is unconstitutional because there is no reasonable ground for such classification; Const. 1895, art. 8, § 6, providing for uniformity of taxes.

2. That a taxpayer in a previous year, after negotiations, paid a license tax for \$100 without protest, does not estop him to contest the validity of the ordinance increasing the amount of such license tax in a subsequent year to \$250.

Appeal from Common Pleas Circuit Court of Spartanburg County; Buchanan, Judge.

Action by the Standard Oil Company against the city of Spartanburg. From judgment for defendant, plaintiff appealed. Reversed.

This is an action brought to recover the sum of \$250 paid by the plaintiff under protest as a license tax for the business of selling oil in the city of Spartanburg. The defendant collected said sum under the following clause of an ordinance to raise supplies, ratified the 11th day of November, 1902: "Kerosene: Any merchant or merchandise broker, dealer in oils, or agents for oil companies, or other persons receiving illuminating or lubricating oils either in carloads or less than carloads and selling and reshipping the same in quantities of 50 gallons and upwards, shall pay a license of \$250 per annum: provided, this license shall not apply to merchants and dealers handling oils on which the license has been paid."

The allegations of the complaint material to the consideration of the questions raised by the exceptions are as follows:

"(8) Plaintiff alleges that it is not liable for the special license tax of \$250 required by the said ordinance, for the reason that the said ordinance is unconstitutional, null, and void, in that it discriminates in favor of such merchants or dealers handling oils, etc., on which the license has been paid, and in that particular does not apply equally to all persons engaged in the same business in the city of Spartanburg. That it is also discriminative and unconstitutional, in that it does not require any license tax of those merchants or dealers selling and reshipping in quantities under fifty gallons, nor does it require any license or license tax of merchants engaged in lines of business other than those specified in said ordinance.

"(9) Plaintiff also alleges that by the terms of the said ordinance it is a tax which is levied upon the property therein mentioned, and not upon the occupation, and is therefore unconstitutional, null and void, in that it is not levied upon the said property in proportion to its value.

"(10) The plaintiff alleges, therefore, for the reasons above set forth, that the said ordinance is in violation of the Constitution of 1895, with reference to taxation and license taxes, and more especially article 1, § 5, which provides: 'The privilege and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.' So much of article 1, § 17, as provides: 'Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.' Article 8, § 6, which provides: 'The corporate authorities of cities and towns in this state shall be vested with power to assess and collect taxes for cor-

porate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same; and all the property, except such as is exempt by law, within the limits of cities and towns shall be taxed for the payment of debts contracted under authority of law. License or privilege taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto.' Article 10, § 1, which provides: 'The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the products of which alone shall be taxed; and also exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes: provided, however, that the General Assembly may impose a capitation tax upon such domestic animals as from their nature and habits are destructive of other property: and provided, further, that the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business.' So much of article 10, § 5, as provides: 'That all taxes levied for corporate purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.'

"(11) That on January 1, 1902, under an agreement had with the defendant, through its duly authorized officers and agents, the plaintiff paid the said sum of \$250 demanded by the defendant, protesting, however, that it was not liable therefor, and, in order to save its agent from threatened arrest for carrying on the business hereinbefore mentioned in violation of the terms of the said ordinance, on the said 1st day of January, 1902, took a refunding receipt from the said defendant, whereby the defendant agreed that in the event that plaintiff brought its action in any court having jurisdiction to recover the said sum of \$250 thus paid under protest, and it should be judicially determined that the said defendant was not liable in the said sum, the defendant would refund to the said plaintiff the said sum of \$250, or such sum as plaintiff might recover judgment for in the said action."

The answer of the defendant was practically a general denial.

The decree of his honor, the circuit judge, omitting the statement as to the object of the action, is as follows: "The plaintiff attacks the ordinance in question on many grounds, the main grounds of attack being that the ordinance is void upon its face, as in conflict with the Constitution, in that it is discriminatory and unequal; in that it does not apply to merchants generally, but only to such as sell oil; in that it does not even apply to all sellers of oils, but exempts such as sell oil bought from others who have

paid license tax thereon; and in that the provision imposes license only on such persons as sell oil in quantities of fifty gallons and upwards. Upon the first and third grounds of attack mentioned above, I do not think the ordinance is invalid. As to the second ground, even if the exemption referred to would otherwise invalidate the ordinance, the fact that this particular provision was framed by the plaintiff, and inserted in the ordinance at its request, is sufficient to defeat this action. This fact clearly appears from the evidence, and after such conduct on its part it should not now be heard to assert the invalidity of this provision of the ordinance, but is stopped from doing so. It is therefore ordered that the relief asked in the complaint be refused, and the complaint be dismissed with costs." The plaintiff appealed from said decree, and the defendant gave notice of additional grounds upon which it would ask that the decree be sustained.

Carey & McCullough, for appellant. Simpson & Bomar, for respondent.

GARY, A. J. The exceptions and the additional grounds upon which the respondent asks that the judgment be sustained raise the following questions: (1) Was there error on the part of his honor, the circuit judge, in not holding that the ordinance is discriminatory and therefore unconstitutional, in that it fails to make a reasonable classification of other avocations of like character and impose a license tax thereon? In other words, it is contended that the ordinance was discriminatory in its classification. (2) Was there error on the part of his honor, the circuit judge, in not holding that the ordinance is discriminatory and therefore unconstitutional, in that it does not purport to reach even all persons engaged in the same business with plaintiff, by exempting "merchants and dealers handling oils on which the license has been paid"? (3) Was there error on the part of his honor, the trial judge, in holding that "even if the exemption referred to would otherwise invalidate the ordinance, the fact that this particular provision was framed by the plaintiff, and inserted in the ordinance at its request, is sufficient to defeat this action"?

We proceed to consideration of the first question. In *Hill v. City Council*, 59 S. C. 390, 38 S. E. 11, the court says: "The Constitution (section 6, art. 8) only requires that the license or privilege tax shall be just. The requirements in said section that taxes must be uniform in respect to persons and property does not apply to the license or privilege tax. As all callings, occupations, and kinds of business differ more or less the one from the other, the very power to impose a tax that will be just on each class 'involves the right to make distinction between different trades and between essentially different methods of conducting the same general character of business,' " citing *In*

re Haskell (Cal.) 44 Pac. 725, 32 L. R. A. 529. In *Billings v. Illinois*, 23 Sup. Ct. 272, 47 L. Ed. —, the Supreme Court of the United States held that the equal protection of the laws is not denied by an inheritance tax, because under that statute, as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood. In that case the court uses this language: "Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose, the problem presented. Science will have one purpose, business another, and legislation still another. The latter, of course, on account of the restraints upon the Legislature, may not be legal—may not be within the power of the Legislature. To dispute that power, however, is not the same thing as to dispute classification, and yet that there may be a dependence—more freedom of classification in some instances—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products and permit combinations among those who raise or grow products. *Connolly v. Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431. And yet, exercising its taxing power, it has been decided that a state may make that discrimination. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. 43. Other illustrations may be taken from the cases which tend to the same end. If the purpose is within the legal powers of the Legislature and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose; includes all that are), logically

speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And excluding our right to consider policies or assume legislation, we have many times said that a state, in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this court will not make itself a harbor in which can be found 'a refuge from ill-advised, unequal, and oppressive' legislation. *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238."

In *Am. Sug. Ref. Co. v. Louisiana*, 21 Sup. Ct. 43, 45 L. Ed. 102, the United States Supreme Court, in discussing the provision of the Constitution as to the equal protection of the laws, says: "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. 'All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature or the people of the state in framing their Constitution.' See, also, *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. 593; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. 419. In *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inter. Com. Rep. 810, 12 Sup. Ct. 250, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with railroad or steamboat companies did not individually discriminate against the express companies defined by it by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See, also, *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238, 14 Sup. Ct. 396; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. 570; *Western Union Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. Ed. 725, 17 Sup. Ct. 345; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. 305. The Constitution of Louisiana classifies the refiners of sugar, for the purpose of taxation, into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. \* \* \* The discrimination is obviously intended as an encourage-

ment to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws." This question is fully and ably discussed by Mr. Justice Jones in the recent case of *Simmons v. Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607. These authorities show that the first question must be answered in the negative.

We will next consider the second question. The case of *Gulf, C. & S. F. Ry. Co. v. Ellis*, 105 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 686, decides that the classification must not be arbitrary—that is, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed"; also, that such classification must be "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a merely arbitrary selection." This language is quoted with approval in *Porter v. Ry.*, 63 S. C. 169, 41 S. E. 108. The fact that all persons engaged in the sale of oil in the city of Spartanburg were not affected alike by the ordinance was not sufficient to render it unconstitutional, if there was a reasonable classification of such persons. In *Clark v. Titusville*, 22 Sup. Ct. 382, 46 L. Ed. 569, the United States Supreme Court held that an ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales—each class including all whose sales range between a certain minimum and maximum amount—does not violate the constitutional provision as to the equal protection of the laws, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio of the amount their sales differ.

We now come to the consideration of the most important question in the case, which is whether the exemption from taxation of those merchants and dealers handling oils on which the license had been paid was a reasonable classification. It cannot be successfully contended that the exemption from payment of the license tax was intended for the benefit of the municipality, for the tendency of the classification was to lessen its revenues. Nor can it be argued that the exemption was in any sense an encouragement to commerce, for the merchants and dealers under this classification conducted their business in no respect different from those who paid the license tax. It can scarcely be insisted that it was for the benefit of those who paid the tax, as its tendency was to create a larger number of competitors in business with them, especially when we have before us one of the parties who paid the tax objecting to its legality. We are irresistibly forced to the conclusion that the exemption was intended as a mere favor to those included within the classification, and that it was therefore unconstitutional.

We will next consider the third question.

It appears from the testimony that in 1897 the plaintiff objected to the license tax sought to be collected by the defendant for that year, and as a result certain negotiations were had between the defendant and certain agents of the plaintiff. As a result of these negotiations the amount agreed upon was \$100, and the defendant put in its supply ordinance for that year a provision similar to the one in question, which was framed by an agent of the plaintiff. Mr. Calvert, the mayor, testified that those negotiations could only bind the city council for that year. So long as the defendant left the license tax at the sum of \$100, the plaintiff paid the same without protest. Thereafter the defendant raised the tax to \$150, then \$200, then \$250, by the ordinance in question. This controversy does not arise out of the ordinance of 1897, but out of the ordinance of 1902, which in law is entirely separate and distinct from the ordinance of 1897. The defendant has made material changes in the amount of the tax, and, while the plaintiff was willing to pay the tax of \$100, we can very well understand why it would not be willing to pay the tax required by the last ordinance. We cannot agree with the circuit judge that the plaintiff was estopped from contesting the constitutionality of the ordinance in question.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(66 S. C. 61)

**COLVIN v. McCORMICK COTTON OIL CO.**  
(Supreme Court of South Carolina. April 18, 1903.)

**SALE—DELAY IN DELIVERY—MEASURE OF DAMAGES—APPEAL—REVIEW—PAROL EVIDENCE.**

1. In an action for breach of contract in failing to deliver machinery for a cotton mill as provided by contract, damages to cotton seed bought for manufacturing, arising from expenses incurred in cooling it after heating, are within the reasonable contemplation of the parties.

2. An objection to evidence will not be considered unless the ground thereof is stated in the case.

3. Parol evidence is admissible to show the negotiations leading up to the contract sued on, where it does not tend to contradict or vary the terms of the written contract.

4. In an action for breach of contract for failure to deliver at the time agreed upon certain machinery, expenses incurred by plaintiff, after the breach, in expectation, in view of the acts of the defendant, that he would perform the contract, are not so remote as not to be recoverable as damages for the delay.

5. The admission of leading questions is within the discretion of the trial court.

6. In an action to recover the price of machinery, defendant can recover for delay in delivering the machinery such damages only as he could not prevent with reasonable expense or exertion, and cannot recover for damages resulting through his own negligence.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 2297.



7. Whether the acts of one who had agreed to furnish machinery at a certain time after breach of the agreement were such as to cause the other party to the contract to incur expenses in expectation of subsequent performance of the contract, is a question for the jury.

8. It is error at law to refuse to set aside a verdict without evidence to support it.

Appeal from Common Pleas Circuit Court of Abbeville County; Townsend, Judge.

Action by Jas. A. Colvin against the McCormick Cotton Oil Company. From judgment for defendant, plaintiff appeals. Reversed.

Henry C. Hammond and Parker & Greene, for appellant. Johnstone & Welch and Frank R. Gary, for appellee.

JONES, J. This action was brought to recover an alleged balance of \$1,740.79, with interest, and 10 per cent. thereof additional as attorney's fees, as the amount due upon a written contract for the sale and purchase of certain cotton oil mill machinery. By way of defense, and also by way of counterclaim, defendant sets up damages for alleged breach of contract by plaintiff in failing to deliver the machinery and putting the mill in running order within the time specified, to the amount of \$1,909.12. The jury rendered a verdict in favor of defendant for \$726, and from the judgment thereon comes this appeal by the plaintiff. The exceptions are very numerous, 82 in number, with many subdivisions, but we will consider them under the following subject heads:

1. Demurrer to the answer. Exceptions 1 to 5, inclusive, assign error in overruling plaintiff's demurrer to the answer made, upon the grounds that it did not state facts sufficient to constitute a defense or counterclaim, the specifications being that the damages alleged in the answer were not the proximate or the direct and the natural result of the alleged breach of contract, but were too remote, not within the contemplation of the parties to the contract, consequential, and the result of defendant's own acts. The demurrer was to the answer as a whole, and not to any particular item of damages alleged therein. If, therefore, there is any item of damages alleged therein which is proper, then the demurrer must be overruled. The defense and counterclaim alleged in the answer were both based upon the same specifications of damages. We quote, therefore, the sixth paragraph of the answer, relating to the counterclaim: "(6) That the defendant alleges that early in May, 1899, it contracted with the plaintiff for the machinery mentioned in the complaint herein; that at that time it was understood and agreed that said machinery, constituting the mill, should be delivered on or before the 15th of September of said year, and that the plaintiff should have it in running order within two or three weeks from said date; these dates were fixed with the understanding and agreement that the defendant could prepare to begin manufac-

turing at the beginning of the cotton oil season of 1899-1900, and so that the defendant could make its arrangements to that end; that the plaintiff under this condition of affairs failed to perform, and on the other hand violated, its contract with the defendant; that the machinery was not shipped until many weeks after the aforementioned date when it was contracted that it should be shipped, and was not put in running order until January of 1900; that, acting upon the understanding and agreement aforesaid with the plaintiff, the defendant made all preparations and arrangements to begin manufacturing at the beginning of the season of 1899-1900; that the defendant purchased cotton seed, looking to that end; that the defendant afterwards was compelled, in order to prevent these seed from heating and spoiling, to have them moved or aired two or three times a week from October 1, 1899, to December 1, 1899, at a cost of \$96; that on account of the crowded condition of its warehouse—produced by the aforementioned delay of the plaintiff—it incurred an extra expense in the unloading of 25 cars of seed, amounting to \$50; that it had temporarily to place 300 tons of cotton seed in its hullhouse, and afterwards to remove them to the mill, incurring wastage and extra expense in connection therewith to the amount of \$75; that owing to the aforementioned delay it was compelled to transfer 50 tons of hulls from the mealroom to the hullhouse, at a cost of \$10. That for four months the defendant was compelled, on account of said delay, to rent an extra warehouse, at an expense of \$40; that owing to said delay the defendant was compelled to transfer 100 tons to and from the aforementioned rented warehouse, incurring a loss thereby in waste and expense amounting to \$100; that, pending the erection of the mill as hereinbefore stated, the defendant was compelled to incur an extra expense or prolonged interest period on borrowed money, amounting to \$324.62; that on account of said delay the defendant paid out money on insuring seed, amounting to \$27.50; that owing to the delay aforesaid 250 tons of cotton seed became heated and thereby damaged to the extent, together with extra press cloths rendered necessary, of \$600; that owing to the said delay the defendant incurred an expense of \$100 in preserving 700 tons of seed that became heated, and were only preserved for manufacturing purposes by being moved and thereby cooled; that owing to the said delay some of the seed became partially heated, and the meal therefrom depreciated in value to the extent of \$256, and the oil therefrom deteriorated in value to the extent of \$90; that owing to the aforementioned delay 35 tons of the meal manufactured by this defendant from injured or heated seed was so inferior as to be unsuited to the general market, and had to be disposed of at a loss of \$140. These losses and expenses, amounting to \$1,909.20, incurred and suffered by the defend-

ant on account of the delay, failure, and breach of the understanding and agreement by the plaintiff as hereinbefore set forth, this defendant alleges constitute a counterclaim as against any sum that may be due to the plaintiff, and the defendant demands judgment therefor against the plaintiff."

In the case of *Sitton v. MacDonald*, 25 S. C. 70, 60 Am. Rep. 484, the court said: "The rule as to the proper measure of damages (in an action for damages for the breach of a contract) is not always free from difficulty. It is not the same under all circumstances, but necessarily varies to meet the varying cases as they arise. It is different in actions ex contractu from those in tort. In the former it is more restricted, the fundamental principle being that the damage must be 'the primary and immediate result of the breach of contract.' Wood's *Mayne*, Dam. § 12; *Tappan & Noble v. Harwood*, 2 Speers, 536; *D'Orval v. Hunt*, Dud. 180. In the latter well-considered case it was held that 'for the breach of an executory contract, without fraud or imposition, the jury can only give such damages as fairly and naturally result from it, and which can be measured by a pecuniary standard; remote and consequential damages cannot be allowed.' This is undoubtedly the rule, but it is not always easy to fix the exact limit between what is primary and secondary or what is immediate or consequential and remote. If the breach is merely in the tardy delivery of the property intended for sale, it is obvious enough that ordinarily the damage would be the difference in the price realized from that which might have been obtained at the proper time. But if the breach is in the nondelivery of an article not intended for sale, but for use in some particular business, other considerations intervene, and the matter is not so clear. In this class of cases, the courts have endeavored to lay down certain rules to assist in fixing the damages upon proper principles. In *Hadley v. Baxendale*, 9 Exch. 341, which seems to have been considered a leading case both in England and America, the following rules are indicated: 'First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract according to the usual course of things are always recoverable; second, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract.' See Wood's *Mayne*, Dam. § 14, and notes."

Applying these principles to the case as presented by the demurrer to the answer, the allegations in the answer being thereby admitted to be true for the purpose of the demurrer, we cannot say as matter of law that not a single item of damages alleged naturally arose in the usual course of things from the alleged breach of contract, nor

can we say that no item of damages alleged arose from the special or peculiar circumstances of the case which was not known to the plaintiff. Take, for example, the injury alleged to have been sustained from the heating of the cotton seed bought and stored for the use of the mill by reason of the delay in putting in the machinery. It was within the reasonable contemplation of the parties that defendant would lay in a stock of cotton seed and store them for use in the operation of the mill machinery which plaintiff contracted to provide for the season of 1899-1900. If by reason of the delay in placing the machinery the cotton seed heated and damaged in the storeroom to any extent not attributable to the negligence of defendant, or if defendant, in a proper effort to limit or prevent the injury to be apprehended from heating, was put to extra expense in handling and cooling the seed, arising from plaintiff's delay, these clearly come within the rule stated. The demurrer was therefore properly overruled.

2. Admissibility of testimony. Exceptions 6 to 15, inclusive, allege error in rulings as to the admissibility of certain testimony. First. The witness Bushnell, over objection, was asked, "What representations did you make to get these gentlemen to buy that machinery?" To this plaintiff objected, without stating any ground therefor. The court ruled that, if there was any agreement, they can show it. This witness was also asked, over objection, "Did not they inform you that the reason that they wanted that machinery shipped by the 15th of September, and erected and in operation within two or three weeks after that date, was that they wanted to get advantage of the full season of 1899-1900?" No ground of objection was stated. It is now contended that these rulings were erroneous, because the written contract was the best evidence of all representations leading up to the contract, and that the written contract in evidence contained a stipulation that "there is no understanding or agreement not on the face of this paper." We must overrule the sixth and seventh exceptions relating to this matter, for the reasons: (1) In order to review the ruling of the circuit court as to the competency of testimony, the record must show the specific ground of objection urged before the circuit court, or the specific ground upon which the court rested the ruling. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634; *Norris v. Clinkscapes*, 59 S. C. 243, 37 S. E. 821. (2) Parol testimony is competent to show the negotiations between the parties leading up to the execution of a written contract, provided it does not contradict or vary the terms of the written contract. *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415. The written contract in this case stipulated that the machinery was to be delivered on or before September 15, 1899, and contained an agreement by plaintiff to furnish the services of an erecting

engineer to superintend the erection of the machinery.

Second. The witness J. E. Britt, over objection, stating the ground of objection, was permitted to be asked and to answer the following questions: "What arrangements were made, outside of this contract here, in connection with the different reasons that were given for fixing the date of delivery, and what other arrangements were made about the delivery of the machinery and the setting it up in time for work?" "What was that statement to him, and why was the date fixed the 15th of September?" "Did you tell him what arrangements you wanted to make about operations?" The objection to this testimony was that the written contract is the best evidence, and its terms cannot be varied. The witness answered: "We explained to Mr. Bushnell that we wanted that machinery in time for the opening of the coming season, and he agreed to have it there in ample time, and we wanted him to fix the date of shipment as September 1st, and he wanted fifteen days more, and we agreed for him to ship it by the 15th of September." "We told him that we would go ahead and buy cotton seed, and make all of our arrangements about borrowing money, etc., in order to commence operations with the mill at the beginning of the season, and he said, 'All right, go ahead and make all arrangements.'" We do not see that this testimony altered, varied, or contradicted the written contract. It merely showed the circumstances and negotiations which led to the contract, and consistent therewith, falling within the rule stated in *Bruce v. Moon*, supra. The eighth exception is therefore overruled.

The ninth exception complains of error in allowing the witness Britt to testify as to damages to cotton seed bought after the breach of the contract, the same being too remote and the result of defendant's own act. The only objection presented to the circuit court was that the testimony should be limited to the damages to cotton seed which were purchased on or before the 15th September. The testimony was responsive to the allegations in defendant's answer, which remained therein without objection, and was therefore competent. Besides, we think testimony as to such damages was permissible, if defendant continued to buy and store cotton seed after the 15th September, 1899, in reasonable expectation that plaintiff would afterwards place the machinery.

For these reasons, the tenth exception must also be overruled, which assigns error in allowing the witness Britt to answer questions as to the amount of money defendant was compelled to borrow in consequence of plaintiff's breach of contract.

The eleventh exception alleges error in permitting defendant's counsel, in examining the witness Britt, to read to witness from the answer. The case shows that, when this objection was made, defendant's coun-

sel withdrew proposed question. Later, defendant's counsel asked the witness this question: "You allege that you had 700 tons of seed?" and to this appellant excepts upon the ground that it was leading and suggested the answer. This objection was not raised in the circuit court, and if it had been it would not have been ground for reversal, as it is very largely left to the discretion of the trial court how far he will permit leading questions.

The twelfth and thirteenth exceptions, relating to the admission of certain testimony by the witness Stillwell, must be overruled. The ground of objection stated in the exception was not presented to the trial court, and the testimony was of the character which has already been considered as not varying the terms of the written contract, but merely referring to negotiations leading to the contract and consistent therewith, and to the circumstances surrounding the transaction.

3. The charge to the jury in reference to the law governing the fixing of damages for breach of contract. Exceptions 16 to 27, inclusive, relate to this subject. The court explicitly instructed the jury in accordance with the rule stated in *Sitton v. MacDonald*, supra. At defendant's request the jury were charged as follows: "The rule in this state for fixing damages in cases like this one now being tried is as follows: First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable; second, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract." "In this case, the defendant sets up for a discount on plaintiff's cause of action, and also as a counterclaim, a demand for damages arising out of an alleged breach of contract, and the jury are instructed that in measuring damages they are limited to such damages as arise ex contractu, and cannot resort to the rule in cases of tort." "In measuring damages arising out of cases ex contractu, there are these rules which the jury are bound to observe, to wit: (1) That damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are recoverable; (2) that for a breach of contract parties are liable only for such consequential losses as may reasonably be presumed to have been in contemplation of the parties at the time of making the contract; (3) that damages which would not arise in the usual course of things from a breach of contract, and which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract; (4) that if the parties were in-

jured by their own carelessness or want of diligence they cannot claim damages." The jury were further instructed "that mere knowledge will not increase the damages recoverable for consequential losses, but the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. It must be inferred from the whole contract that the party sought to be charged consented expressly or impliedly to become liable for special damages, before he can be so charged." "Liability for damages arising out of causes of action founded upon contracts must be founded upon consent, express or implied."

After the foregoing, plaintiff preferred many requests to charge, which were not refused, but charged with a modification, and numerous exceptions under this head are made. We can only take time to give examples of the exceptions as typical of the class to which they belong. The nineteenth exception is as follows: "(19) Because his honor erred in refusing to charge the plaintiff's sixth request to charge, as follows: 'That even if the jury should find in this case that it was in contemplation of the parties that the defendant should purchase seed with a view to beginning manufacturing upon the arrival of the machinery, still, if they should conclude that the contract was breached on the 15th day of September, 1899, such agreement would not justify the defendant in continuing to purchase seed after knowledge of the breach of contract; and if he continued to purchase seed thereafter, knowing of such breach, and such purchased seed became heated and spoiled, damages thereto would be the result of the defendant's acts, and could not be set up against the plaintiff herein to reduce the amount of his claim;' and erred in charging such request with the modification, 'unless their conduct was induced by the acts or words of the plaintiff.' The said charge, as modified, being erroneous in that: (a) No words or acts of the plaintiff at the time of making the contract, or before its breach, are sufficient to make him liable for damages resulting from acts of the defendant subsequent to the breach, and knowledge by the defendant of it; (b) no words or acts of the plaintiff subsequent to the breach, not constituting a new contract or a modification of the old one, which is not alleged, are sufficient to make plaintiff liable for the acts of the defendant subsequent to the breach; (c) because there is no evidence of any acts or words of the plaintiff inducing the defendant to purchase seed after the breach of the contract, and the said charge is erroneous in that it is responsive to the pleadings and evidence." Now, it cannot be properly said that there was no testimony in the case tending to show that it was in the contemplation of the parties that defendant

would continue to buy and store cotton seed for the use of the mill so long as there was a reasonable expectation that plaintiff would deliver the machinery. The opportunity for buying cotton seed would not ordinarily arise before September 1st, the beginning of the cotton season, when seed would begin to be put upon the market, and, as matter of fact, defendant purchased the first lot of seed about September 12th. On the 30th of September the machinery, not having arrived, defendant telegraphed plaintiff about it, and received reply stating that it would be two or three weeks before machinery could be shipped. On November 18th, plaintiff wrote defendant stating that plaintiff's man would be at McCormick soon to erect the machinery, and on the 22d day of November a car load of the machinery was shipped, and some time afterwards plaintiff began erecting the machinery, completing the same in January, 1900. This surely was some evidence to show that as reasonable men, with ordinary knowledge of the cotton seed oil business and the methods of securing material for manufacture, both parties had in contemplation that defendant would during this period buy and store cotton seed for its business. Under this view, the buying of seed after the 15th September, and while the contract was being executed, was as much within the contemplation of the parties as it was before that time. The modification of plaintiff's request was doubtless made in view of these circumstances, calculated to induce defendant to buy seed after the breach of the contract by plaintiff.

Appellant's eighth, tenth and nineteenth requests to charge were as follows: "(8) That if the jury believe that by a moderate expenditure the McCormick Cotton Oil Co. could have prevented the alleged damages in this case by moving the seed, it was its duty so to do, and, if the losses alleged in this case arose from want of proper attention to the seed alleged to have been bought, then plaintiff is not liable." "(10) That if the defendant, the McCormick Cotton Oil Co., could have sold on 15th of September any of the cotton seed alleged to have been purchased in this case, if there was a market for them, where they could have been sold without loss, and the defendant knew, or ought to have known, that the seed were about to heat and spoil, and become thereby damaged, it was the duty of the said defendant to sell and dispose of the said seed and save itself from loss and damages, and, if it failed to do so, it cannot now claim damages against the plaintiff in this action, nor a set-off against his claim." "(19) That if the jury find from the evidence that the McCormick Cotton Oil Co. at a moderate cost could have procured an additional warehouse wherein they might have stored a portion of the cotton seed alleged to have been bought in this case, and so as to have given room and opportunity to air said cotton seed, and to save them from dam-

age by proper attention, and that instead of so doing it crowded large quantities of seed into a warehouse where they could not be properly cared for, and that such seed damaged for a want of proper care and attention, the McCormick Cotton Oil Co. must bear the loss, and no damages caused thereby can be charged against the plaintiff. Hall on Damages." Each of these requests was charged, with the words added, "unless their conduct in the matter was induced by the acts or words of the plaintiffs." Appellant has several exceptions to these modifications of the requests to charge, the specifications of error being as follows: "(a) It is the duty of the claimant to use all proper efforts to make his damages as light as possible, and no acts or words of the other party will relieve him [it] of such duty. (b) The effect of such charge was to abrogate the rule of due care and reasonable diligence on the part of the complainant, whenever there has been a breach of contract by the other party. (c) There was no evidence of any acts or words on the part of the plaintiff inducing the defendant not to move his seed or to do other acts to prevent damages, and said charge was erroneous in that it was not responsive to the pleadings and evidence." The rule is well established that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it with reasonable expense or exertions, it is his duty to do so, and he can charge the delinquent for such damages only as he could not prevent with such reasonable expense or exertion. *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1120; *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, and note. But we do not understand the charge as violating this principle. The jury, as already stated, were instructed that defendant could not recover for damages resulting from its own negligence, and under this instruction it was the duty of the jury to consider what damages resulted from plaintiff's breach of contract, and not what damages resulted from defendant's own negligence thereafter. Whether the circumstances, to which allusion has already been made, were such as to justify a reasonable and prudent person in storing and holding cotton seed in the manner done by defendant in expectation of their use in the oil mill about to be erected, was a question for the jury. If there was nothing in the testimony to show that the conduct of defendant with reference to storing and holding the seed was induced by the words or acts of plaintiff, the modification was harmless; if there was some evidence thereof, the modification was correct. Without further comment, we think all these exceptions to the charge must be overruled.

4. Refusal of motion for a new trial. It is excepted that the court erred in refusing the motion for a new trial made upon the grounds

44 S.E.—25

that the verdict is not responsive to the pleadings, and that there is no evidence to sustain it. It is well established that it is error of law to refuse to grant a new trial when there is absolutely no evidence upon which to base the verdict. To this end only do we consider the testimony. The plaintiff's claim stood practically admitted by the answer, which only denied that the interest began on the 15th September, 1899, and alleged that interest did not begin until the arrival of the machinery, and denied that plaintiff is still the owner and holder of the claim. It stood admitted, therefore, that plaintiff had delivered the machinery; that the price thereof was \$8,000; that defendant had paid thereon: March 20, 1900, \$3,000; March 26, 1900, \$509.21; March 16, 1900, \$2,750—making \$6,259.21 total credits. The balance, therefore, which was due plaintiff was \$1,740.79, without interest. By the written contract, interest at 6 per cent. was to be paid after maturity of each installment, which was stipulated to be as follows: \$3,000 payable on arrival of machinery at McCormick; \$2,500 payable January 1, 1900; \$2,500 payable July 1, 1900. The contract also provided for 10 per cent. as attorney's fees. The undisputed evidence was that plaintiff was the owner and holder of the claim. Leaving out of consideration the matter of interest and attorney's fees, plaintiff, on the admitted and undisputed facts, was entitled to a judgment for \$1,740.79, provided that sum is not to be canceled in whole or in part by the items of damages set up in the answer by way of defense and counterclaim. These items could only be counted once in the estimate, as the defense and counterclaim are both based upon the same items of damage. Therefore, admitting everything claimed by defendant on these items of damage, which aggregate \$1,909.12, the largest verdict which defendant could possibly be entitled to recover against plaintiff would be the excess of \$1,909.12 over \$1,740.79, and interest on deferred payments. Yet the verdict was for \$726 in favor of defendant. There is absolutely no evidence to sustain such verdict, and it was error of law to refuse to set it aside and grant a new trial.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(132 N. C. 660)

MENZEL et al. v. HINTON et al.

(Supreme Court of North Carolina. May 19, 1903.)

MORTGAGE—FORECLOSURE—SALE UNDER POWER—LIMITATIONS—BAR OF DEBT.

1. Where a mortgage contains a power of sale, the right of the mortgagee to foreclose by execution of the power is unlimited as to time, Code 1883, § 152, prescribing a 10-year limitation for an action to foreclose a mortgage or deed of trust, having no application to a sale under the power, but applying only to actions.

2. The right of a mortgagee to enforce a mortgage containing a power of sale by sale under the power is not affected by the fact that the right to sue on the debt secured is barred by limitations.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Camden County; M. H. Justice, Judge.

Action by P. T. Menzel and others against O. L. Hinton and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

G. W. Ward and W. M. Bond, for appellants. E. F. Aydlott, for appellees.

CONNOR, J. The Code of 1883, § 152 (3) provides that the period prescribed for the commencement of "an action for the foreclosure of a mortgage or deed of trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same." We are unable to discover in this language any period of time fixed within which the mortgagee is required to execute the power of sale. It will be observed that this section prescribes the time for bringing an action (1) for the foreclosure of a mortgage, or (2) deed in trust for creditors, with power of sale. The instrument executed by Foreman to Hinton is a mortgage containing a power of sale, and is not within the language of the statute. It was not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power; hence no time is fixed by the statute within which he must execute the power. The word "action" in the paragraph evidently has reference to the action for foreclosure, and not to the execution of the power of sale, which requires no action. To construe the statute otherwise, would be to write into it language which we do not find there.

It must be conceded that the language used by this court in *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78, would seem to sustain the contention of the plaintiffs. In that case the bond for the security of which the mortgage was given was barred by the statute of limitations, the last payment thereon having been made more than 10 years before the threatened execution of the power. The mortgagor applied for an injunction to restrain the sale by the mortgagee under the power, which was refused. The only question presented in that case was whether the mortgagor had any equity upon which to base his application for the interference of the court. The case is correctly decided. If the execution of the power was not barred by the statute, he was, of course, not entitled to an injunction; if it was barred and

his right to execute the power at an end, the legal title would not pass by the sale. It will be observed that this case was decided prior to the passage of Act 1893, p. 37, c. 6, permitting actions to be brought to remove a cloud from title. Clark, J., in that case says: "The court will therefore not interpose by an injunction merely to prevent a cloud upon the title."

*Hutaff v. Adrian*, supra, is cited in *Smith v. Parker*, 131 N. C. 470, 42 S. E. 910. No question was involved in that case regarding the statute of limitations, nor was it cited for that purpose. Conceding that an action in personam upon the note held by Hinton against Overton was barred by the statute, it would not affect the decision of this cause. It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. *Capehart v. Dettrick*, 91 N. C. 344. This, because the bar of the statute affects only the remedy, and not the right. *Parker v. Grant*, 91 N. C. 338; *Rouss v. Dittmore*, 122 N. C. 775, 30 S. E. 335; 19 Am. & Eng. Enc. 146; *Sturges v. Crowninshield*, 4 Wheat. 206, 4 L. Ed. 529. Hence it is that in an action upon a debt barred by the statute, for the payment of which a "new and continuing promise" is relied upon, the "cause of action" is the original debt, and the new promise is relied upon to repel the bar. *Falls v. Sherrill*, 19 N. C. 372. In *Kull v. Farmer*, 78 N. C. 339, the distinction between an action on a debt barred by the statute and one discharged in bankruptcy is pointed out; in the latter "the cause of action" is the new promise, the old debt being a consideration to support the promise. The reason for the distinction is obvious. Prior to the adoption of our Code, there was no statute of limitations in regard to sealed instruments, bonds, and mortgages. There was a presumption of payment or satisfaction after the lapse of 10 years. Rev. Code, c. 65, § 18. This presumption affected the right, as distinguished from the remedy. *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Long v. Clegg*, 94 N. C. 764. Of course, if the debt is paid or satisfied, either by actual payment or by presumption of law, the mortgage which is incidental to the debt is likewise discharged, and in equity—the purpose for which the legal title was conveyed being accomplished—would be treated as discharged, and the mortgagor as the owner of the land. *Ray v. Pearce*, 84 N. C. 485; *Edwards v. Tipton*, 85 N. C. 480; *Simmons v. Ballard*, 102 N. C. 109, 9 S. E. 495. That such is not the law under our statute of limitations is settled by the uniform and unanimous decisions of this court.

In *Long v. Miller*, 93 N. C. 227, 233, Smith, C. J., said: "As to the enforcement of the mortgage \* \* \* there is no statutory bar. While the personal action is barred, the action to enforce the mortgage is not, as was

† 2 See Limitation of Actions, vol. 22, Cent. Dig. § 652.

decided in *Capehart v. Dettrick*." *I James v. Gaither*, 93 N. C. 364.

In *Arrington v. Rowland*, 97 N. C. 131, 1 S. E. 557, *Merrimon, J.*, said: "If the debt secured by the deed of trust had been independent of and apart from the deed, as contended by the defendants, the plaintiffs would have the right to have the trust executed. The court would not in that case deny the plaintiffs this remedy, simply on the ground that the debt intended to be secured is barred by the statute of limitations."

*Clark, J.*, in *Taylor v. Hunt*, 118 N. C. 172, 24 S. E. 359, said: "The security, when not barred, is enforceable, though action on the debt is barred."

*Smith, C. J.*, in *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87 (8), said: "Equally without support is the suggestion that, if the debt is barred, so must the mortgage to secure it be. These are essentially distinct as affected by the statute of limitations, as is held in *Capehart v. Dettrick* and *Long v. Miller*."

In *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696, *MacRae, J.*, said: "Indeed, though an action upon the note was barred by the statute, the lien created by the mortgage is not impaired in consequence of the running of the statute of limitations on the debt."

In *Hedrick v. Byerly*, 119 N. C. 420, 422, 25 S. E. 1020, *Montgomery, J.*, said: "The statute of limitations defeats the remedy when the note is sued upon, but it does not discharge the debt, and, although the debt may be barred by the statute, yet the mortgage by which the debt is secured, if itself not barred, may be foreclosed by the mortgagee in proceedings for that purpose."

Thus we see it uniformly and without dissent held by this court that the right to subject the mortgaged land to the payment of the debt is not affected by the statutory bar of the debt. This is in accordance with the current of authority in other courts.

The question is clearly set forth and discussed in the case of *Goldfrank v. Young*, 64 Tex. 432, in which *Stayton, A. J.*, said: "In reference to the operation of the statute of limitations in any matter in which the recovery of money is sought, the statute itself limits it to 'actions or suits in courts,' and it provided within what time 'actions or suits' in the different classes of cases may be brought; but it does not attempt to determine within what period any one must enforce a right which the debtor has placed it in the power of the creditor to enforce otherwise than by an 'action or suit in court.'"

\* \* \* The declaration that persons must institute 'suits or actions in courts' within a fixed period to enforce their claims, which can be enforced only in that manner, is not equivalent to declaring that a creditor, who has been given by contract a right and means by which he may enforce his claims otherwise than through the courts, shall not enforce it

after the time at which he might institute an action or suit, without subjecting himself to the bar which would be urged by a plea of limitation. It is not always true that rights which cannot be enforced through the courts are valueless, nor that contracts which the courts cannot enforce are invalid." In this case the Supreme Court of Texas held "that the statute of limitation which applied to a money demand operates upon the remedy when its enforcement is sought by 'suits or actions' in courts. It does not deprive the creditor of a remedy when he had provided, by contract, to enforce through a trust deed the payment of his claim."

This case was approved in *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273, the court saying: "The statute does not say that no debt shall be collected, but that no action shall be brought. Nor does it provide that the debt shall be extinguished. And statutes of limitation worded like ours are generally held to operate solely upon the remedy in the courts, and not to destroy the debt." *Tombler v. Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896. To the same effect is *Hartranft's Estate*, 153 Pa. 530, 26 Atl. 104, 34 Am. St. Rep. 717; *Slaymaker v. Willson*, 1 P. & W. 216; *Gardner v. Terry*, 99 Mo. 523, 12 S. W. 883, 7 L. R. A. 67; *Connecticut Mut. Life Ins. Co. v. Dunscomb* (Tenn.) 69 S. W. 345, 58 L. R. A. 694. In *Grant v. Burr*, 54 Cal. 298, it is said: "The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment; therefore, where the legal title to land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed. The statute of limitations is to be employed as a shield, and not as a sword; as a means of defense, and not as a weapon of attack."

In *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695, it is held: "The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage." *Jones on Mortgages*, § 1204; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270.

"Except when the statute expressly or by fair inference destroys the remedy upon the mortgage at the same time that the remedy is destroyed as to the debt, it may be enforced after the statute has run upon the debt, unless the same statutory period is applicable to both." 2 *Wood on Limitations*, § 223, p. 549; *Hardin v. Boyd*, 113 U. S. 765, 5 Sup. Ct. 771, 28 L. Ed. 1141.

"The maker of a trust deed or mortgage with a power of sale cannot enjoin a sale thereunder on the ground that the debt is barred by the statute of limitations; and this is held to be true even in those states where the general rule is that the bar of the debt bars the right to institute suit to foreclose.

\* \* \* For similar reasons, when the trustee or mortgagee has sold the mortgaged property under an express power of sale contained in the mortgage or trust deed, the sale cannot be set aside on the ground that the debt and the instrument securing it were barred at the time of the sale." 19 Am. & Eng. Enc. (2d Ed.) 178; Minor, Inst., book 3, p. 366.

These authorities conclusively settle the proposition that the right to enforce the mortgage is not affected by the statutory bar of an action in personam upon the debt. As we have said, a mortgage containing a power of sale not being within the words of the statute, and therefore the execution of the power not being affected thereby, we can see no reason why the mortgagee may not execute the power at any time. The debt being in existence, unpaid, no court of equity would enjoin the execution of the power upon the theory that there was a presumption of payment of the debt. It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage after the expiration of 10 years from the last payment on the debt, the mortgagor being in possession, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar.

The point upon which we rest our decision is that, as the mortgagor has expressly put it in the power of the mortgagee to sell the land for the payment of the debt, and thereby relieved him of the necessity of bringing an action for that purpose, his right is not affected by the statute of limitations, which applies only to actions brought for the enforcement of rights. The Legislature may, if in its wisdom it should see fit, place the execution of the power of sale, in respect to the time within which it must be exercised, upon the same footing as actions to foreclose a mortgage with power of sale; but we cannot, in the absence of any legislative declaration, make the law. It is ours simply to declare it.

This opinion does not overrule or question *Hutaff v. Adrian*, supra, in respect to the point decided in that case, to wit, that the plaintiff was not entitled to injunctive relief. In so far as it is said that after the expiration of 10 years the mortgage is dead, the right is destroyed, we cannot concur.

The judgment of the court below is affirmed.

CLARK, C. J. (dissenting). The exact point presented in this case has twice been decided in this court, without dissent, and, having become a rule of property, men have acted upon it, and its reversal would shake titles which have been acquired in reliance upon these decisions.

In *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78 (1893), there was a mortgage with power of sale, and more than 10 years after

maturity of the note the mortgagee advertised under his power of sale. The court held that, upon those facts alleged in the complaint, "the bond and mortgage are alike barred by the statute of limitations. Code 1883, § 152 (2, 3). A sale under such mortgage would carry to the purchaser no title. The plaintiff mortgagor, being in possession, has a full defense to an action for ejectment. *Capehart v. Biggs*, 77 N. C. 261; *Fox v. Kline*, 85 N. C. 173."

If this had not been so prior to chapter 6, p. 37, Laws 1893, a mortgagor in a mortgage with power of sale never would have been protected by the lapse of time. At the last term, by a unanimous court, *Hutaff v. Adrian* was reviewed and reaffirmed in *Smith v. Parker*, 131 N. C., at page 471, 42 S. E. 910, the court saying: "In *Hutaff v. Adrian* (decided February term, 1893) it was said that, taking the allegations of the complaint as true, the defendant's bond and mortgage were barred by the statute of limitations, hence the purchaser at a mortgage sale would get no title, for the mortgage was dead, which is a question of law, and, the plaintiff being in possession, no injunction would lie merely to prevent such cloud upon title," except for the statute of 1893, p. 37, c. 6, which had been enacted subsequent to *Hutaff v. Adrian*.

The basic reason of these decisions is this: A power of sale is no part of the conveyance, but is merely a power of attorney to do an act which is equivalent to a power to waive judgment in an action, if not barred by payment or otherwise, on the bond and for foreclosure. A power of sale changes in no wise the characteristics and incidents of a mortgage. 2 *Pingree on Mortgages*, § 1813. When by lapse of time the bond and mortgage are both barred, or the debt has been paid, the power of sale falls, and ceases to be of any validity. A party is entitled to take the benefit of the statute, just as he would of actual payment having been made, if he pleads it at the first opportunity. The statute is simply an irrebuttable presumption of payment, and, like payment, must be pleaded. If an action had been brought to foreclose this mortgage after the lapse of 10 years, the mortgagor could have pleaded the statute of limitations. Only his failure to do so would be a waiver. The absence of the mortgagor from the state suspended the running of the statute as to the action on the bond, but not as to the lien on the land. *Anderson v. Baxter*, 4 Or. 105.

When there is a sale under the power of sale, there is no opportunity to plead either the statute or payment, and the mortgagor, hence, is entitled to do this when an action of ejectment is brought (as is held in the above cases), because this is his first and only opportunity to plead it as a defense. The action of ejectment not having been brought, the mortgagor is now proceeding,



as authorized by chapter 6, p. 37, Laws 1893, to bring this action to remove a cloud upon title, in which equitable proceeding he can set up the fact that he would have pleaded the statute of limitations if the purchaser had brought an action of ejectment. This is the identical ground which would have authorized him to sustain an injunction to prevent the sale, had he so chosen. He has the election, being in possession, to do either, or to await an action of ejectment, provided he sets up the payment or statute of limitations at the first opportunity in proceedings pending in court.

There is no statute of limitations against the execution of a power of sale, and none is needed. It is a mere power of attorney. When either payment or the statute of limitations can be, and is, set up to the debt and mortgage, the execution of the power of attorney is a nullity, for the debt and mortgage have lost their validity, provided the defense is pleaded at the first opportunity. This opportunity may be afforded by an action of ejectment brought by the purchaser, or it may be set up by the mortgagor himself, either in an action for an injunction before the sale, or in an action to remove cloud upon title after the sale, as in this case. The statute, chapter 6, p. 37, Laws 1893, does not compel an injunction to prevent a sale, but gives relief after sale, when, as here, the claimant does not bring his action of ejectment.

The substantial matter is the debt and mortgage, and the mortgage is barred in this case by the lapse of time, and the statute has been pleaded at the first opportunity in a proceeding in court. The power of sale is outside of court, and there was no opportunity afforded to plead the statute to that proceeding, even if there were one. Here the mortgage became barred 19th February, 1895, being 10 years from the last payment. The sale under the power of sale, 4th May, 1899, had no efficacy if the purchaser had chosen to bring an action of ejectment and the defendant had pleaded the statute. *Hutaff v. Adrian and Smith v. Parker*, supra; *Simmons v. Ballard*, 102 N. C., at page 109, 9 S. E. 495. Hence, doubtless, the purchaser did not move. The first proceeding actually in court in which the statute could be pleaded is this to remove the cloud upon title. Upon the facts agreed, judgment should have been in favor of the plaintiffs.

It is true that the mortgage is not necessarily barred when the debt is, but, when the bar of the statute of limitations can be successfully pleaded to the mortgage, the power of sale (which is a mere power of attorney to dispense with the formality of an action and judgment of foreclosure) is barred because it has nothing to act upon. Powers of sale are not favorites of the law (*Mosby v. Hodge*, 76 N. C. 387), and it would be exceeding strange if, when by reason of the statute of limitations an action

cannot be maintained to foreclose the mortgage, a power of attorney to sell without formal decree of foreclosure should put vitality into a mortgage upon which a court is powerless to decree foreclosure.

DOUGLAS, J. (dissenting). I am forced to dissent from the opinion of the court for several reasons, principally because it is in direct conflict with the opinion of this court in *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78. In that case this court says: "Upon the allegations in the complaint, taken as true, the defendant's bond and mortgage are alike barred by the statute of limitations. A sale under such mortgage would carry to the purchaser no title. The plaintiff mortgagor, being in possession, has a full defense to an action for ejectment when brought by the purchaser. The court will therefore not interfere by injunction merely to prevent a cloud upon the title." I have omitted the citations of authority. This is practically the entire opinion. It is no dictum, but a clear and explicit enunciation of the essential principle underlying the case. It was delivered 10 years ago by a unanimous court, and has since remained, without question, an established rule of property. It was cited with approval at the last term of this court in *Smith v. Parker*, 131 N. C. 470, 42 S. E. 910.

It is suggested that, while the decision in *Hutaff's Case* was right, the reasons given therefor were wrong. This may apply to the rulings of the superior court, but not to the opinions of this court, which not only become the settled law of the case, but are published for the guidance of the profession and the people in all future cases of a similar character. If this were not so, it would be better that opinions were never written—certainly, that they were never published. Mere per curiam orders of affirmance would be equally efficient, with less danger of harm. I cannot bring myself to say that the learned court that delivered the opinion in *Hutaff's Case*, while expressly basing their decision upon principles essentially erroneous, stumbled blindly upon the right. Not only has that decision since remained unquestioned, but, as far as I am informed, it is not in conflict with any preceding decision. During the 10 years that have elapsed since its rendition the personnel of this court has repeatedly changed, but the unchanging principle has remained with at least the silent acquiescence of five different legislatures. As it has become a settled rule of property, not in violation of any constitutional or natural right, I think it should remain unchanged. It is said that this court has held that the debt may be barred and the mortgage remain valid. Such a decision in no way conflicts with *Hutaff's Case*, nor has it any application to that at bar. If the note is not under seal, it may be barred in 3 years, and yet the mortgage securing it might not be

barred in less than 10 years. Regarding the security as merely incidental to the debt, I have doubted the correctness of this doctrine, but nevertheless it is in accordance with our decisions, and would apply to an action for foreclosure as well as a power of sale. Those decisions are to the effect that the mortgage, if itself not barred, may be foreclosed by action or sale after the debt is barred, but they do not go to the extent of holding that the power of sale exists forever. This is clearly the effect of the decision in *Hedrick v. Byerly*, 119 N. C. 420, 25 S. E. 1020, which is cited by the court.

But if this were an open question, why should we decide otherwise? While statutes of limitation were formerly looked upon with some disfavor, they are now regarded, within proper limits, as necessary for the security of property and peace of society. Our present statutes of limitation take the place of our old statutes of presumption, and are in legal effect irrebuttable presumptions, especially when relating to land. They were intended to strengthen, and not to limit, the older statutes. Therefore it may be well to see what was the force and effect of the preceding statute of presumptions. In *Powell v. Brinkley*, 44 N. C. 154, it was held that (quoting the syllabus) "the statute presumption of payment on mortgages, from the lapse of time, is payment at the day the debt fell due, and the legal estate reverts in the mortgagor without a reconveyance." The court, by Pearson, J., says in the opinion: "There was a presumption of payment at the day when the debt fell due. \* \* \* The condition of the deed was performed, and consequently there was no necessity for a reconveyance. The title reverted by force of the condition. It is familiar learning that, if the debt secured is paid on the day of forfeiture, the estate is reverted without a conveyance. If a forfeiture takes place at law, the estate becomes absolute, and then a reconveyance is necessary, as it has become an equitable, as distinguished from a legal, right to redeem and have back the estate, as in the case when part payment after the day of forfeiture has been made—for the presumption refers to the day of the last payment. But, even in such case, it seems clear that the same grounds which raise a presumption of the payment of the mortgage debt, and consequently of the satisfaction of the mortgage, must necessarily raise a presumption of the reconveyance of the estate created to secure the debt—which has been satisfied. This doctrine has been fully and ably discussed by the late Chief Justice Ruffin. *Roberts v. Welch*, 43 N. C. 287." The court evidently followed this line of thought in *Hutaff v. Adrian*.

It is true, subsection 3 of section 152 of the Code of 1883, in terms applies only to an action for the foreclosure of a mortgage, but the same rule would apply, by analogy, with greater force to powers of sale, which,

to use the words of Judge Pearson, "are looked upon by the courts with extreme jealousy, because the mortgagor is thereby put entirely in the power of the mortgagee." *Mosby v. Hodge*, 76 N. C. 387.

In *Kornegay v. Spicer*, 76 N. C. 95, the court, speaking through the same great jurist, says: "A mortgagee with a power of sale is a trustee, in the first place to secure the payment of the debt secured by the mortgage, and in the second place for the mortgagor as to the excess. The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground that in a plain case, when the mortgage debt was agreed on and nothing was to be done except sell the land, it would be a useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default. But this power of sale has always been watched with great jealousy." The opinions of Judge Pearson are neither misty nor evasive, and the clear meaning of the above quotation is to the effect that a court of equity will not permit the execution of a power of sale when the court would not or could not sell in an action for foreclosure. In other words, a sale by the mortgagee was permitted only to save the expense of an action, and "in a plain case, when the mortgage debt was agreed on and nothing was to be done except sell the land." But we are told that this construction "would be to write into it [the statute] language which we do not find there." I do not see it in that light. The statute does not say that a power of sale may be executed by the mortgagee a hundred or a thousand years after the debt is due, as will be the effect of the opinion of the court. To sustain *Hutaff's Case* we are required neither to write anything into the statute nor to write anything out of it. It is in thorough accord with the general policy of our laws, and is not forbidden by law. Section 3867 of the Code of 1883 repeals only public and general statutes, and does not profess to interfere with the great principles of legal or equitable jurisprudence. We are constantly recognizing and enforcing pleas in bar not alluded to in the Code—such, for instance, as "contributory negligence" and "fellow servant." But, if it were ever necessary to write it into the statute, we are not called on to do it. It has been done for us, and, in the 10 years that have since elapsed, it has, by the uniform decisions of this court and the continued acquiescence of the Legislature, become a settled rule of property, under which in all probability lands have been bought, titles have been acquired, and homes established, that may be swept away

by this decision. And for what purpose? Perhaps to follow more closely some ideal rule of logic, or to conform to the decisions of some other state? I see no sufficient reason to depart from the time-honored maxim of *stare decisis*.

(132 N. C. 1069)

## STATE v. COLE.

(Supreme Court of North Carolina. May 19, 1903.)

**MURDER—INDICTMENT—SUFFICIENCY—ELEMENTS—PREMEDITATION AND DELIBERATION—MALICE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY—TRIAL—FUNCTIONS OF JURY—DEGREE OF CRIME.**

1. Pub. Laws 1893, p. 76, c. 85, dividing murder into degrees, and in section 3 providing that nothing therein contained shall be construed to require a change in the existing form of indictment for murder, does not violate Const. art. 1, § 11, which provides that in all criminal prosecutions every man has the right to be informed of the accusation against him.

2. Under Pub. Laws 1893, p. 76, c. 85, defining murder in the first degree as murder perpetrated by willful, deliberate, and premeditated killing, or committed in the perpetration or attempted perpetration of felony, and providing further that nothing therein contained shall be construed to require a change in the existing form of indictment for murder, an indictment is sufficient to support a conviction of murder in the first degree, though it does not allege that the killing was done with premeditation and deliberation.

3. Under Pub. Laws 1893, p. 76, c. 85, defining murder in the first degree as murder perpetrated by willful, deliberate, and premeditated killing, or committed in the perpetration or attempted perpetration of felony, in order to constitute murder in the first degree, the same elements of the crime must exist as at common law, together with the additional one of premeditation and deliberation.

4. From the use of a deadly weapon, either proved or admitted, the law implies malice; and the burden is on the defendant to show, if he can, matter in excuse, justification, or mitigation.

5. Premeditation and deliberation will not be presumed from the use of a deadly weapon, but must be proved by the state.

6. No particular length of time is necessary to constitute premeditation.

7. Where one attempting to commit a premeditated and deliberate murder, in and as the result of the act, kills another than his intended victim, he will, in respect to the person killed, be guilty of murder in the first degree, if there is a legal connection between the original purpose of the act and the unexpected result.

8. In order that testimony may be of sufficient probative force to constitute evidence, it must do more than raise a mere conjecture or suspicion.

9. The Supreme Court will not interfere with a conclusion of a judge and jury that there was not only some, but sufficient, evidence to bring the mind to the conclusion of guilt beyond a reasonable doubt, except in a very clear case of error.

10. In a prosecution for murder, evidence considered, and held insufficient to show premeditation and deliberation.

11. Though it is the duty of the jury to fix the degree of murder in their verdict, they are not at liberty to do so arbitrarily, or in accordance

with their opinion as to the kind or quantity of punishment which should be inflicted.

Clark, O. J., dissenting.

Appeal from Superior Court, Vance County; Winston, Judge.

Joe Cole, Sr., was convicted of murder in the first degree, and appeals. Reversed.

The prisoner was indicted for murder as follows: "The jurors," etc., "present that Joe Cole, Joe Cole, Jr., and John Jones, late of the county of Vance, on the 29th day of September, 1902, with force and arms, at and in the county aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder Fred Stevens, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The jury found Joe Cole guilty of murder in the first degree, and Joe Cole, Jr., and John Jones guilty of murder in the second degree. Sentence of death was pronounced upon Joe Cole, and he appealed.

The evidence was as follows:

W. P. Clement testified for the state that he was on the train leaving Manson. "I got on the rear of the second-class car for white people, and went through, and found the darkies singing bolsterous songs, and I said: 'Boys, you are in the wrong car. You will have to go to your car.' There were six or seven, including the two Coles and Jones. They paid no attention. I tapped little Joe on the shoulder and repeated what I had said. He replied: 'By God! we will go when we get ready.' I then went out, opening the door of the white car, and opposite the door of the colored car, telling them to come on. I went to the front end of the colored car, and started back, taking up tickets. The car had three compartments—first-class, second-class, and smoker. The last was next to second-class car for whites. When I reached the first-class compartment, I met all the crowd coming back, muttering: 'We have first-class tickets, and how is it we are driven round this way?' All passed through the second-class car, except four—old Joe, little Joe, Jones, and another. I started to pass, when little Joe, Jones, and the other, whose name I do not know, caught hold of me and said: 'How is this? We've got first-class tickets, and we are driven round this way. How is it?' I explained that it was a state law, and the railroad had nothing to do with it. Old Joe [the appellant] just then entered the first-class compartment from the smoker. He came on, saying something. I don't know what—a sort of a roaring. The first I caught was: 'We are all friends, we are all brothers, we'll all fight for one another, and we'll all die for one another.' While he was saying that, Mitchell, my porter, was standing by, patting him on the shoulder, and said, 'Let captain explain.' Old Joe lunged at me to hit me with his fist. The porter then hit him in the chest with his hand, and prevented his hitting me. He staggered back

against the smoking-room door and drew his pistol. The porter then rushed on him, and pushed him back into the front left-hand corner of the smoking room. At that time, little Joe, Jones, and the other one shoved me in the smoking room with them. I straightened up, and saw old Joe Cole shove the porter off with his left hand and raise his right hand. He did that twice. There was a pistol in his right hand. Then little Joe tackled the porter with a pistol in his hand. The porter turned and left old Joe free. Then Stevens entered the back door of the car and ran up to old Joe to grab him, his head to one side, and his eyes shut. He touched old Joe with his hand, but did not flinch him. Just as he was about to hit old Joe, and before he struck him, Cole raised his pistol, put it at Stevens' face, and shot him. Young Joe then shot the porter. I think he shot the porter first. He hallooed, 'I am shot.' Jones got his pistol out, but did not use it. He helped push me in the smoking car. From the time I left them in the white car until I met them in the colored car, was not less than two, nor more than four, minutes. This occurred in North Carolina, about one and a quarter miles north of Middleburg, in Vance county, on the 17th August, 1902, at 2:15 p. m. Stevens was road master, and my superior. Jones had a pistol. Didn't try to do a thing, that I saw or heard. It was on the Raleigh & Gaston Railroad. Stevens was not road master of that part of the road where this occurred, and had no jurisdiction over me there. Stevens was a stout man, as large as Mr. B. [one of the counsel]. He rushed on Joe with head turned to one side, with his eyes shut. Then this man pushed his pistol in his face and fired. Stevens came from the white car. He had not talked with either of these persons, that I know of. The prisoners were from Lynchburg, Va., and got on my train at Norlina. They acted like they had been drinking, and I thought they had. Jim Mitchell is in the Rex Hospital in Raleigh."

Sam Newsome testified for the state: "These men got on at Norlina. At Ridgeway they became offensive in the second-class colored car. Just before we got to Manson, they passed through the first-class colored car and went to the white car, singing. After we got to Manson, Capt. Clement came through my car—first-class colored—taking up tickets. Joe Cole met the captain in first-class car and said: 'You turned my son and the rest out of the car, and we've got first-class tickets.' He put his hand behind him, and a colored woman said: 'He is going to shoot.' He drew his fists. Then the porter came up and took him by the arm and talked to him, saying, 'Conductor will explain,' and got him back in the smoker. Two others passed behind the conductor and got in the smoker. I went to the smoker door. Young man Cole told the porter to turn his father loose, took out his pistol and shot the porter,

who refused to do so. About that time the road master [Stevens] came in from the second-class white car and went to take old man Cole, who shot him with a pistol. Old Joe was standing up when he shot, and nobody had hold of him. Capt. Clement was on the right-hand side of the smoker when the porter was shot. I saw nothing done to the prisoners. I would have seen it in that car. Clement and the porter had no pistols. I saw the old man and the young man have pistols. The old man here is the man. I recognize him. Stevens was killed; was dead when he hit the floor; shot in the head. There were other passengers on the train in the second-class car, and some in the car we were in."

Isaac Steinheimer testified for the state: "I was on train in first-class coach for whites. Heard of the shooting and went forward. At rear end of the colored coach I found Turner holding the two Coles, who were trying to escape. They were on bottom step of the platform. Gun was called for. I got one, and assisted in securing and tying them. I took pistol from old Cole's pocket. It had been recently fired. No pistol was found on young Cole or Jones. I didn't see the trouble at all, and knew nothing of it until it had ended. I got the pistol and cartridges of the old man."

J. B. Brack testified for the state to finding a pistol near a point where he understood the train had stopped after the shooting, between Rowland's and Twisdale's places. It was the day after the shooting, about 1 o'clock p. m.

Capt. Clement recalled: "The train stopped after the shooting between Rowland's and Twisdale's places, about a mile and a half north of Middleburg. From Manson to Middleburg, four or five miles. Schedule time between these stations, six minutes. The second-class car for whites was nearly full of passengers. I knew a good many of them, and can name several now," which he did.

The prisoner was convicted of murder in the first degree, and moved in arrest of judgment. The motion was overruled, and the prisoner appealed from the judgment pronounced.

T. M. Pittman, for appellant. J. H. Bridgers and the Attorney General, for the State.

CONNOR, J. The first question raised on the appeal for the consideration of the court is whether the bill of indictment is sufficient, in substance and form, to support the finding by the jury of murder in the first degree. The indictment is in the form generally used in this state, and did not charge that the killing was done with premeditation and deliberation. The contention of the prisoner's counsel is that section 3, c. 85, p. 76, of the Public Laws of 1893, conflicts with section 11 of article 1 of the state Constitution, and that

therefore the statutory provision must be declared void. It is ordained in that article of the Constitution that, "in all criminal prosecutions, every man has the right to be informed of the accusation against him. \* \* \* " The act of 1893 (Pub. Laws 1893, p. 76, c. 85) does not deny to the accused that right. Murder was the charge made against the prisoner. He knew (by fiction of law, at least) that prior to the act of 1893 it was not necessary either to aver or prove deliberation and premeditation as to the killing. It was sufficient if malice was shown. The act of 1893 was to that extent favorable to those who after its enactment might be indicted for murder. But such as might be after that time indicted for murder were informed by section 3 of the act (notwithstanding the advantage given to those charged with murder) that the form of the indictment in use in the state would not be altered, and that the jury, upon the evidence, should determine in their verdict whether the crime was murder in the first or second degree; premeditation and deliberation being the features which constitute murder in the first degree. The very words of the act give a clear notice of the form of indictment to be used, and what could be shown in evidence by the state, and the duty and power of the jury to inquire into and weigh the evidence, and to determine whether the homicide was committed with premeditation and deliberation. Our statute, then, does not change the quality of the crime of murder, as the offense was defined before the enactment of the statute. The division simply notices—concedes—that the atrociousness of the crime may be greater or less according to conditions and surroundings, and the punishment to be inflicted should be greater in some instances than in others. Many of the states of the Union have statutes similar to ours, and a majority of the courts sustain the sufficiency of bills of indictment that do not contain the averment of premeditation and deliberation. The question has not been directly raised in this court, but, in a number of cases that have been before us since the act of 1893, our attention has been called to the form of the indictment; and none of the judges, so far as this writer knows, has had doubts about the sufficiency of such indictment. The point was virtually decided in *State v. Covington*, 117 N. C. 866, 23 S. E. 337. We think the ruling of his honor in refusing to have the judgment arrested for insufficiency of the indictment was correct.

Whatever difference of opinion may have existed in regard to the construction of the Acts of 1893, p. 76, c. 85, before or at the time of the decision of Fuller's Case (N. C.) 19 S. E. 797, it is now conceded that by the statute the crime of murder in the second degree is as at common law, which is defined to be: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's

peace, with malice aforethought either express or implied." Blk. Com. p. \*195. To constitute murder in the first degree, since the passage of the statute, the same elements are requisite, with the additional and essential one of "premeditation and deliberation." That from the use of a deadly weapon, either proved or admitted, the law implies malice, and the burden is upon the prisoner to show, if he can, matter in excuse, justification, or mitigation. It is the duty, and incumbent upon the state, if it will ask for a conviction of murder in the first degree, to prove "premeditation and deliberation." They will not be presumed or implied from the use of a deadly weapon. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128.

The present Chief Justice, who dissented in Fuller's Case and Rhyne's Case, said in his dissenting opinion in the last-named case, in speaking of the construction placed on the act in Fuller's Case, "Having reiterated it since, we must take it now as settled." These decisions, however, also hold that no particular length of time is necessary to constitute premeditation. 124 N. C. 857, 33 S. E. 135. The court will not undertake to prescribe any arbitrary rule defining the time during which it is necessary that the prisoner "premeditate and deliberate." In the several cases which have come before this court upon appeal, it has adhered to this construction of the statute; the division of opinion among its members being in regard to the question whether there was or was not evidence of "premeditation and deliberation."

We assume that it is also well settled that if one, attempting to commit a premeditated and deliberate murder, shall, while in the act, and as a result of it, kill another, he will, in respect to the person killed, be guilty of murder in the first degree; as, if one lay poison for A., and it is taken by B., from which he dies, it is murder in the first degree; or if one, of malice, either express or implied, but without premeditation, be in the act of killing A., and while in the act, and as a result thereof, he kill B., it is murder in the second degree. In both these cases, however, there must be a legal connection or relation between the original purpose and act and the unexpected result. In a certain sense, of course, every act is related to every other and preceding act of a human being; but the law, being based upon principles applicable to the practical transactions of human life, avoids impracticable, scholastic refinements, and adopts such rules as experience has shown to be capable of practical application.

His honor charged the jury: "If the killing of Stevens was not the result of an effort to kill Clement, but was intentionally done, then the prisoner could not be convicted of murder in the first degree for such killing unless the jury find, beyond a reasonable doubt, that the prisoner, before the shooting, coolly determined to kill Stevens,

and had deliberated and premeditated on it, and, as a result, had formed a fixed purpose to kill; in other words, to convict a prisoner of murder in the first degree, you must be satisfied beyond a reasonable doubt either that the prisoner had, with deliberation and premeditation, formed a fixed purpose in his mind, before he shot, to shoot and kill Clement, and, in an effort to do so, killed Stevens, or he had, with deliberation and premeditation, formed a fixed purpose to kill Stevens, and, in pursuance of such fixed, determined, premeditated, and deliberate purpose, he did kill Stevens. In either of these situations, he would be guilty of murder in the first degree." We are not inadvertent to the difficulty which is always involved in the question whether testimony is of sufficient probative force to constitute evidence, or whether it is a mere scintilla. The rule is clear that testimony must be sufficient to do more than raise a mere conjecture or suspicion. The difficulty is found in applying it to particular cases as they arise. Certainly this court will not interfere with the conclusion of a judge and a jury that there was not only some, but sufficient, evidence to bring the mind to a conclusion of guilt beyond a reasonable doubt, except in a very clear case of error. In this case, with the full statement of the uncontradicted testimony of an eyewitness, which is consistent and bears the impress of truth, we are forced to the conclusion that there was not sufficient evidence that the prisoner killed the deceased "in an effort to kill Clement, or that he had, with deliberation and premeditation, formed a fixed purpose to kill Stevens." We do not pass upon or express an opinion in regard to his purpose to kill Clement, but assuming, for the sake of the argument, that he had done so, he did not have his pistol pointed towards him, but as Stevens came in "he raised his pistol." The position of Clement at the moment that Stevens came in the car rendered it impossible for the prisoner to shoot at him and hit Stevens. Clement says expressly that, as Stevens came in, the prisoner raised his pistol and shot. The coming in of Stevens, who was doubtless attracted by what had occurred and the noise, was a separate and independent incident in the transaction. It bore no legal relation to the then condition of the parties. It was the intervention of a new element or agency, and brought about an unexpected, and, in a legal sense, independent, result. The shooting of Stevens by the prisoner was without necessity. He was not armed. His evident purpose was to interfere and aid the conductor and porter in compelling the prisoner and those with him to behave themselves. He was free from blame. The prisoner, by his prayer for instructions, prepared by faithful, able, and learned counsel, concedes that he is guilty of murder in the second degree, which excludes all idea of excuse.

While we adhere to the decisions of this

court that it is not necessary that any "particular time" shall elapse for the prisoner to meditate and deliberate, yet the very term necessarily involves the idea that there must be some time, however short, between the first conscious conception and the completion of a purpose or determination in his mind. Fitz-James Stephens, in his History of the Criminal Law of England, gives an interesting account of the efforts made by the sages of the law to work out a satisfactory definition of "malice," "malice aforethought," and "malice prepense." The author suggests that he has solved the difficulty in his Digest. The conclusion to which we are brought is that it affords another of the many illustrations of the poverty of language in giving expression to mental conceptions. We find that the words "foresight," "forethought," "forecast," and "premeditation" are used as synonyms. "A man shows his want of premeditation who acts or speaks on the impulse of the moment." It is impossible to conceive of an act committed under the conditions described by Clement, in the killing of the deceased, as being the result of "premeditation and deliberation," or the expression of a "fixed purpose." Of course, it is for the jury, by their verdict, to fix the degree, but it is not contemplated that they shall do so arbitrarily, or in accordance with their opinion as to the kind or quantum of punishment which should be inflicted. Their verdict must be based upon competent evidence, under a fixed rule of law. In some states of the union the question of punishment is left with the jury. Such has never been the purpose or the policy of the Legislature of this state.

We think that the prisoner was entitled to have the jury instructed, as prayed by him, that there was no evidence of murder in the first degree, and that, for the refusal to give it, he is entitled to a new trial.

We should, in accordance with the example set by those who have preceded us, have been content to conclude this opinion with the declaration of the law of the case, and our reasons therefor, but for the suggestion urged upon us that in some way we are giving encouragement to lawlessness and lynching. The very remarkable suggestion is made, and seriously insisted upon, that it is our duty, in the decision of this case, to consult criminal statistics, newspaper reports of lynchings, and threats thereof, that we may be the better enabled to know and declare what the law is by doing so. Just how or by what mental process this court is to be enlightened in this way, we are not very clearly advised. Nor can we conjecture what certain persons or classes of persons may say or do because we have, in the discharge of our duty, adjudged the prisoner to be entitled to a new trial. "Such an argument should not be addressed to courts, which cannot make but only construe and administer the law as it is written. If worthy of con-

sideration, it should be directed to the Legislature as a reason for changing the law." This is the language of a great and learned judge (Bynum, J., in *Bank v. Green*, 78 N. C. 252). To the suggestion that the construction put upon the statute in *Fuller's Case*, decided in 1894, is "unfortunate," we note that the personnel of this court has since that time undergone many changes, and the case has at almost every term been cited with approval, and conceded to be the controlling authority for this court. It is also worthy of note that the Legislature has met at five different sessions, and the law in this respect has not been changed. We have no other means of ascertaining what the law is. The conclusion which we have reached is sustained by the uniform current decisions of this court, and our best consideration, guided, not by criminal statistics, frequently misleading, nor by an attempt to ascertain or direct public sentiment, but by a determination "to administer justice without respect to persons, and to do equal rights to the poor and the rich, to the state and to individuals." Whether such suggestions (which do not come from counsel) that the judges, either from incapacity to know the law, or mental bias or sentimental weakness, are inefficient or incompetent, are calculated to suppress lawlessness, is well worthy serious consideration. If we are to have "a government of law, and not of men," the courts must be content to move in the orbit assigned to them by the Constitution, declaring the law as it is written, "knowing nothing of the parties, everything about the case." When we "go outside of the record" to decide causes, we invite counsel to address to us arguments fit for other forums than this, and ourselves embark into unknown and unsafe waters. The law, instead of being a fixed "rule of action" for the guidance of the citizen, and protection of his life, liberty, and property, becomes the expression of the opinion of men set in high judicial position, varying according to the drift of public sentiment or temporary conditions. This is not the example or teaching of the elders. We will not do the people of this state the injustice to believe that they desire their judges to construe the law otherwise than it is written by themselves, or to hasten any man, however degraded or humble, to his death in accordance with arguments drawn from other sources than the "law of the land."

CLARK, C. J. (dissenting). There is no contradiction in the testimony upon which the exceptions made to the charge of his honor are based. The testimony of Clement, the conductor in charge of the train, is fully given in the statement. The prisoner was, together with little Joe and Jones, indicted for murder. He was convicted of murder in the first degree, and appealed. The other defendants were convicted of murder in the second degree, and did not appeal.

It was in evidence that the negroes had just come from Virginia, and they were incensed at the legal requirement in this state for the separation of the races in the cars. The prisoner was avowing their determination to "fight for one another; that they would die for one another." The prisoner "lunged" at the conductor, and hit him with his fists. The porter shoved him back, whereupon he drew his pistol. At this, three of the prisoner's comrades shoved the conductor into the smoking room, and one of them shot the porter. The conductor saw the prisoner shove the porter off and twice raise his right hand with his pistol in it. The jury had a right to infer from this action, from his comrade shooting the porter, from the prisoner's declaration that they would fight and die together, and from his shoving back the porter, and twice raising his hand with his pistol in it, that the prisoner's intention was to get room to level his pistol at the conductor. There were premeditation and forethought in this. He shoved the porter back. Then he raised his hand with the pistol in it, lowered it, and raised it again with the pistol in it. What that purpose was, the jury alone could decide, not the court. If it was to shoot the conductor, there was not only the "instant of premeditation," which is all that is required by our authorities, but there was calculation, method—a determination to get a good aim, and room to level the pistol at his object. Just then the deceased—roadmaster of the railroad company—entered the car and rushed to grab the prisoner. His object evidently was to seize the prisoner and prevent his shooting the conductor, and the prisoner, balked of his intention to shoot the conductor, turned and shot the deceased. This would seem the only reasonable motive, and certainly the motive was to be drawn from the conduct of the prisoner and the surrounding circumstances, and was a matter which the judge properly left to the jury. If the prisoner was, with legal premeditation, however brief, intending to shoot the conductor, and shot the deceased because he was interfering to prevent it, this was murder in the first degree—as much so as if he had killed the conductor. It was no sudden gust of passion, but an execution of his already informed intention to kill, by killing the man who attempted to prevent him. It was premeditated killing, though the time was shorter in the selection of his new object. The facts of this case duplicate those in *State v. Benton*, 19 N. C., at page 223, where Judge Gaston says: "The accused was engaged in a most wicked act, not unlikely to terminate in murder. It was the duty of every bystander to interpose and stop this career of violence. The deceased at this moment came up toward the parties, when the prisoner instantly turned from the first contemplated victim of his vengeance, advanced, and, without a word of warning, plunged a knife into

him and killed him. We can discover no provocation on the part of the deceased to change the character which the law impresses on the fatal deed—the character of willful murder." The matter was properly submitted to the jury, and, it seems to me, with instructions too favorable to the prisoner.

His honor charged the jury: "If the killing of Stevens was not the result of an effort to kill Clement, but was intentionally done, then the prisoner could not be convicted of murder in the first degree for such killing unless the jury find, beyond a reasonable doubt, that the prisoner, before the shooting, coolly determined to kill Stevens, and had deliberated and premeditated on it, and, as a result, had formed a fixed purpose to kill. In other words, to convict the prisoner of murder in the first degree, you must be satisfied, beyond a reasonable doubt, either that the prisoner had, with deliberation and premeditation, formed a fixed purpose in his mind, before he shot, to shoot and kill Clement, and, in an effort to do so, killed Stevens, or he had, with deliberation and premeditation, formed a fixed purpose to kill Stevens, and, in pursuance of such fixed, determined, premeditated, and deliberate purpose, he did kill Stevens. In either of these situations, he would be guilty of murder in the first degree." The prisoner excepted to so much of the charge as submitted the question of his guilt of murder in the first degree; but, as I understand the law, this charge was not only not unfair to the prisoner, but was more favorable to him than he was entitled to. The evidence was sufficient to go to the jury, to show that the prisoner had, with deliberation and premeditation, formed the purpose in his mind to do murder; and, with this purpose fixed in his heart, it makes no difference upon whom his vengeance was wreaked, and particularly is this so in this case, where the killing is a part of a continuous transaction. *State v. Benton*, 19 N. C. 223; *State v. Shirley*, 64 N. C. 610; *State v. Smith*, 2 Stro. 77, 47 Am. Dec. 589; *Holmes v. State*, 88 Ala. 26, 7 South. 193, 16 Am. St. Rep. 17; *People v. Miller*, 121 Cal. 343, 53 Pac. 816; *Hopkins v. Com.*, 50 Pa. 9, 88 Am. Dec. 518. I think the judgment should be affirmed. I concur in the opinion of the court sustaining the sufficiency of the indictment.

Every dissenting opinion is necessarily a declaration that, in the opinion of the dissenting member of the court, the law has been erroneously declared by the majority. It is not every time, however, that a judge who disagrees with the majority is justified in dissenting. The matter should either be of enough importance to justify putting his dissent on record, in the prospect that on some future occasion the court may change its views, or the matter should be of such a nature that the dissenting judge deems it to the public interest to point out the injurious consequences which in his judgment will re-

sult from the principles laid down in the opinion of the court. Especially should this be the case when, as here, the dissent is against granting a new trial to one convicted of a capital offense.

There is nothing that is more subversive of good government than lynchings, yet more men have been executed in this mode in North Carolina in the last 14 years than by lawful process, and some years twice as many, as appears by the reports of the Attorney General. The last message of the Governor of the state reports eight executed by lynch law in the last two years, of whom three only were lynched for rape, and in the same period only five were executed by the sheriff for all offenses. The frequency of lynchings has dulled the popular perception to the dangerous demoralization which will result from such punishments inflicted "outside of the law." Not long since, a coroner's jury impaneled to sit upon one executed in this method, in one of the most intelligent counties of the state, passed resolutions eulogizing the lynchers, and the grand jury of an adjoining county officially indorsed their action by a resolution. In the case of this very prisoner (the appellant), and in numerous others known to all men, a military guard had to be ordered out, at much expense, to protect the prisoner till a legal trial could be had, and frequently the accused have had to be brought to Raleigh for safe-keeping. There need not be and should not be such conflicts between the public desire for the repression of crime, and the execution of that will through their properly constituted public officials and servants.

In a free country, law is simply the expression of public opinion, formulated through the servants of the people elected for that purpose. The lynchings in this state, as elsewhere, are a declaration that public opinion is not yet in favor of the abolition of capital punishment, and shows that there is in many quarters a lack of confidence in the certainty of the execution by the properly constituted authorities of the law, which requires the infliction of such punishment for murder and rape. When public confidence is restored, in the certainty of the execution of the law in this particular, lynchings will cease. The evil can only be removed by destroying the cause.

It has not been alleged in any quarter that those selected to execute the laws in any of the three departments—executive, legislative, or judicial—are lacking in integrity, learning, and devotion to their duty, but we know this: That whereas by the Attorney General's report in 1890, when criminal statistics were first reported, there were for the two years, 1889-1890, indictments for murder, of whom two, only, were hung by process of law, 96; rape, 25; manslaughter, 15; total, all criminal cases, 10,437—there were by the Attorney General's report in 1902, for the two years, 1901-1902, indictments as follows:



murders, 191; rape, 37; manslaughter, 60; total criminal cases, 17,610. These are the official reports of the superior court clerks, compiled by the Attorney General—an officer of this department—and, being published by authority of law, we take judicial notice thereof.

The great expense of criminal courts is borne by law-abiding citizens, that men and women may be secure in their persons, their lives, and their property, and the great object of punishment is to lessen crime by deterring others from its commission. The above figures show that the object is not being attained, but, on the contrary, the reverse. The figures are official, and have been published by the state under authority of the General Assembly, and for this very purpose of furnishing information whether the method of executing the law is such as to decrease crime, or needs amendment to that end. The number of murders in London last year, with its 6,000,000 of people, drawn together from all parts of the globe and all classes of men, is shown by the police reports to have been 20. North Carolina has less than one-third of the population, and, with one of the most homogeneous people in the world, makes the above showing in her published official reports. That evil doers should so multiply among us can be due only to some defect in the execution of the laws, which should, but too evidently does not, repress and diminish crime. The existence of lynchings is but one form of public protest, and is one from which only evil can come.

What are the defects in our administration of justice which should be remedied, it may not be proper, in a judicial opinion, to indicate; but, as a justification of my dissent in this case, it is enough to say that, in my judgment, the ruling here made, by increasing the difficulty of sustaining convictions for murder upon such a state of facts as is here shown, is, in my judgment, detrimental to the public welfare.

Whatever the cause, the number of murders has doubled in 12 years, while manslaughter has increased fourfold, and other crimes 70 per cent. And it must be remembered that there are a large number of homicides, which, because committed in self-defense or for other reasons, have not been indicted, and are not included in the above numbers; and, indeed, the number of homicides in this state last year has been unofficially reported and published as being 285—how correctly, cannot be ascertained. Thinking, as it is my right of dissent to say, that the judgment of the court is erroneous as a matter of law, I should not have put myself on record with a dissenting opinion if I did not think that my highest duty to the public welfare required this dissent to a ruling whose harm will go farther, in my judgment, than the release of this appellant from just punishment for the capital offense of which a jury have found him guilty. The conviction

of the prisoner was a matter for the jury. I have viewed with unfeigned alarm the growing disposition to take cases from the jury, both in civil and criminal matters, upon the ground, unknown to the elders (see opinion of Bynum, J., in *Wittkowsky v. Wasson*, 71 N. C. 458, and Douglas, J., in *Coble v. R. R. Co.*, 122 N. C. 900, 29 S. E. 377), that there is not sufficient evidence, when the 12 men who are by the Constitution sole judges of the facts have found the evidence sufficient to compel a unanimous verdict, and the trial judge has refused to set aside their action, as he is vested with the power to do.

In a trial for any capital offense, apart from any other reasons, the mode of trial prescribed by legislation, of itself, renders a conviction for murder in the first degree almost an impossibility in this state, except in cases of sheer poisoning or lying in wait, if the prisoner is able to retain able and skillful counsel. If the abolition of capital punishment was embodied into law, and was a fair expression of public opinion, this would be proper. But because the practical abolition of capital punishment is not according to the law, which still denounces capital punishment in certain cases, and is contrary to public opinion, we have lynchings, to threaten public order, and the great increase in homicides, as shown from our official reports. In a trial for a capital offense, formerly the prisoner was neither allowed counsel to speak for him, nor compulsory process to summon witnesses in his behalf, nor the right to cross-examine the witnesses for the state. To mitigate this barbarism and injustice of the common law, a great disparity in the number of challenges was given the prisoner. Now, though the above disadvantages to the prisoner have been removed, the prisoner has still 23 peremptory challenges, while the state has only 4, besides his unlimited number of challenges for cause. It is only necessary for the prisoner to "run" for one man on the panel who is friendly to him, for, if he can secure that man by the rejection of 23 others besides those stood aside for cause, he has defeated the unanimous verdict which is requisite for conviction.

The prisoner has, and should have, the benefit of the presumption of innocence, and that the jury should be convinced of his guilt beyond a reasonable doubt; and he has also the unavoidable advantage that every judge who sits in the trial court and in this court has, like the writer, more or less often been counsel for those charged with crime, and naturally views every cause, more or less, from that standpoint, and with the natural sympathy any humane man must feel for any one who is on trial for his life. In addition, in our state, the jury must be unanimous, and the failure to agree of 1 juror out of 12 defeats conviction. This has been changed in some of the states, it having been found necessary, in order to secure the administration of justice, to require only a two-

thirds or a three-fourths vote; but the people of this state will be slow, probably, to abolish the requirement of a unanimous verdict. The state, however, is further handicapped in capital cases, and without any reason, by the prisoner being allowed 23 peremptory challenges to its 4. This has been changed in most of the states, which now allow an equal number of peremptory challenges (usually 6 or 10) to each side. Then the defendant in all criminal cases has the still further advantage that while the defendant can except, and review on appeal any ruling against him, the state can never except to any ruling, however erroneous, made in favor of the prisoner and against the prosecution. Formerly in North Carolina, and until changed by statute, the state could appeal from a verdict of not guilty (*State v. Had-dock*, 3 N. C. 162; *State v. McLelland*, 1 N. C. 632), and should be allowed to do so again, in the interest of public justice. This is allowed in Connecticut and some other states. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, and cases cited under that case in 27 L. R. A. 498, and 48 Am. St. Rep. 202. The sympathy of the jury and of the judge are naturally with one charged with a capital offense, lest he shall be convicted unjustly; but this natural tendency should not be added to by the matters above mentioned, and others not mentioned, which make the execution of the law in cases of those charged, however justly, with a capital offense, almost a dead letter, so far as a conviction carrying the death penalty is concerned.

Our statute law says murder shall be punished with death. In practice, in this state and some others, the punishment is ordinarily a fine paid by the accused to his counsel as a fee, and a far heavier fine paid by the law-abiding people for the costs of the useless trial. The exceptions do not count; being, as our Reports show, one, and never over two, in a hundred, executed by law, and double that number by lynchings.

It is useless to pass laws against carrying concealed weapons whenever men shall become convinced that slayers of men, however guilty, can only in rare instances be punished by law, and that real protection is really in their own pockets, and "getting the first shot." It will be equally useless to denounce lynchings, by statute or otherwise, in any locality where men in any considerable number believe that in no other way than by the fear of lynching can grave crimes be prevented, and that the fear of punishment by law is too vague and indefinite to deter men from the commission of capital offenses. The ever-increasing tide of crime should be repressed in an orderly and legal way, by the administration of the law by the courts, and resort to any other mode is evil, and evil only. But to do this, the administration of justice, especially in capital cases, should be more efficient. Any amendment which shall render it possible to convict the guilty will

not, if properly framed, destroy any safeguard to those who are innocent. It is possible here, as well as elsewhere, to make legal proceedings more efficient without making them work injustice. Whatever our laws are, they should be enforced.

The passage of the bill to divide murder into two degrees was secured with the design of making the execution of the law more efficient, since juries might convict of murder in the second degree in cases in which they might acquit rather than convict of an offense calling for capital punishment. Unfortunately, however, the majority of the court, in *State v. Fuller*, 114 N. C. 885, 19 S. E. 797, ruled further, though there was no provision in the act on the subject, that the immemorial common-law presumption of guilt of the offense charged in the indictment, raised by proof of killing with a deadly weapon, was transferred, to be a presumption only of murder in the second degree. Though there was a dissent in that case, this ruling has now been so long acquiesced in that it can probably only be changed now by legislative enactment. The result, however, has been the almost practical abolition of convictions for murder in the first degree, which was not contemplated by the Legislature. In consequence of that ruling, the majority of the court felt unable to approve the verdict of murder in the first degree in *State v. Gadberry*, 117 N. C., at page 825, 23 S. E. 477, in which the prisoner was carrying off a little girl for purposes of lust, and upon her weeping and crying, and calling upon her father and mother and brother to save her, they came without any weapon, whereupon the prisoner pushed the child into the road in front of him, "put the pistol to the child's back, fired, and ran off into the woods." The verdict of guilty was set aside by this court. There is not a more horrible case in the books. In *State v. Bishop*, 131 N. C. 753, 42 S. E. 836, in conformity to the same precedent, the majority of the court felt compelled to set aside a verdict of murder in the first degree where four negro men went in a body to a store, grossly insulted a young white clerk, and, when they got him out doors, chased him around, firing 15 or 20 shots at him, seven of which struck him, all in the back, and after he fell they stood by till one of their number fired two more shots into the dying man, when they all jumped into a wagon and rode off. In *State v. Thomas*, 118 N. C. 1113, 24 S. E. 431, a man cruelly beat his wife, was heard to threaten to kill her, then a heavy blow followed, her neck was broken, he threw her body into the water, and denied having touched her. Yet the court held there was no evidence of murder in the first degree and set aside the verdict. In *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128, a negro being engaged in a row with another employé, the employer asked him in a gentle way as to the trouble, whereupon without provocation he slew the employer and

rushed off, boasting of the deed. The majority of this court set aside the verdict. At the following term of the court below, when the prisoner submitted to guilty of murder in the second degree, the presence of a company of soldiers was necessary to secure his safe conveyance to the penitentiary. This should not be the case in any country where the people make and execute the laws. There are several other cases in our books almost as bad. Enough has been done for those who murder. It is time the courts were doing something for those who do not wish to be murdered.

"Mercy murders, pardoning those who kill."

The eminent judges who made the precedent in *State v. Fuller* could not and did not see how far it would be carried. In the present case, the deceased, unarmed, was simply trying to prevent the murder of the conductor. The prisoner killed him for trying to prevent it. There was no provocation. It seems to me that this is clearly murder in the first degree, and that I should say so.

Regretting to differ from my Brethren in any case, and especially in a case of this nature, a high sense of public duty compels me to enter my dissent to a ruling which is according to precedent as they see it, but which, to my view, is not only clearly erroneous in law, but must have a detrimental effect upon the due administration of justice. If what is here said shall in any way bring about increased efficiency in the administration of justice, and moderate or reduce the growing volume of crime, which has increased 70 per cent. in 12 years, and doubled the number of true bills for murder and quadrupled the number of indictments for manslaughter in that short space of time, this dissent will not have been written in vain. The fear of prompt and sudden punishment can deter from crime, and reduce the frightful and growing number of homicides; else why have a costly administration of justice at all? It is certain that under our present procedure in capital cases, and the construction placed by the court on the act dividing murder into two degrees, that punishment in such cases is very far from certain. Men do not fear the law enough to refrain from gratifying their evil passions. These things should be plainly said, and, if the only relief is in legislation, law-abiding citizens should know it, that a sound public opinion may apply the remedy.

(132 N. C. 705)

DALE v. SOUTHERN RY. CO. et al.

(Supreme Court of North Carolina. May 26, 1903.)

TRESPASS ON REALTY—DAMAGES AFTER ACTION BROUGHT—ACTION BY TENANT—JOINER OF LANDLORD—HARMLESS ERROR.

1. In an action for injury to land caused by a trespass committed by defendant railroad company in filling up a ditch while changing a grade of its roadbed, a refusal to instruct

that there was no evidence of any damage prior to the bringing of the action was harmless to defendant, where the verdict was for nominal damages only.

2. Under Pub. Acts 1895, p. 297, c. 224, providing that in actions for trespass on realty the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass, a tenant may sue for injuries to his leasehold estate caused by a trespass on the property, without joining the landlord.

3. Under Pub. Acts 1895, p. 297, c. 224, providing that in actions for trespass on realty the entire amount of damages which the party aggrieved is entitled to recover shall be assessed by the jury, all damages accruing after the commencement of the action and up to the time of the trial may be recovered.

Appeal from Superior Court, Burke County; Hoke, Judge.

Action by M. L. Dale against the Southern Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. F. Bason and S. J. Ervin, for appellants. Avery & Ervin, for appellee.

DOUGLAS, J. This was an action for damages to his leasehold alleged to have been sustained by the plaintiff on account of a trespass committed by the defendant in filling up a ditch while engaged in changing the grade of its roadbed near Silver creek, in Burke county. This ditch or branch was a natural water course. The action was instituted on March 3, 1902, by the plaintiff, who alleged that he was a tenant in possession of the land under a lease for a term of two years from and after January 1, 1902, and that, by reason of the obstruction of a ditch by the defendant in the winter of 1901 and 1902, the flow of the water from the leased premises was prevented, and the crops for the years 1902 and 1903 would be greatly lessened and reduced in amount; the plaintiff tenant being entitled, under his contract of lease, to one-third of the grain and one-half of the hay raised on said land. The landlord was not a party to the action. The defendant contended (1) that there were no damages as alleged; (2) that the work was done by Oliver & Co., independent contractors, and that, if any damage was done, the said contractors were alone responsible therefor; (3) that, in any event, no damage could be had against the defendant company, accruing after the commencement of the action, in March, 1902.

The following were the issues, and answers thereto: "(1) Did the defendant the Southern Railway Company wrongfully and unlawfully trespass upon the premises and estates of the plaintiff, causing damage to the same? Yes. (2) What damage has the plaintiff suffered by the wrong and injury, to time of action commenced? Five cents. (3) What is the entire damage the plaintiff

¶ 2. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 514.

has sustained by this wrong and injury? \$250.

The first exception was to the refusal of the court to grant a new trial. As we see no error in the conduct of the trial, this motion was properly refused.

The contention of the defendant in the court below that the contractors, Oliver & Co., were alone responsible for the alleged injury, seems to have been abandoned in this court, as it was neither pressed in the argument, nor alluded to in the defendant's brief. In any event, it is unavailing, as Parsons, the defendant's witness and engineer in charge, testified that "the entire work was under the supervision of the Southern Railway engineer, and done as he directed." As there was no evidence to the contrary, the plea of avoidance, whose burden was on the defendant, could not have been sustained.

The only exceptions discussed in the defendant's brief are the third, fourth, sixth, eighth, and ninth. The sixth exception is to the refusal of the court to give the following prayer: "There is no evidence tending to show that the plaintiff sustained any damage prior to the 3d day of March, 1902, and you should therefore answer the third issue, 'No.'" This instruction was properly refused, as the trespass would of itself have entitled the plaintiff to nominal damages. As the jury found only nominal damages—five cents—the defendant has no cause to complain. The other exceptions all depend directly or indirectly on the right of the plaintiff to recover for damages accruing after the commencement of the action. The defendant's brief seems to rely principally upon the dissenting opinion in the case of *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703. While that dissenting opinion contains some well-stated propositions of law, it does not sustain the defendant's contention. Even if it did, it could scarcely be expected to outweigh the opinion of the court.

The defendant further contended in the argument that the plaintiff could not maintain his action without the joinder of the tenant in fee. We see no merit in either contention. Pub. Acts 1895, p. 297, c. 224, provides that in cases like that at bar "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his

property." The words "party aggrieved" clearly refer only to the plaintiff in the action. The object of the law is to prevent a multiplicity of suits by him, and not to deprive him of his lawful remedy, or to render a resort thereto both difficult and hazardous. He has suffered substantial damages to his crops and his leasehold, which are entirely severable from those of his landlord. Why should he be compelled to make every one a party to the action who may have some vested or contingent interest in the fee, when his claim is in no way adverse to them? The principle that the landlord and tenant may bring separate actions for injuries to their respective interests, has been recognized by this court at its present term. *Williams v. Canal Co.*, 130 N. C. 746, 41 S. E. 1030; *Norris v. Canal Co.* (at this term) 43 S. E. 593.

As the statute requires that all damages to which the plaintiff is entitled by virtue of the alleged trespass shall be assessed in this action they must necessarily include all those accruing up to the trial. *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703; *W. J. Lassiter v. Railroad*, 126 N. C. 509, 36 S. E. 48; *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027; *Rice v. Railroad*, 130 N. C. 375, 41 S. E. 1031.

We do not see any substantial difference, in the allowance of permanent damages, between cases where the subsequent damage naturally follows the previous injury, and those cases where recurring damages would necessarily result from a continuing trespass, were it not for the acquisition of an easement. In both cases we think the statute contemplates the assessment of the entire damages. In the case at bar the plaintiff testifies that "the rock that did damage in ditches along the railroad was not put there till after the suit was brought." If this were an independent injury, it might not be cognizable in the present action; but it seems but one of many similar acts constituting a continuing trespass, connected with the same general work upon the road-bed of the defendant, and contributing to the same common damage. We think, therefore, that, being part of the same general transaction complained of, it comes within the purview of the statute.

The judgment of the court below is affirmed.

(132 N. C. 709)

**HOWARD v. SOUTHERN RY. CO.**

(Supreme Court of North Carolina. May 26, 1903.)

**MASTER AND SERVANT — RAILROADS — SAFE PLACE TO WORK — CAR PLATFORM — VIOLATION OF RULES — CONTRIBUTORY NEGLIGENCE.**

1. Plaintiff, an employé of defendant railroad, was riding on the latter's freight train, sitting on the steps of a shanty car, for the purpose of viewing the country. The steps of the car struck against some wood piled by defendant's servants alongside the track, and plaintiff was injured. It was not necessary for plaintiff to sit on the platform, and he had seen defendant's rules against riding on the platform of passenger trains. *Held*, defendant was not liable.

Petition for rehearing. Dismissed.

For former opinion, see 43 S. E. 1004.

W. C. Feimster and Armfield & Turner, for petitioner. L. L. Witherspoon and S. J. Ervin, for defendant.

CONNOR, J. This cause was decided at the last term, and disposed of by a per curiam opinion. 43 S. E. 1004. Upon a petition to rehear, the case was argued, and full and exhaustive briefs filed by counsel. We have carefully considered the record and the briefs, and are of the opinion that the case was properly decided at the last term of the court.

Upon the plaintiff's evidence it appeared that he was an employé of the defendant, and was traveling from Salisbury to Gold Hill on a freight train, consisting of six or more box cars and some shanty cars; that he was sitting on the steps of one of the shanty cars, with his feet on the bottom steps of the car; that the defendant's servants had piled wood upon the side of the track about three feet high. There were benches inside the shanty car for the hands to sit upon, and there was no suggestion that it was necessary for the plaintiff to sit upon the platform. It also appeared that the company's rules against riding on the platform of passenger trains had been seen by the plaintiff. It appears that the plaintiff was sitting upon the steps for the purpose of seeing the country through which they were passing; his knees projected a few inches beyond the shanty car. The engine passed the cord wood safely, and the bottom of the box car was high enough to pass over the wood without touching it. It struck the step upon which the plaintiff was sitting. There was evidence that the plaintiff and other employés of the defendant were in the habit of riding on the shanty cars, and on the platform, and on top of the cars, or wherever they pleased. His honor being of the opinion that upon the plaintiff's own testimony he was not entitled to recover, the plaintiff in deference thereto submitted to a nonsuit.

There can be no doubt in regard to the

44 S. E.—26

duty of the defendant to furnish its employés a safe place in which to travel to and from their place of employment, and it is clear upon the plaintiff's testimony that the defendant had furnished a car with sufficient room and accommodation for the plaintiff and the other hands. There was no necessity for the plaintiff to sit upon the steps of the car, nor was he there in the line or the performance of any duty. Certainly he was not entitled to demand any higher degree of care upon the part of the defendant than if he had been a passenger. The passenger who needlessly exposes himself against the rules of the company, and is injured under the circumstances testified to by the plaintiff, would not be entitled to recover; and this upon the familiar principle that if one voluntarily puts himself in a place of danger, and is injured in consequence thereof, he cannot claim damages. This principle is sustained by numerous authorities. The plaintiff relies upon the case of *Lindsay v. Railroad* (decided at this term) 43 S. E. 511. In that case it was the duty of the plaintiff to be upon the top of the car, and the defendant, in permitting the rope to hang over the car, was clearly guilty of negligence. It was not one of those risks which the plaintiff assumed by taking employment. Without pursuing the subject further, we think his honor's ruling is correct. *Baltimore & Ohio R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

The petition to rehear must be dismissed.

(132 N. C. 691)

**ORR v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. et al.**

(Supreme Court of North Carolina. May 26, 1903.)

**INJURIES TO SERVANT—FAILURE TO FURNISH TOOLS—CONTINUING NEGLIGENCE—ASSUMPTION OF RISK.**

1. The master's duty to furnish the servant with proper tools cannot be delegated to a fellow servant, so as to relieve the master from liability for injuries resulting from failure to furnish such tools.

2. Where a servant's injury is caused by the master's negligence in failing to furnish sufficient tools, etc., with which to perform the work, the master's negligence is continuing, so that contributory negligence of the servant will not relieve the master from liability.

3. The danger of injury in taking down a telephone pole without the use of "spikes" and "dead men" to lower it is not so obvious that a servant assumes the risk in attempting to do the work without the tools mentioned.

Appeal from Superior Court, Mecklenburg County; Coble, Judge.

Action by J. S. L. Orr against the Southern Bell Telephone & Telegraph Company and others. From a judgment for plaintiff, defendant Southern Bell Telephone & Telegraph Company appeals. *Affirmed*.

Maxwell & Keerans, for appellant. Jones & Tillett, for appellee.

DOUGLAS, J. This case was before us at February term, 1902, and is reported in 130 N. C. 627, 41 S. E. 880. The essential facts are sufficiently stated in that opinion, and the principles of law therein decided, as pertaining to the facts of this case, remain the law of the case. This court then said, in setting aside a judgment of nonsuit: "But we do think it was the duty of the defendant to furnish the plaintiff with the proper tools and appliances with which to do this dangerous work, and that it was not the duty of the plaintiff to furnish them." As the court then held that it was error in the court below to nonsuit the plaintiff, it would have been equal error to have done so now. This disposes of two of the plaintiff's exceptions.

Two other exceptions were to the refusal of the court to direct the jury that if they believed the evidence they should find the first and third issues in favor of the defendant. Owing to the nature of the evidence, these prayers were properly refused. The usual issues were submitted: (1) As to the negligence of the defendant; (2) the contributory negligence of the plaintiff; (3) assumption of risk; and (4) damages. They were all found in favor of the plaintiff, under instructions in which we see no error.

There are no exceptions as to the admission or exclusion of testimony, but all relate to the motions to nonsuit, and prayers given or refused. Those relating to the respective duties of the plaintiff and defendant to carry such tools as were needed are settled by the former opinion. It was the duty of the master to furnish such tools, and, as this was a personal duty, it could not be delegated to a fellow servant, so as to relieve the master. The mere fact of such delegation would create a vice principal to that extent. *Chesson v. Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Wright v. Ry.*, 123 N. C. 280, 31 S. E. 652; *Bolden v. Ry.*, 123 N. C. 614, 31 S. E. 851.

The order to take the tools was not addressed to the plaintiff individually, but to all the hands collectively. If the plaintiff had been told what particular tools he should personally take, and his injury had resulted from his failure to carry such tools, the case would be different. The mere fact of his attempting to do the work without such tools was not in itself an assumption of the resulting risk, and this was practically held in our former opinion. Holding to the contrary would, in practical effect, nullify our decisions requiring the master to furnish proper tools, as in all cases the negligence of the defendant would be then neutralized by the plaintiff's implied assumption of the risk. The failure of the master to furnish reasonably safe machinery and proper tools is regarded as continuing negligence, which becomes the proximate cause of the injury. This is one of the basic principles in the im-

portant cases of *Greenlee v. Railway*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and *Troxler v. Railway*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. In the latter case, which, although later in point of time, is perhaps the leading opinion upon the subject—having been more fully considered and concurred in by a unanimous court—it is said: "Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly held. *Norton v. Railroad*, 122 N. C. 911 [29 S. E. 886]; *McLamb v. Railroad*, 122 N. C., at page 873 [29 S. E. 894]; *Cone v. Railroad*, 81 N. Y. 206 [37 Am. Rep. 491]. The failure to provide the necessary appliances is the *causa causans*."

It is contended that, even if the plaintiff was not guilty of contributory negligence, he knew that the tools were not at hand, and assumed the risk of taking down the pole without them. It was argued that this was a simple operation, equivalent to sending a man to cut down a tree, the danger of which could easily be determined by any one. If we thought so, this would end the case, but taking down a telegraph or telephone pole is a distinct and dangerous operation. The pole is neither cut down nor permitted to fall, as that would probably destroy it and its attachments. It is dug up and let down by degrees, so as to protect it from injury. The danger lies in the great leverage of a long and heavy pole, to counteract which the resisting force must be applied near the upper end. This can be done only by spikes and "dead men," or something equivalent thereto. The former are small poles, with sharp spikes in one end. Dead men are like crutches, on which the telegraph pole that is being lowered is permitted to rest while the men are changing their positions and taking a fresh hold. In cases where the defendant fails to perform its duty in furnishing safe and suitable appliances, the plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety. This is in analogy to the rule laid down in the following cases: *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426; *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202; *Thomas v. Railroad*, 129 N. C. 895, 40 S. E. 201.

Referring again to the argument that the principle of this decision, if carried out to its fullest extent, would apply to the ordinary work upon a farm, we can only repeat what we have already said, that "we feel compelled to carry out a principle only to its

necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles." *Chappell v. Ellis*, 123 N. C. 259, 263, 31 S. E. 709, 68 Am. St. Rep. 822. We do not mean to say that farmers have any greater rights or exemptions than other classes of our people, but simply that the character of their work does not require the same degree of care as that of others employed in more dangerous occupations. This principle is so recognized by the Supreme Court of the United States in *Railroad v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in sustaining the constitutionality of the Kansas fellow servant act, where the court says on page 210, 127 U. S., page 1163, 8 Sup. Ct., 32 L. Ed. 107: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objection, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities." This case was quoted and approved in *Railroad v. Herick*, 127 U. S. 211, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Railroad v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; and *Railroad v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611.

The judgment of the court below is affirmed.

(122 N. C. 696)

# BRAY v. JOHN L. ROPER LUMBER CO.

(Supreme Court of North Carolina. May 26, 1903.)

## CONTRACTS—INTERPRETATION—EVIDENCE.

1. In an action on a contract for the sale of lumber, which provided that boards which were defective by reason of knots and other defects making them unmerchantable by the inspection laws of the North Carolina Pine Association should be treated as culls, it was error to allow a witness, who admitted that he did not know what the rules of the association were, to testify as to what were culls.

Appeal from Superior Court, Currituck County; Winston, Judge.

Action by Ella V. Bray against the John L. Roper Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Pruden & Pruden, W. M. Bond, and Shepherd & Shepherd, for appellant. E. F. Aydlett, for appellee.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the

defendant an alleged balance upon a contract to furnish lumber by the plaintiff to the defendant. The contract, after setting forth the dimensions and quality of the lumber, contained the following: "Defective boards by reason of too many large (limb) knots, unsound knots red heart badly stained, or other defects making them unmerchantable by the inspection laws of the North Carolina Pine Association, to be treated as culls, except when decayed (rotten) to the extent of rendering them unfit for use. No allowance will be made for lumber thus rejected." The inspection rules of the North Carolina Pine Association, according to the contract between the parties, furnished a description and meaning of the word used in the lumber business—"culls"; and yet it appears on the trial that P. M. Bray, a witness for the plaintiff, was allowed to state, over the objection of the defendant, what class of lumber was embraced in the word "culls," although he admitted that he did not know the rules of the North Carolina Pine Association. It nowhere appears in the case on appeal that the rules of the association were introduced in evidence. The testimony of Bray on the matter of what were culls ought not to have been received. We are clear on this point, but at the same time the case on appeal presents some confusion of statements. For instance, the witness Bray said: "I do not know the rules of the North Carolina Pine Association." But he went on to say in that immediate connection: "Logs will pass as merchantable under these rules that will not plane out; must be badly stained. There is nothing in the rules about stained or culls. A number one board, stained, reduces the grade, but does not make it a 'cull' unless badly stained." The witness, by his testimony, unequivocally stated that he did not know the inspection rules of the North Carolina Pine Association, and yet he speaks of their contents. The confusion is increased when we turn to the instruction of his honor to the jury on that question, where he said: "In measuring and inspecting this lumber, the rule of the North Carolina Pine Association was to obtain. Whatever that rule called for was to control them, and is to control you. Whatever that rule put in the class of culls must go there, whether of knots or stains, or other defects. If applying the North Carolina Pine Association rules puts more of the timber as culls than the plaintiff expected, then the rule must still be enforced," etc. The case, as made up, seems to treat the inspection rules of the North Carolina Pine Association as the standard of the measurement of lumber, and yet the rules, as we have said, were not introduced as evidence; and the witness Bray, though allowed to testify about the standard of measurement contained in the rules, stated that he did not know what the rules were. On the point,

however, that we have discussed, we are clear that the testimony of Bray was inadmissible, as the case is presented to us.

Error.

(132 N. C. 702)

**HAYES et al. v. UNITED STATES FIRE INS. CO.**

(Supreme Court of North Carolina. May 26, 1903.)

**INSURANCE—MISREPRESENTATIONS—INTEREST IN PROPERTY—MORTGAGE—FORECLOSURE—TERMINATION OF POLICY—RETURN PREMIUM—INVESTIGATION OF LOSS—BREACH OF CONDITIONS—WAIVER.**

1. Where a policy provided that it should be void if insured concealed or misrepresented any material fact concerning the subject of the insurance, or if his interest was not truly stated or was other than unconditional sole ownership, and insured stated that the property was unincumbered, when in fact it was subject to a mortgage, the policy was void, though insurer's agent made no inquiry as to the title, and insured had no intention to deceive, or withhold the fact that the property was mortgaged.

2. Where a policy provided that it should be void if, with insured's knowledge, foreclosure proceedings were commenced, or notice given of sale of the property under a mortgage or trust deed, the advertising of the property for sale under a mortgage thereon terminated the insurance.

3. Where a policy provided that it should terminate on the commencement of mortgage foreclosure proceedings, on the commencement of such proceedings the insured was entitled only to the return of a ratable proportion of the premium.

4. Where, after the loss under a policy, and on investigation, the insured signed a stipulation that such investigation should not waive or invalidate any conditions of the policy, or any rights whatever of either of the parties, and should not be taken as an acknowledgment of liability on the part of the insurer, such investigation did not operate as a waiver of the breach of a condition of the policy relieving insurer from liability.

Douglas, J., dissenting.

Appeal from Superior Court, Guilford County; McNeill, Judge.

Action by W. A. Hayes and another against the United States Fire Insurance Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

John A. Barringer, for appellants. Chas. M. Stedman, for appellee.

**CLARK, C. J.** On 16th October, 1900, the male plaintiff insured his barn and contents for one year in the sum of \$700. In the application it was stated that the title to the property was unincumbered, and it was stipulated in the policy that "the entire policy should be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein," or "be other than the unconditional and sole ownership," or "if, with the knowledge of the insured, foreclo-

sure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," etc. It appeared from the evidence offered by the plaintiffs that the plaintiffs had on 1st August, 1899, taken a conveyance of the tract of land on which the barn stood, to themselves jointly, for the recited consideration of \$4,500, and on the same day had executed a mortgage to the vendor to secure said sum of \$4,500, payable in nine installments of \$500, with interest, and that on 25th October, 1900 (nine days after the policy was taken out), the property was advertised for sale, under a power of sale in the mortgage, when only one installment of \$500 had been paid, and it was sold 3d December, 1900. In the meantime the fire occurred, on 1st December. After the fire the male plaintiff indorsed on the policy an assignment of his interest therein to his wife, the other plaintiff herein.

The male plaintiff testified in his cross-examination that the agent of the company "made no inquiry of me as to the title to the land or barn. I had no intention to deceive the company by withholding the fact that there was a mortgage on the land. I did not omit to state that there was an incumbrance on the property from any sinister motive." But the omission was as to a matter most material to the risk. The policy stipulated that it should be void "if the interest of the insured in the property be not truly stated herein," or if there was concealment of "any material fact or circumstance concerning this insurance or the subject thereof." Yet this was done, and the testimony of the male plaintiff that he "did not intend to deceive the company by withholding the fact that there was a mortgage on the land" is no defense. It was a most material fact, and, if made known to the company, would doubtless have prevented the insurance. Again, when the property was advertised for sale under the mortgage soon after the insurance (25th October), this terminated the insurance, by the agreement in the policy; and the insured, in good faith, should at once have gone to the agent of the insurer, and applied for cancellation of the policy and the return of a ratable proportion of the premium.

The plaintiff, however, relies upon the fact that the agent of the company went out to investigate the loss, and determined the amount of damages from the fire to be \$679. But whatever inference of waiver might otherwise be drawn from such circumstance is negatived not only by a stipulation in the policy that such investigation, in case of loss, should not be deemed a waiver of any objection to the liability of the company under the policy, but before making this investigation the insured and the agent of the company entered into a written agreement that such investigation and investment should "not waive or invalidate any of the conditions of the pol

¶ 1. See Insurance, vol. 23, Cent. Dig. § 637.



icy," or "any rights whatever of either of the parties," but was merely to avoid unnecessary delay to the plaintiff, and should not be taken in any wise as an acknowledgment of liability on the part of the company. This agreement was reasonable, and the consideration, saving delay to the plaintiff, is not only apparent, but is recited in the agreement itself. The complaint, while averring an adjustment of the amount of loss, does not allege that this constituted a waiver, and the defendant was not required to negatively aver that such conduct was not a waiver of its defenses.

Upon the facts shown in evidence by the plaintiffs, the court properly directed a judgment as of nonsuit, under the statute. No error.

DOUGLAS, J., dissents.

(132 N. C. 711)

**MAYNARD v. LIFE INS. CO. OF VIRGINIA et al.**

(Supreme Court of North Carolina. May 26, 1903.)

**PARTIES — SUBSTITUTED DEFENDANT — POSITION AS INTERPLEADER — BURDEN OF PROOF — INSURANCE BY CREDITOR — VALIDITY — ASSIGNMENT — RIGHT OF DEBTOR'S ADMINISTRATOR TO CONTEST.**

1. Code, § 189, provides that the defendant may make affidavit that a person not a party demands the same debt, and may apply for an order to substitute that person in his place, and discharge him from liability on his paying into court the amount of the debt. *Held*, that a person so substituted occupies the position of an interpleader, and has the burden of proof, though the order uses the word "substitute."

2. The administrator of a debtor, on whose life the creditor has taken out insurance, cannot contest the validity either of the policy or of its assignment, such defenses belonging to the company alone.

Appeal from Superior Court, Alamance County; W. R. Allen, Judge.

Action by C. G. Maynard against the Life Insurance Company of Virginia, in which D. McRackan, administrator of Mills M. Walker, deceased, was substituted as defendant. Judgment for plaintiff, and the substituted defendant appeals. Affirmed.

Womack & Hayes and E. S. Parker, for appellant. Boone, Bryant & Biggs, for appellee.

CLARK, C. J. In June, 1870, Mills M. Walker being indebted to Eli Murray in the sum of \$5,000; the latter took out a policy of insurance on the life of said Walker in the sum of \$5,000, payable to his heirs, executors, and assigns, and paid the premiums thereon till 1876, when he took in lieu a paid-up policy for \$1,214, payable to himself, heirs, executors, and assigns at the death of said Walker. Murray died in 1876, and this policy was sold by his administrator, together with other choses in action of the estate, and was bought by plaintiff. On the

death of Walker, in 1902, the plaintiff filed proper proofs of death. The administrator of Walker notified the insurance company that he demanded payment of said policy, and forbade payment to plaintiff. The plaintiff then brought action against the insurance company, averring the above facts in his complaint. The defendant insurance company filed no answer, and controverted in no way the validity of the plaintiff's claim, but filed, as provided by Code, § 189, an affidavit as to the above-stated action taken by the administrator of Walker, and asked that he be made a party, and that it be allowed to pay into court the amount of said policy (\$1,214), and be discharged from further liability. This motion was granted, and the money was paid into court, the administrator of Walker was substituted as party defendant, and the clerk was directed to hold the fund "to wait the final determination of this action between the plaintiff and the administrator of Walker." The answer of the administrator averred no payment by Walker, or by any one for him, of any of the premiums on said policy, or repayment of any premium paid by Murray, and the jury found that the debt due by Walker to Murray had never been paid.

The defenses set up by the administrator of Walker attacked the validity of the policy, and the assignment thereof to the plaintiff. But these were defenses which could only be set up, if at all, by the insurance company. *Johnson v. Knights of Honor* (Ark.) 13 S. W. 794, 8 L. R. A. 732. If the policy was not valid, there would be no fund to litigate over, and, if the assignment was invalid, it in no wise concerned the administrator of Walker. *Burbage v. Windley*, 108 N. C., at page 363, 12 S. E., at page 840, 12 L. R. A. 409. The insurance company was satisfied that it legally owed the \$1,214 to the owner of the policy, and, though the original defendant in the action, it has not denied that the holder and assignee thereof—the plaintiff—is the owner. The administrator of Walker has shown no possible claim upon the fund, or interest in or title thereto, and cannot be heard to object to the payment thereof to the assignee and holder of the policy. Though the order making Walker's administrator a party uses the word "substitute," the legal effect of such order is to make him an interpleader. Code, § 189. And in such cases the burden is always on him. *Wallace v. Robeson*, 100 N. C. 206, 6 S. E. 650; *Redman v. Ray*, 123 N. C. 502, 31 S. E. 831; *Cotton Mills v. Well*, 129 N. C. 452, 40 S. E. 218. An interpleader is entitled to but one issue—"Does the fund belong to him?" The alleged invalidity of the plaintiff's claim, as against the insurance company, is no concern of his. *Bank v. Furniture Co.*, 120 N. C., and cases cited at bottom of page 477, 26 S. E. 928. The payment of the fund into court by the insurance

company, in the suit by the plaintiff, without denying the plaintiff's complaint, is a payment for the plaintiff's use, unless the court should find that the intervener has the better title, and he has shown none.

The plaintiff shows the policy, and its assignment to himself. The insurance company admits its liability on the policy, denies no allegation of the complaint, and pays the money into court. The intervener (Walker's administrator) shows no interest whatever in the fund, and has no right to object to the validity of a claim which the insurance company has admitted, or to assert the invalidity of the assignment of the policy to the plaintiff, for that cannot possibly concern him. The plaintiff cites us to many authorities to sustain the validity of the policy, and of its assignment. Kerr on Insurance, 680, and cases there cited; Steinback v. Diepenbrock (N. Y.) 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; Chamberlain v. Butler (Neb.) 86 N. W. 481, 54 L. R. A. 338; Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; and many others. But we are not called upon to consider these points, since, as above stated, those matters can only be raised by the insurer. The claim of the intervener has the merit of novelty, if that be a merit. He has shown no legal right and no equity.

In adjudging payment of the fund by the clerk to the plaintiff, and payment of costs by the intervening defendant, there was no error.

(132 N. C. 697)

#### HARRIS v. DAVENPORT et al.

(Supreme Court of North Carolina. May 26, 1903.)

LIMITATIONS—NONSUIT—RECOMMENCEMENT OF ACTION—ADMINISTRATORS—CLAIMS AGAINST—LIS PENDENS—APPEAL—RECORD—COSTS.

1. Code 1883, § 166, provides that, if an action be commenced within the time limited, and plaintiff be nonsuited, he may commence a new action within one year after such nonsuit. *Held*, that where proceedings by an administrator for the sale of land of his intestate were set aside because of insufficient service of summons, such dismissal amounted to a nonsuit within the statute.

2. Code 1883, § 164, provides that, if a person against whom an action may be brought die, and the claim is filed with the representative within the time specified, and the same is admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar of limitations. *Held*, that the action of an administrator in commencing proceedings to sell the land of the intestate to pay a debt due the administrator, is equivalent to filing a claim with himself and his admitting the amount to be due, and hence falls within the statute.

3. Where, in a suit by an administrator for the sale of lands of his intestate for the payment of debts, the lands are particularly described, and the petition filed in the proper office, prior to a purchase under proceedings by the heirs for a sale of the land for partition, the petition in proceedings by the administrator was notice to the purchaser.

4. Where, after an appeal, the clerk of the trial court, at the request of appellee, sent up

as a part of the case the testimony of certain witnesses, which was not necessary as included in the case on appeal as made up by the trial court, the cost of printing the same and of making the copies, and other costs of such a nature, would be taxed against appellee.

Appeal from Superior Court, Buncombe County; Justice, Judge.

Proceedings by I. A. Harris, as administrator, against D. D. Davenport and others for a sale of lands of the intestate. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. A. Moore, for appellants. Jones & Jones, for appellee.

MONTGOMERY, J. There are two questions involved in this appeal. One is whether or not the claim of the plaintiff as a creditor of his intestate is barred by the statute of limitations, and the other is whether the doctrine of *lis pendens* is applicable to the purchaser of the land at a sale made by order of the superior court of Transylvania county. The defendants, except Charles A. Moore, are nonresidents of this state, and the defendants M. A. Davenport, T. M. West, Emily C. Thompson, C. P. Reese, Jane Miles, B. F. West, and Mary Bearden are the heirs at law of the plaintiff's intestate. At the time of the death of plaintiff's intestate, June 1, 1888, she was indebted to the plaintiff for medical services and board, as found by the referee. On the 8th day of September, 1888, the plaintiff qualified as administrator of the intestate, and on the 10th December following instituted a special proceeding in the superior court of Transylvania county to sell the real estate of the intestate to make assets for the payment of debts. Judgment was had in that proceeding, the land was sold, and the sale confirmed. But afterwards, in July, 1893, the judgments of sale and confirmation were declared by the superior court to be irregular and void for the reason that the summons had not been served according to law. On the 1st day of January, 1894, the plaintiff commenced this proceeding for the same purpose as that commenced in 1888. On the 7th October, 1893, the defendants in the present proceeding, Charles A. Moore having acquired by purchase from the other defendants one-fourth interest in the lands, brought in the superior court of Transylvania county a special proceeding for the sale of the land for partition among the owners, and a sale was made to P. S. King under the regular order of the court, and confirmed on the 16th of February, 1894. By consent of the parties an order was entered in the present proceeding referring all matters in issue between the parties to Frank Carter, Esq., with directions that he take and state the evidence, and report the same, with his findings of fact and conclusions of law thereon, to the court. The referee heard the case, and made report to the court on the 19th February, 1901. The findings of fact by the referee

need not be noticed here for the reason that none of the exceptions thereto were founded upon the averment that they were made without evidence to support them. The referee held as matters of law: (1) That the estate of the intestate was indebted to the plaintiff, I. A. Harris, in the sum of \$303, with interest from the 1st of June, 1888. (2) That the judgment ordering a sale of the land for partition in the proceeding by the heirs at law and Charles A. Moore, and the purchase by King, were void, and that, if King acquired any interest in the land at that sale, the same was subject to the right of sale by the plaintiff, as administrator, to make assets for the payment of the debts of the intestate. (3) That King was not a bona fide purchaser for value, and without notice. (4) That the present proceeding, commenced on the 1st of January, 1894, constituted lis pendens in the cause, and King, when he purchased the land described in the plaintiff's petition, did so with notice of the special proceeding to sell the land for the payment of debts. (5) That Charles A. Moore took title of so much of the land, or the net proceeds of the sale thereof when sold by the administrator to make assets to pay debts, that might remain or belong to the said estate after the payment of the debts of the intestate and the costs and charges of the administration. (6) That Charles A. Moore was not a bona fide purchaser for value, and without notice, of any portion of said land as against the right of the administrator to sell the same for the purpose of making assets to pay the debts of his intestate and the costs and charges of administration. (7) That the claim of the plaintiff, I. A. Harris, administrator of the intestate, was not barred by the statute of limitations. All of the exceptions of law filed by the defendants to the report of the referee were overruled at the March term, 1902, of the superior court of Buncombe county, to which county it had been removed by consent, and an order of sale instructing the plaintiff, as administrator, to sell the land described in the petition to make assets to pay debts and the costs and charges of administration, including the referee's allowance.

The referee found that the debt due from the intestate to the plaintiff was for board of the intestate and medical attention and drugs furnished to her within 12 months just preceding her death. We think the three-years statute of limitations (Code 1883, § 155) set up by the defendants cannot avail them. Within six months after the death of the intestate the plaintiff had qualified as her administrator, and had commenced a special proceeding in the county where the lands of the intestate were situated to subject them to the payment of debts. It is true, as we have said, that the proceedings in that case, including the judgment of confirmation of the sale, were set aside and declared void for the reason that there had been no proper

service of summons on the defendants, but it is also true that within a year he had brought another special proceeding for the same purpose. The action was dismissed for want of jurisdiction of the parties, and that has been held as a nonsuit of the plaintiff under section 166, Code 1883. *Straus v. Beardsley*, 79 N. C. 59; *Dalton v. Webster*, 82 N. C. 279. The action of the administrator creditor in commencing the proceeding to sell the land of the intestate to pay his debts was equivalent to the filing with himself of his claim and his admitting the same to be due, and falls under the provisions of section 164 of the Code of 1883. In such a case the statute of limitations ceases to run either in favor of the personal representative or the heir at law. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211. It is unnecessary to discuss the question of the right of the nonresident defendants to plead the statute of limitations.

In the petition of the plaintiff in the present proceeding the lands sought to be subjected to the payment of the intestate's debts were particularly described, and the petition was filed in the proper office before the day when King purchased the land under the proceedings by the defendants in this case (the plaintiff in that) for a sale of the land for partition. King's purchase, therefore, was with notice of the present proceeding, and the petition in the present proceeding from the time it was filed was a notice to the plaintiff—lis pendens. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351.

It appears that the plaintiff's attorneys addressed a letter to the clerk of the superior court, asking him to send up to this court, as a part of the case on appeal, the entire testimony of the witnesses before the referee, *Garrison, I. A. Harris, Kitty E. Harris, W. B. Duckworth, and M. J. Orr*. The defendants objected, but the evidence was sent up. The matter was not embraced in the case on appeal as made up by his honor, and was not necessary in any aspect of the case, and the cost of printing the same, and the cost of making the copies by the clerk, and all other costs attending that matter, must be taxed against the plaintiff, and not against the defendants.

Affirmed.

(66 S. C. 54)

POPE & FLEMING v. HARTER et ux.  
JOSEPH ROSENHEIM & SONS v. HAR-  
TER et ux,

(Supreme Court of South Carolina. April 16, 1903.)

#### ACTION FOR PRICE—LIABILITY OF AGENT.

1. A complaint alleging that defendant, while conducting a business as agent of another, purchased from plaintiff certain goods, without disclosing at the time the name of his principal, states no cause of action for the price against the defendant.

Appeal from Common Pleas Circuit Court of Bamwell County; Klugh, Judge.

Two actions: (1) By Pope & Fleming against W. E. and Julia E. Harter, and (2) by Joseph Rosenheim & Sons against same defendants. From order sustaining demurrer, plaintiffs appeal. Affirmed.

Bellinger & Townsend, for appellants. L. L. Tobin, contra.

POPE, C. J. These two actions came on to be heard before his honor, J. C. Klugh, as circuit judge. They were heard together for the convenience of counsel. After the complaint in each case was read, the defendant W. E. Harter interposed a demurrer, in writing, wherein he alleged that such complaint failed to state a cause of action against the defendant W. E. Harter, in "that it appears upon the face of the complaint that the goods and merchandise mentioned in the complaint were sold to the defendant Julia E. Harter through her agent, W. E. Harter, and that the defendant W. E. Harter assumed no liability on account of the same." The circuit judge sustained the demurrer in each case in the following order: On hearing the demurrer herein, ordered that the same be sustained, and the complaint be dismissed as to W. E. Harter." After entry of judgment upon the demurrer as to W. E. Harter, the plaintiffs in each case gave notice of appeal on following ground: "That his honor the circuit judge erred in concluding and holding that it appeared on the face of the complaint that the goods and merchandise were sold and delivered to the defendant Julia E. Harter through her agent W. E. Harter, and that the defendant W. E. Harter assumed no liability on account of the same; whereas he should have concluded and held that, while the fact that W. E. Harter was doing business as agent was known at the time of the sale, the name of his principal was not disclosed, and hence he is liable as principal upon such contract of sale."

In disposing of the single ground of appeal in each action, we think it advisable to reproduce a copy of one complaint, for the two complaints are practically identical, except in the amount sued for. In one it is \$177.68, and in the other it is for \$478.65. The complaint is as follows: "The plaintiffs above named, complaining of the defendants herein, allege: (1) That the plaintiffs above named were at the times hereinafter mentioned, and now are, copartners in trade, doing business as merchants in Augusta, Georgia, under the firm name of Pope & Fleming. (2) That W. E. Harter was at the times hereinafter mentioned, and now is, the agent of his wife, the defendant Julia E. Harter, conducting as such agent a mercantile business at Allendale, S. C., under the firm name and style of 'W. E. Harter, Agent.' (3) That in the conduct of such business the said W. E. Harter purchased from the plaintiffs, and the plaintiffs sold and delivered to him as such

agent, goods and merchandise, amounting in value to the sum of \$177.68, on the 19th and 24th days of September, 1898, at and for that price, which he as said agent promised to pay. (4) That at the time he purchased said goods and merchandise the said W. E. Harter did not disclose the name of his principal. (5) That no part thereof has been paid. Wherefore the plaintiffs demand judgment against the defendants for the sum of \$177.68."

We are impressed with the idea that the plaintiffs in each case have been carried away with the allegation of the complaints "that, at the time he [W. E. Harter] purchased the said goods and merchandise, the said W. E. Harter did not disclose the name of his principal," ignoring, apparently, the other allegations of the complaints, that he not only purchased the said goods as agent, but that he purchased the goods as the agent of his wife, Julia E. Harter. In the complaints, the plaintiffs have set forth defendant's specific agency for his codefendant. If in the complaint the plaintiffs had stopped by alleging that W. E. Harter, agent, had purchased the goods, that he did not and never has disclosed as agent for whom he had purchased the goods, the defendant W. E. Harter could not have successfully demurred. But the plaintiffs have not set out how the defendant W. E. Harter became personally liable for the goods purchased for his principal. The circuit judge did not err, as there complained.

It is the judgment of this court that the judgment of the circuit court in each of the actions herein considered be affirmed so far as the defendant W. E. Harter is concerned, and the actions are remanded to the circuit court for trial so far as Julia E. Harter is concerned.

(53 W. Va. 411.)

#### SANSOM v. BLANKERSHIP.

(Supreme Court of Appeals of West Virginia. April 28, 1903.)

#### QUIETING TITLE—POSSESSION—ANSWER—REPLICATION.

1. Equity has no jurisdiction to remove cloud over title to land unless the plaintiff is in actual possession.

2. If there is no replication to an answer, it is taken as true for all its material allegations.

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County; F. S. Doolittle, Judge.

Bill by Sarah Sansom against R. L. Blankership. Decree for defendant, and plaintiff appeals. Affirmed.

Campbell, Holt & Duncan, J. H. Meeks, and Crum & Crum, for appellant. Geo. J. McComas, for appellee.

BRANNON, J. Sarah Sansom brought a suit in equity against R. L. Blankership and others in the circuit court of Wayne county, claiming to be owner of a tract of land, and

that she was in possession of it, and that the defendant entered upon it and cut and removed timber growing on the same, thereby working irreparable damage to her land. The bill says that the father of the plaintiff and F. M. Blankership, a defendant, owned land which was divided among his heirs, she getting 106 acres and F. M. Blankership 40 acres adjoining her, which did not interlock with her tract, but that he had made a deed to R. L. Blankership and Mary V. McSweeney, and, without right or title, fraudulently and wrongfully inclosed in it a part of the plaintiff's 106 acres, and that this caused a cloud over part of her land. She prayed and obtained an injunction against trespass and cutting timber, and asked that the cloud over her title be dispelled by decree, and that she be quieted in the enjoyment of her land.

The answer of R. L. Blankership and Mary V. McSweeney states that the plaintiff and F. M. Blankership, while he owned the 40 acres, took possession of the tracts so allotted to them, and agreed upon a partition line between them, which was clearly marked, and lived up to and acquiesced in for a number of years, and that, for a number of years after partition deeds under the partition decree, there was no objection made to the line or occupancy up to it; that the conveyance to them from F. M. Blankership was up to this line. They deny that the land in question is owned by the plaintiff, and deny that they had done irreparable injury to the plaintiff. No replication was made to this answer. The case was heard on the bill and answer, and the injunction was dissolved and the bill dismissed, and Sarah Sansom appeals.

The plaintiff filed an amended bill practically the same as the original, except that it set up that suits had been brought to set aside, as fraudulent against creditors of R. L. Blankership, the said conveyance from him to his children, and it was set aside and the land sold under decree to Adkins, and the land was conveyed by Adkins to R. L. Blankership. The amended bill is said to have been at rules when the cause was heard. No notice of it was taken in the decree. It is not mentioned in the record. It is copied into it, but is no part of it.

For the defendant it is argued that the original bill should have been dismissed upon demurrer, for these reasons: (1) Because the bill does not show good title in the plaintiff, or bad title in the defendant. This criticism of the bill is, technically speaking, true; but as the bill shows a common title in both as to source, and alleges that the conveyance to R. L. Blankership and Mary V. McSweeney fraudulently included part of the plaintiff's land, the bill must be held to charge good title in the plaintiff and bad in the defendant. (2) Because the bill does not show the land in controversy or the injury to amount to \$50. Amount does not control equity or a suit involving title to land. (3)

Because the bill showed only a controversy as to a piece of land between the line of the plaintiff's deed and the line of the defendant's deed, and was a controversy between conflicting titles or boundary, cognizable at law, not in equity. Equity does not accept a suit only to settle title or boundary to land; but an exception is that, if the plaintiff is in actual possession, he may sue to remove an adverse title from his title, because it is a cloud over it. This rule arose when one in actual possession could not bring ejectment, and when no one could be sued in ejectment from his merely claiming adverse title. For one in possession, no other remedy but equity to remove cloud existed. Now, as I think, for reasons given in *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, one in possession may sue in ejectment one who simply exercises acts of ownership over or claims title to the former's land. I do not see why one not in actual possession may not maintain ejectment against one not in actual possession, but claiming title or exercising acts of ownership, to settle title. But that would not oust equity of its antecedent jurisdiction to remove cloud. The bill alleges that plaintiff was in possession, and that gives jurisdiction to remove cloud. It does not say that she was in actual possession; but possession means, *prima facie*, actual possession. The demurrer was properly overruled.

Next, as to the cause on bill and answer. The answer contained a general denial of all of the bill not specifically answered, thus denying plaintiff's possession. But elsewhere the answer says that on the division of the land of the father, Sarah Sansom and F. M. Blankership took possession of their separate parts. This admits, taken alone, Mrs. Sansom in possession to her limits; but the answer adds that later they agreed upon, marked, and held possession according to division line. If so, her possession at the date of the suit did not take in the contested land, and there is no jurisdiction in equity. There being no replication, the answer alleging this line and possession of the parties only up to it is taken for true. *Bierne v. Ray*, 37 W. Va. 571, 18 S. E. 804. It might be said that if the plaintiff took possession it goes, for this suit, to her limits, notwithstanding the subsequent agreement upon a line; but the answer says that her possession was limited to that line, and I think we shall have to treat it as the true view that she held only to the line, and was not in possession of the litigated land. Therefore, for want of possession, the bill was properly dismissed for want of jurisdiction to try conflicting title or boundary, as the answer denied her possession. *Freer v. Davis*, 52 W. Va. —, 43 S. E. 164; *Hitchcock v. Morrison*, 47 W. Va. 206, 34 S. E. 993; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596. As there is no jurisdiction, we say nothing as to the effect of the agreed line.

The plaintiff assigns error in disregarding the amended bill. If she wanted any benefit from it, should she not have had it mentioned in the decree? It was her duty to mature it. She never asked that it be read, if it was matured. Moreover, it was not material, as Adkins was not a necessary party, nor Fry, the commissioner who conveyed the land under the decree. They had no title. The amended bill did not in the least alter the case as to jurisdiction.

The case was heard on only bill and answer. The appellant complains that the case was not continued to take proof. Why did she not ask for time? She did not. "When the record does not show that objection was made to the hearing of a case, the presumption is that the cause was heard without objection."

The bill was dismissed generally. It is said that it should have been without prejudice. So it ought to have been, as there was no jurisdiction.

We will affirm the decree, but without any prejudice to the rights of any of the parties. The plaintiff had no right to sue in equity, if in fact not in actual possession, unless to restrain trespass pending action to try title at law. *Carberry v. Railroad*, 44 W. Va. 260, 28 S. E. 694; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596.

(52 W. Va. 682)

**CHARLESTON NATURAL GAS CO. v.  
LOW et al.**

(Supreme Court of Appeals of West Virginia.  
March 30, 1901.)

**EMINENT DOMAIN—PUBLIC USE—NATURAL  
GAS COMPANY.**

1. Supplying an incorporated city or town and its inhabitants with natural gas for the purposes of heating and illumination, by a corporation organized under the general laws of the state, and occupying the streets and alleys of such city or town for the purpose by means of the location therein of its pipes, connections, boxes, valves, and other fixtures, under an ordinance of the city or town, is a public use, for which such company may take private property, in the manner prescribed by chapter 42 of the Code of 1899, upon which to locate its pipe line.

2. Such company is bound to furnish gas to every inhabitant of such city or town who applies therefor and complies with the regulations prescribed by the ordinances of the town or fixed by contract between the council and the company.

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County; F. A. Guthrie, Judge.

Action by the Charleston Natural Gas Company against A. A. Low and B. F. Butler, trustees, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Brown, Jackson & Knight, for plaintiff in error. Molloyhan, McClintic & Mathews, for defendants in error.

POFFENBARGER, J. The common council of the city of Charleston having passed

an ordinance reciting the probability of the discovery of natural gas sufficiently near said city to make it practicable to transport the same to it; the anticipation that the use of such gas for domestic and manufacturing purposes will add largely to the wealth and prosperity of the city, as well as contribute to its health and cleanliness; and the desirability of the adoption of such municipal regulations as shall provide against the waste of said gas, and afford to the citizens of Charleston facilities for the receipt thereof upon a uniform system which shall be protective of life and property so that gas may be economically used; and granting to William Seymour Edwards and his associates, their successors and assigns, the right and privilege of opening and using the streets and alleys of the city for laying pipes for the purpose of conveying natural gas, with the necessary street boxes and valves, and making the necessary street connections, subject to certain conditions providing for indemnity to the city against damages, fixing a limit of time within which the grantees should accept the franchise and be ready to supply gas to consumers, and requiring them, when ready so to deliver, to file with the recorder of the city a statement of the price or cost to consumers, not to be increased except by consent of the council—said franchise was assigned by said parties to the Charleston Natural Gas Company. This company owns a gas well in Boone county, from which it desires to convey gas by means of pipes to Charleston, and for the purpose of constructing its pipe line it desires to take five small parcels of land, the legal title to which is in B. F. Butler and A. Augustus Low, trustees. These parcels are 65, 40, 1,100, 120, and 168 feet long, respectively, and 10 feet wide; and, being unable to agree upon a price therefor with the owners, the company filed its petition in the circuit court of Kanawha county for the condemnation of said strips of land for the use of its pipe line. The trustees and their cestuils que trustent appeared and demurred to the petition, and, the demurrer being sustained and the petition dismissed, the petitioner was allowed a writ of error to and supersedeas from the order.

It is contended by counsel for the defendants that, in order that the lands may be condemned, it must be shown that the use for which they are wanted is clearly and unmistakably a public use in the legal sense of the words as defined by the courts, that their condemnation is authorized by statute, and that the statutes, if any, authorizing it, are not unconstitutional. These propositions cannot be controverted. It is the province of the Legislature to declare the public uses for which private property may be taken, but the power of the Legislature in this respect is limited by the Constitution, and it remains with the courts to say whether the legislative enactment making such declaration and appropriation is in conflict with the

constitutional limitation, and, if so, to declare it unconstitutional and void. *B. & O. R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. When the court has determined that the use for which property is condemned is a public use, its judicial function is gone, and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts. These are matters belonging to the legislative discretion. *Varner v. Martin*, supra. The only question to be determined in this case is, therefore, whether the use for which the land is sought to be taken is a public use, and this involves an inquiry as to the interest the public will have in the operation of the proposed pipe line of this company, it being insisted by the defendants that the operations of this company are not subject to such legislative regulation and control as to vest in the public a right to a certain definite use of the property proposed to be taken. Although clause 5 of section 2 of chapter 42 of the Code declares private property may be taken for companies organized for the purpose of transporting carbon oil or natural gas, or both, by means of pipes or otherwise, and qualifies this right by the words "when for public use," neither that clause nor any other part of said chapter contains any further guaranty of the public interest or right in the property which may be so taken, or any regulations or restrictions upon such companies to prevent them from excluding the public from a beneficial interest in it. Section 24, c. 52, Code 1899, provides that: "A company organized for the purpose of transporting natural gas, petroleum or water, necessary for use in carrying out the provisions of this act in piping and transporting natural gas and petroleum or for boring for the same, through tubing and pipes, may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary for the laying down of such tubing and piping, and for the erection of tanks and the location of stations along such line, and the erection of such buildings as may be necessary for the purpose aforesaid; such appropriations shall be made and conducted in accordance with the law providing for compensation to the owners of private property taken for public use." After provisions not material to this controversy, said section further declares: "Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state." This section imposes no regulations, rates, or limitations upon companies organized for transporting natural gas, other than that they shall be common carriers.

Chapter 27, p. 35, Acts 1879, as amended and re-enacted by chapter 44, p. 100, of the Acts of 1891, regulates the transportation and storage of petroleum, and compels all persons, corporations, and companies to conform to the regulations thereby prescribed; one of which is that they shall accept all petroleum offered to them in sufficient quantities and in merchantable order, and transport and deliver the same at any delivery station within or without the state on the route of its line of pipes which may be designated by the owners of the petroleum so offered. The act also fixes maximum rates for transporting and storing petroleum, and provides for testing it, and for monthly statements to be made by such persons and companies, and imposes numerous duties upon them and their agents. But this act is silent as to natural gas.

It is contended that under the principles laid down by this court the purpose for which the petitioner seeks to take the land is not a public use, and this objection is based largely upon the absence of any legislative regulations applicable to the transportation and handling of natural gas similar to those applicable to mills, ferries, railroads, oil pipe lines, and other agencies having an undoubted right to condemn private property for their purposes. In *Varner v. Martin*, 21 W. Va. 534, the court held as follows: "Where the title and control of the property to be condemned is in private hands or in a corporation, three qualifications are necessary to impose upon it such a public use as will justify the taking of such private property without the consent of the owner: (1) The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain, definite use of the private property on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. \* \* \* (2) This use of the property, which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without except by suffering great loss and inconvenience. (3) And when the title of property is thus transferred by condemnation to an individual or to a corporation, the necessity for such condemnation must be obvious. It must obviously appear from the location of the property proposed to be condemned, or from the character of the use to which it is to be put, that the public could not, without great difficulty, obtain the use of this land, or of other land which would answer the same general purpose, unless it was condemned. And in such case the courts will judge of the necessity for confirming such condemnation." This is approved in *Railroad Co. v. Iron Works*, 31 W. Va. 710, 8 S. E. 453, and in *Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405. In *Salt Co. v.*

Brown, 7 W. Va. 191, Judge Paull said: "What, then, constitutes a public use as contradistinguished from a private use? The most extended research will not likely result in the discovery of any rule or set of rules or principles of certain and uniform application by which this question can be determined in all cases. Eminent jurists and distinguished writers upon public law do not express concurrent or uniform views upon this subject. It is a question from its very nature of great practical, perhaps of insuperable, difficulty, to determine the degree of necessity, or the extent of public use, which justifies the exercise of this extraordinary power upon the part of a state, by which the citizen, without his will, is deprived of his property." What is a public use is incapable of exact definition. The expressions "public interest" and "public use" are not synonymous. The establishment of furnaces, mills, and manufactories, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. In re Niagara Falls & W. R. R. Co., 108 N. Y. 375, 15 N. E. 429. In Lewis on Em. Dom. § 165, it is said: "The use of a thing is strictly and properly the employment or application of the thing in some manner. The public use of a thing is the employment or application of the thing by the public. 'Public use' means the same as 'use by the public.' \* \* \* If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use, and the act of appropriation is void." The character of the agencies employed in applying the property to the use of the public is wholly unimportant in determining whether or not the use is public or private. They may be municipal corporations, private corporations, or individuals. Nor is it material that, while the public has a fixed, definite, and certain interest or use in the property, the private corporations or individuals upon whose application the condemnation is made derive private gain and advantage from the enterprise. It is enough that the purpose is one of public necessity or great public convenience, and is made certainly and directly subservient to public use, and to such an extent that the use cannot be defeated, withdrawn, or withheld by the agency in whose hands it is thus placed. Under such conditions the property is not transferred from one private purpose or use to another pri-

vate use, but is devoted to a public use, and therefore within the power of legislative appropriation. It remains subject to legislative control. But it is not enough that the general prosperity of the community will be promoted by the enterprise or purpose for which the property is sought to be taken, such as the opening of mines, operation of factories, etc. Salt Co. v. Brown, supra; Varner v. Martin, supra.

It is apparent that a railroad carrying passengers and freight, a pipe line transporting oil, a ferry or bridge conveying passengers across streams, are public necessities—as much so as common highways or the navigation of the waters. Schoolhouses, courthouses, city buildings, and other structures erected for the use of public officers and at public expense from funds raised by taxation are purely of a public nature. The reason for deeming a water gristmill of a public nature is also clear. The purpose for which the land is sought to be taken in this instance differs very materially from all of these. It partakes somewhat of the nature of the use to which property is applied when taken for the purpose of supplying water to a city. It has none of the characteristics of the common carrier, nor is it in any sense a use for the purpose of a highway. Here the city of Charleston is the place to be supplied with gas. It is situated at one of the termini of the line, just as a city at the end of an aqueduct conveying water to it. It is very well settled by the authorities that the power of eminent domain may be invoked for the purpose of supplying water to cities. Gardner v. Trustees, 2 Johns. Ch. 162, 7 Am. Dec. 526; Inhabitants of Wayland v. Commissioners, 4 Gray, 500; Kane v. Baltimore, 15 Md. 240. "The public health of cities requires an abundant supply of pure water, and for this purpose land may be condemned for reservoirs and other facilities for supplying cities with water. \* \* \* In like manner supplies of water may be condemned." Mills, Em. Dom. § 18. "The condemnation of property for public sewers or works for the disposition of sewerage, for supplying a city or town with water or gas, is so manifestly for public use that it has been seldom questioned, and never denied. So supplying a city and its inhabitants with natural gas is a public use." Lewis on Em. Dom. § 173. Natural gas is not so essential to the inhabitants of a city or town as water. But it will hardly be contended by anybody that, in order to make the use public in that sense which will warrant the appropriation of private property to it, it must be necessary to the preservation of life, or of such character that its place cannot be supplied by something else. Chief Justice Marshall, in criticizing the term "necessary," in McCulloch v. Maryland, 4 Wheat. 414, 4 L. Ed. 579, said: "It does not always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without the other. If



reference be had to its use in the common affairs of the world or in approved authors, we find it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." It is as clearly apparent that the necessity of the use as regards the public interests is not an absolute physical necessity, as that public use is not synonymous or coextensive with public utility, benefit, advantage, or welfare. It is sufficient if it be a reasonably well adapted means for the accomplishment of one or more of the ordinary ends of public necessity or convenience.

Natural gas has become a recognized means of lighting streets, public buildings, business houses, and private residences, and of furnishing heat, all of which are necessary to the municipal and individual purposes of cities and towns. "Heating being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is inquired, why do not municipalities also purchase coal mines, and issue their bonds therefor, and embark in the business of mining and selling coal to private consumers? An obvious reply is that coal and other fuel may be carried to the consumer by the ordinary channels of transportation, at a comparatively moderate expense, while in conveying natural gas streets must be opened, pipes laid, works erected, fixtures and machinery purchased, and other expenses incurred beyond the enterprise and capital of an individual." *State v. City of Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. In *Bloomfield, etc., Natural Gas Light Co. v. Richardson*, 63 Barb. 437, decided in 1872, the court said: "The use of gas for illuminating purposes has become almost a necessity of modern civilization. The right to take the private property of those who own the fee of streets and highways may be absolutely necessary to the public enjoyment of the benefits of this invention, and we think there can be no doubt, upon principle and upon the adjudicated cases, that the conduction of illuminating gas, with such public objects as are specified in the act conferring the special powers upon this company, is within the category of those public improvements to enable which to be carried out the Legislature may confer upon the parties engaged in the enterprise the right to take the private property necessary to effect the object, upon making compensation according to the Constitution." That was a suit the object of which was to condemn private property for the use of a private corporation organized to conduct natural gas to

cities by mains, to sell and supply gas for lighting the streets, public parks, dwellings, and other buildings therein—just such a case as we have here.

But it is claimed in this case that the beneficial use or enjoyment of the property sought to be taken by the public is not secured by any statutory regulation, as hereinbefore pointed out. It is true we have no general statute of that kind. Why this has been omitted we cannot inquire, but it must be apparent to all that there is a vast difference between gas and oil, and that it would be difficult to apply the regulations peculiar to common carriers to a pipe line for conveying gas, for the reason that it is utterly incapable of being deposited in bottles, barrels, casks, and tanks at the end of the pipe line. Its nature requires that it be confined absolutely from the moment that it comes from the earth until it is used, and from the spot of its source to the point of consumption. There is also a limit beyond which it is impracticable to convey it for use, and its principal use is confined to the purposes of illumination and heat in the cities and towns. The transportation and use of it seems, therefore, to be susceptible of but little regulation beyond fixing a maximum price to the consumer, and this the municipal corporations, to which the Legislature has qualifiedly delegated powers of local government, have ample authority to regulate, as well as to impose terms and conditions such as will insure safety to the lives and property of citizens in its use. But have the citizens of Charleston an absolute and indefeasible right to the use of the gas upon reasonable and equal terms? Is the company bound to furnish gas to all who apply for it without an express legislative imposition of that duty upon it? Undoubtedly. The courts have so held in many of the states, and their decisions are grounded upon both reason and the best of authority. In *Gibbs v. Balt. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979, Chief Justice Fuller, delivering the opinion of the court, says: "These gas companies entered the streets of Baltimore under their charters in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated." In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, Chief Justice Waite said: "Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation." Occupying the streets of Charleston, by permission of its council first had, for the purpose of supplying to the inhabitants natural gas, the company is bound to furnish gas to every citizen applying therefor and willing to pay the price agreed upon between the company and the city. The occupancy of the streets by such a company can only be for purposes in which the public is concerned; and the obligations thus assumed by the company, whether expressly incorporated in the franchise or

not, will be enforced. "A gas company is of a public nature if it exercises its right by virtue of a state law and local ordinances; and wherever, within its assigned limits, it has connected its mains and service pipes and fixtures of individuals, it is bound to supply them with gas on reasonable conditions, when they ask it." *Williams v. Mutual Gas Co.*, 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266. Substantially the same is held in *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539, 70 Am. Dec. 479; *G. L. Co. v. Collday*, 25 Md. 1; *Coy v. Ind. Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Portland Nat. Gas & Oil Co. v. State ex. rel. Keen*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639. The same has been held in cases concerning water companies, which, as shown, are so nearly akin to gas companies. In *Olmsted v. Aqueduct Co.*, 47 N. J. Law, 311, we find: "Although the aqueduct charter contains no express provision requiring the company to supply all consumers, \* \* \* in accepting such charter the company impliedly engages to use it in a manner that will accomplish the legislative design. It is thereby bound to supply on reasonable terms all who apply for water." In *Lumbard v. Stearns*, 4 Cush. 60, the court held: "By accepting the act of incorporation, they undertook to do all the public duties required of it."

Another objection urged is that no right to the use of gas is secured to persons living outside of Charleston along the proposed pipe line. Whether the company is bound to furnish them, and upon what terms, it is not necessary to determine. It is sufficient that the principal object or purpose to which the property is to be devoted is supplying gas to the city of Charleston, all of whose citizens have a fixed and beneficial use, clearly shown to be a public use. It is no objection that this proposed public use is confined in the matter of locality to Charleston, if such is the case. "It is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken." *Lewis on Em. Dom.* § 161, citing many authorities.

The circuit court having erred in dismissing the petition, its judgment is reversed, and the cause remanded.

(53 W. Va. 50)

#### KNIGHT v. NEASE et al.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### EQUITY — EVIDENCE—ANSWER—FRAUDULENT CONVEYANCE—BURDEN OF PROOF—FRAUD.

1. Under our statute, an answer to a bill is not evidence for the defendant, whether it be sworn to or not. Its only effect is to put the plaintiff on proof of the truth of the allegations in his bill, denied by the answer. Code 1899, c. 125, §§ 38, 59.

2. Where a deed is assailed by a creditor of the grantor on the ground that it was not, up-

on consideration, deemed valuable in law, the burden of proving that the deed was made for a valuable consideration rests on the grantee or persons claiming the benefit of the deed.

3. It is not always necessary that direct affirmative or positive proof of fraud be given. It may be, and usually is, proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will be sufficient, although it does not lead to a conviction of absolute certainty. The fraud need not be proved beyond a reasonable doubt. *Ballard v. Chewning*, 39 S. E. 170, 49 W. Va. 508, 519.

4. A case in which fraud may be inferred from the facts and circumstances appearing therein.

(Syllabus by the Court.)

Appeal from Circuit Court, Mason County; F. A. Guthrie, Judge.

Bill by James L. Knight against George M. Nease and others. Decree for plaintiff, and defendants appeal. Affirmed.

John E. Beller, for appellants. Charles E. Hogg, for appellee.

MILLER, J. Appellants, Henry Lieving and George M. Nease, appeal from a decree of the circuit court of Mason county made and entered on the 17th day of May, 1901, in the suit in equity wherein appellee, James L. Knight, was plaintiff, and appellants and O. C. Sayre were defendants. Plaintiff filed his bill at the April rules, 1899, wherein he alleges that on the 18th day of July, 1894, said Nease was the owner in fee of 50 acres of land, situate in the county aforesaid; that on the day and year last mentioned said Nease and Sayre executed to plaintiff their note for \$500, payable 12 months after its date, with interest at 8 per cent.; that on the 4th day of May, 1898, plaintiff recovered a judgment in said circuit court upon said note against Nease and Sayre for \$613.83, with interest thereon until paid, and \$17.40 costs; that no part of the judgment has been paid, although execution had been issued thereon, and returned unsatisfied; that after the execution of the note, but before the judgment thereon as aforesaid, Nease transferred and conveyed said real estate to Lieving "for the ostensible consideration, as expressed in the deed, of \$800"; that at the time of the conveyance of the land by Nease to Lieving Nease was living upon the land with his family; that it was his home place; that Lieving was at that time, and still is, the father-in-law of Nease; that, while the said deed purports to be for a valuable consideration, as expressed on the face thereof, in truth and in fact the said George M. Nease made a voluntary conveyance of the said real estate, without any valuable consideration therefor, to the said Henry Lieving, as aforesaid, and that no money or other thing of value passed between the said Lieving and the said Nease as a consideration therefor, and it was a mere sham and a shift to have the transaction to appear to have been founded upon a valuable consideration, so as to

§ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 809.

hinder, delay, and defraud this plaintiff in the collection of his said debt; that said conveyance was made by Nease to Lieving to hinder, delay, and defraud the creditors of Nease, and especially the plaintiff, and of this intention on the part of Nease Lieving had notice at the time of said conveyance, and that he participated therein, and aided Nease in the alleged fraud, by accepting said conveyance; that ever since said conveyance Nease has resided on the land as if no conveyance thereof had been made as aforesaid; and that Nease and Sayre are insolvent. The bill, which is verified by affidavit, then propounds to defendant Lieving and to defendant Nease, respectively, six several special interrogatories, not necessary to be here set out, and prays that said interrogatories may each be answered, that said deed may be set aside as to plaintiff's said demand, and for general relief.

The joint and separate answer of defendants Nease and Lieving was filed to the bill, "or to so much thereof as they are advised it is necessary or material for them to answer." They admit that Nease was the owner in fee of the tract of land described in the bill on the 18th day of July, 1894; admit the execution of the note, judgment thereon, and nonpayment thereof, as alleged; admit the conveyance of the land by Nease to Lieving; but "say that about one year before said judgment was rendered respondent George M. Nease sold and conveyed to said defendant Henry Lieving, for the sum of \$800, the tract of land, and respondents, and each of them, deny that said deed was made to hinder, delay, or defraud the said plaintiff." "Respondents, and each of them, say that said deed for said tract of land from said George M. Nease to said Henry Lieving was made in good faith, and in truth and in fact the consideration, \$800, stated in the said deed, was paid to said George M. Nease by said Henry Lieving. And said Henry Lieving says that the allegation in said bill wherein he is charged with having knowledge of the intent on the part of said Geo. M. Nease to defraud the plaintiff and other creditors of said Nease, and that this respondent Henry Lieving participated therein, is not true." Respondents also answered the specific interrogatories, and verified their answer as prescribed by statute. Depositions were taken and filed by both plaintiff and defendants. Sayre did not make any appearance, and as to him the bill was taken for confessed. On the 17th day of May, 1901, the cause was heard upon the bill taken for confessed as to defendant Sayre and its exhibits, upon the joint and separate answer of Nease and Lieving, with general replication thereto, and upon the depositions taken and filed as aforesaid; whereupon the court decreed that the defendants Nease and Sayre do pay to the plaintiff \$725.83, with interest thereon until paid, and the costs of suit; that the said deed from Nease to Liev-

ing be set aside and held for naught as to plaintiff's said demand; and that said indebtedness constitutes a valid and subsisting lien on said 50 acres of land. This is the decree appealed from.

The answer in its denials, is not as specific and positive as it might be, but its sufficiency or insufficiency is not necessarily a question to be here determined, as this appeal can be decided on other grounds. The interrogatories contained in the bill are as follows: "First. Did you, Henry Lieving, know at the time of the said conveyance, or had you been informed at the time of said conveyance, that the said George M. Nease had signed a note to the said James L. Knight, along with C. C. Sayre, for five hundred dollars, or any other sum, for a loan of money or for any other thing? Second. Did you, Henry Lieving, pay any money to George M. Nease by reason of said conveyance, and, if so, how much, and where did you obtain the said money, and from whom? Third. How far do you live from the residence of the said George M. Nease, and how long have you continued to reside within that distance of him, the said George M. Nease? Fourth. What relation were you to the said George M. Nease at the time of the said conveyance, and how long had such relation existed between you and him? Fifth. Who is now living upon the property conveyed to you by George M. Nease by the deed hereinbefore referred to? Sixth. If you paid any money to George M. Nease for said land, did you borrow it, and, if so, from whom did you borrow it, and have you paid the party back from whom you borrowed? If you have paid the money back to the party from whom you borrowed it, state where you got the money, and when, with which to pay the money back to the party from whom you borrowed it." And said plaintiff also propounds the following interrogatories, which the said George M. Nease is asked and required to answer under oath: "First. How much money did you, George M. Nease, receive from Henry Lieving for the transfer of your land as set out and described in this bill? Second. When and where did you receive said money? Third. What have you done with said money? State particularly how you have disposed of the same, whether you have any left of it, and, if so, how much, and where it is. Fourth. What relation were you to Henry Lieving at the time of the transfer of said land to him by you, and what relation are you now to him? Fifth. Do you still live upon the land which you transferred to Henry Lieving? Sixth. What property did you own at the time of said conveyance made by you to said Henry Lieving? Where was it located? What was its character, and what was its value?" Lieving, in answer to the special interrogatories thus propounded to him, says that several months before the conveyance was made he knew that Nease and Sayre had executed

the note to plaintiff for \$500, but at the time of said conveyance he understood and thought that said note had been paid off by Sayre; that for said conveyance he paid Nease \$700 cash, which he had had on hand for some time, and also canceled a debt for \$100, due from him to respondent; that he lived about one mile from Nease, and had so resided about 18 years; that at the time of the conveyance he was the father-in-law of Nease, and had been for about 17 years; that Mary L. Nease, mother of Geo. M. Nease, had dower in the tract of land when purchased by respondent, which dower had been assigned and set apart to her by agreement; that since said assignment and allotment said Geo. M. Nease had been living with his mother upon the dower part of the land; that the residue thereof had been in possession and under control of respondent and his tenants ever since his purchase thereof; that respondent did not borrow any of the money so paid to Nease for said land; and that said respondent had said money on hands, and had been saving the same up for several years. Defendant Nease, in answer to said several special interrogatories propounded to him, says that he received from Lieving for the conveyance of the land \$700 in money, \$100 of which was paid to him by Lieving on the 28th day of May, 1897, at the office of John E. Beller, in Point Pleasant; that \$600 thereof was paid to him by Lieving on the 1st day of June, 1897, at his home in Graham District of said county; that this money was paid to him by Lieving as part consideration for the land conveyed to him by deed dated on the 28th day of May, 1897; that the balance of the consideration mentioned in the deed, to wit, the sum of \$100, was for a debt which he owed to Lieving, and which debt was canceled by the making of said deed; and that said Lieving paid \$700 in cash. He further states: That he paid out and used said money as follows: To L. W. Brown, \$37.50; P. L. Roush, \$110; for cow, \$22.50; for 1897 taxes, \$8.91; Marlon Roush, \$25; S. E. McMillen, \$60; Bertha McDaniel, \$28; Bentz & Haywood, \$5; G. M. Rickard, \$65; Dr. L. F. Roush, \$28; O. McCloud, \$4; O. A. Kent, \$6.50; Wald Cross, \$305; J. W. Lieving, \$95. That the balance, \$203.54, was used by him for maintenance and care of himself and family, and that he then had none of said money. That he was the son-in-law of Lieving at the time of the conveyance, and had been such since 1882. That he then lived with his mother on the dower part of said land. That her house is on the dower part of said land. That at the time of the conveyance to Lieving he owned no other real estate. That he then owned a cow, of the value of \$22.50; a watch, \$25; a calf, \$5; plow, \$3; harrow, \$1; hay fork, \$2; and saddle, \$2.

The said interrogatories having been thus answered, the question arises as to the effect, if any, which should be given to said

answers, either in favor of the plaintiff or of the defendants. It has been suggested that a defendant's answers to specific interrogatories thus propounded are evidence for him. Whatever the general equity practice in this particular is, or may have been, we hold that this question is now controlled in this state by our statute. In Story's Eq. Pl. (10th Ed.) § 38, it is said: "It is clear from what has been already said that the interrogating part of a bill is not absolutely necessary; because, if the defendant fully answers to the matters of the bill, with their attendant circumstances, or fully denies them in the proper manner on oath, the object of the special interrogatories is completely accomplished. In the old forms of bills there accordingly were no special interrogatories. But from the considerations already mentioned the insertion of special interrogatories is often highly useful to sift the conscience of the defendant, and is almost universal in practice, except in amicable suits. In truth, without such interrogatories it would be impracticable in many cases to extract from a reluctant defendant the facts and circumstances, so as to justify any decree." Bart. Ch. Pr. vol. 1, 279; Fletcher's Eq. Pl. & Pr. § 76, and cases there cited. These authorities establish conclusively that the interrogatories are a part proper of the bill, and that the answers thereto are a part of the answer to the bill. The interrogatories and their answers are distinctively parts proper of the bill and answers respectively in this cause. The interrogatories are inserted in the bill before the prayer and verification thereof, and said answers thereto are also in the body of the general answer to the bill.

Our Code 1899, c. 125, § 38, declares: "If the plaintiff desire the defendant to answer the bill on oath, he must verify his bill by affidavit, and if the bill be so verified, the defendant must, in like manner, verify his answer. But if the bill be not verified, the defendant need not verify his answer, and if he does so it shall not be entitled to any more weight in the cause than if it had not been verified." In section 59 of same chapter it is provided: "When a defendant in equity shall, in his answer, deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or jury of the truth thereof shall be sufficient to establish the same." In the case of Rogers v. Verlander, 30 W. Va. 619, 639, 5 S. E. 847, 861, Judge Green, in discussing this question, says: "The appellant's counsel, it is true, claims that the allegations in the answer of Mary A. Rock in reference to the consideration paid by her to J. W. Verlander for said three acres of land conveyed by this deed are to be regarded as evidence in her behalf against the plaintiff and other creditors of J. W. Verlander, as they were responsive to the allegations on the subject in

the bill. \* \* \* To sustain his position that these allegations in the answer are to be considered as evidence for Mary A. Rock against the plaintiff, as they are responsive to allegations in the bill, the appellant's counsel refer to 2 Story, Eq. Jur. § 1528, and other text-writers. These authorities simply lay down the rule, universally recognized, that prior to the passage of statute law regulating the pleading in chancery causes the rule in equity was, in the language of Story: 'In every case the answer of the defendant to a bill filed against him upon any matter stated in the bill, and responsive to it, is evidence in his own favor.' And the reason given by Story and others for this rule is: 'As the plaintiff calls upon the defendant on oath to answer an allegation of fact which he makes, he hereby admits the answer to be evidence of that fact.' " "But this effect of an answer responsive to a bill has been changed by our statute, as well as by the statute law of most, if not all, of the states. In this state, under our statute laws, answers are not usually sustained by the respondent's affidavit; and their effect has been changed entirely. They are, under our statute law, no longer to be regarded as evidence in any case, whether they be sworn to or not. They are simply pleading, and have effect as such only, just as a plea in a common-law case, whether it be sworn to or not, has no effect as evidence. And hence, to use the language of section 36, c. 125, Code 1887, p. 785, 'every material allegation of the bill not controverted by an answer, \* \* \* shall for the purposes of the suit, be taken as true, and no proof thereof shall be required.' This is the exact effect of a plea at common law. And section 38, c. 125, Code 1887, p. 786, provides that, 'if the plaintiff desires the defendant to answer the bill on oath he must verify his bill by affidavit, and if the bill be so verified, the defendant must in like manner verify his answer. But if the bill be not verified, the defendant need not verify his answer, and if he does so it shall not be entitled to any more weight in the cause than if it had not been verified.' In other words, the only weight the answer has in any cause is the weight attached to it as pleading. In no case is it entitled now to any weight as evidence. In this respect it stands on the same footing as pleas at common law. They are never entitled to the weight of evidence, though the particular plea may be required to be supported by affidavit; as, for instance, pleas in abatement and pleas of non est factum. See section 39, c. 125, Code W. Va. 1887, p. 786."

In the case of *Johnson v. Riley*, 41 W. Va. 147, 23 S. E. 700, Judge Brannon, in his dissenting opinion filed in the case, very tersely states the same views, as follows: "The bill charged that the deed was without consideration, voluntary, and fraudulent. This called on the party to prove the consideration recited to be true. *Rogers v. Verlander*, 30 W.

Va. 619, 5 S. E. 847. He did not do so, unless his answer be read as evidence. The rule was at one time that an answer responsive to the bill was conclusive evidence in favor of the defendant, unless overcome by two or more witnesses, or one witness and corroborating circumstances; but my understanding has been, and, as I had thought, also that of the profession, that our Code provisions had uprooted that rule, and given the answer no force as proof, whether the bill be sworn to or not, or the answer sworn to or not, its only office being now to put the plaintiff to proof of these things in his bill calling for proof. Chapter 125, § 38 [Code 1887, p. 786], gives the plaintiff right, by swearing to his bill, to search the conscience of the defendant for purposes of discovery by thus requiring a sworn answer; but the answer is not evidence for defendant, as the section says that, if the answer be sworn to, it shall not be entitled to any more weight than if unsworn. Now, this means that, though the bill be sworn to, and the answer likewise, yet the answer shall not have any more force from being verified by oath. It does not mean that it is no evidence only in the case where the bill is not sworn and the answer is, leaving it to be implied that, where both are sworn, the answer is evidence. The plain meaning is that in no case is the answer evidence. This is plainer from section 59, declaring that when a defendant, in his answer, denies any allegation of the bill, its effect shall only be to put the plaintiff on proof of the truth of the allegation. Does not this apply to all answers, verified or not verified? Mr. Barton, in note in his *Chancery Practice* (page 396), so construes our statute. The very fact that section 59 declares that answers shall only put the plaintiff on proof, coupled with the fact that section 38, treating of those particular answers that are verified, declares that they shall have no more weight than if not verified, shows a cautious design in the lawmaker to pointedly and expressly so provide as to them." *Bronson v. Vaughn*, 44 W. Va. 406, 29 S. E. 1022; *Kerr v. Hill*, 27 W. Va. 578, 605; *Jarrett v. Jarrett*, 11 W. Va. 584, 630; *Bart. Ch. Pr.* vol. 1, 424. Why should the interrogatories be evidence, and the other parts of the answer not be such?

It seems to be conclusively established by the authorities cited that the answer is not, nor is any part of it, entitled now to any weight as evidence. Its only effect is to put the plaintiff on proof of the allegations of his bill, denied by the answer.

Plaintiff proved by the deputy clerk of the county court of Mason county that Lieving was assessed on the personal property books as follows: For the year 1897, with three horses, total valuation, \$100; two cattle, \$25; two hogs, \$10; one carriage, \$15; and household and kitchen furniture, \$30—total, \$180.00. For the year 1896, with five horses, \$150; six cattle, \$60; two hogs, \$10; farm-

ing implements, \$10; one carriage, \$5; and household furniture, \$25—total, \$260. For the year 1896, with personal property of a total valuation of \$220. For the year 1894, with a total valuation of \$340. For the year 1893, with a total valuation of \$360. For the year 1898, with personal property, all valued at \$210, it being three horses, two cattle, one hog, two carriages, farming implements, and household and kitchen furniture. But was not for any of the years mentioned assessed with any money, notes, or bonds. The evidence also shows that Lieving was assessed for all of the years mentioned with 55½ acres of land at a valuation of \$750, with 5 acres at \$52.00; and for 1898 with 50 acres, valued at \$546. Nease did not testify in the case, but Lieving took and filed his own deposition, in which he, in substance, states that the sale and conveyance of the land to him were true and honest; that he could not give the dates when he got the money with which he paid for the land; that part of the money he got from his wheat crop, but just how much he did not know; part he got from the sale of young cattle and hogs, and some of it—just how much he did not know—was money he already had; and that he sold the cattle and hogs mentioned by him just before he bought the land. On cross-examination he stated that he supposed he owed on the 1st day of April, 1897, \$300 to \$400; that he owed Samuel Roush the largest sum; he could not state the amount exactly—about \$200; that he thought less than \$200—how much less, he did not know; that Roush held two notes; that he did not recollect the amounts; that he could not tell what other parties he owed on April 1, 1897, but would find out when he went home. He could not state how much wheat he sold, nor how long before the conveyance of the land to him he sold it; could not say who bought the wheat, nor how much per bushel he got for it. He could not state how many acres of wheat he had in 1896; was unable to state how much wheat he sowed on his own place in 1896. He could not state who threshed his wheat crop in 1896. He stated that he had been renting from Henderson Sayre, but could not say whether he harvested wheat on Henderson Sayre's land in 1896 or not. He could not tell to whom he paid the money for the threshing. He supposed he sold 12 to 15 head of cattle in 1897, but could not say who bought them, nor how much he got for them. He did not know from whom he bought the cattle; did not know how many hogs he sold in 1897; could not say exactly how old they were when he sold them; that he generally raised them; and did not know how much per pound he got for the hogs sold in 1897, although they were sold by the pound. He stated that a part of the \$100 which Nease owed him was an open account; that some of it had been standing for a long time; he did not know how long; he could

not tell. Witness also filed a statement showing that on April 1, 1897, he owed H. K. Coe, \$17.70; W. A. Ellis & Co., \$175.08; Waid Cross, \$24.90; J. C. Hayman, \$10.45; H. W. Sayre, \$21.50.

The deed acknowledges a cash consideration of \$800, paid on the date of the deed to Nease by Lieving, yet the testimony of Lieving, if it is to be believed, shows that only \$100 was then paid, and that \$600 was afterwards, on the 1st day of June, 1897, paid by him to Nease. Lieving says that he then had the \$700. Why was it not all paid then, instead of the \$100? It is fair to presume that the \$100 was paid in the presence of Beller, in his office, if it was so paid, because he appears to have taken and certified Lieving's acknowledgment of the deed. Why Beller and Nease did not testify to this matter is not explained. Inasmuch as the deed is attacked as voluntary and fraudulent, this omission to testify raises a strong presumption that Beller and Nease would not have supported Lieving's statement regarding the payment of the \$100 had they given their evidence. It is also shown that Lieving and Nease were father-in-law and son-in-law, had sustained that relation for about 17 years, and for all that time had lived within one mile of each other. They must have been thoroughly conversant with each other's business relations and financial conditions. Lieving says that he knew of the execution of the note by Nease and Sayre to Knight for \$500, but was informed that it had been paid by Sayre. Of whom he obtained the information he does not say. Certainly not from Knight, who could, and no doubt would, have willingly given him the correct information about the matter. He says he generally sold about 400 bushels of wheat in the year, but cannot state who bought it, or how much per bushel he received for it. He also says that the crop he sold shortly before he bought the land was raised by him the year before. He swears that he sold 12 or 15 head of cattle in the spring of 1897, which were over one year old, yet his assessment for that year shows only 2 head of cattle, valued at \$25.50. As above shown, the largest valuation of personal property with which he was assessed was \$360 in 1893, and the smallest \$180 in 1897. The next smallest was \$210 in 1898. The list of his creditors filed by him shows quite a number of them. It is not probable that Lieving could have concealed from the assessor and his creditors all trace of the \$700 and the property claimed to have been sold by him, but not assessed, if he had possessed the same, as stated. He testified that he was 63 years old, and had never done anything but farm. He was a man fully matured, with nothing to divert his mind from his usual vocation, yet he cannot, as it seems, recollect the stock owned by him on his farm, or the wheat produced by his toil. He can, however, prepare and file with apparent great accuracy the names of his

several creditors, with the exact sums due to them respectively. This testimony is so contradictory and unreasonable that we cannot accept it as a guide by which the rights of the parties to this suit must be determined.

The statement of Nease, filed with his answer, is not less remarkable. He gives the names of his several creditors, with the exact amount paid to each. The amounts so given aggregate \$496.46, leaving the net balance of \$203.54 of the \$700, which balance he used in the maintenance and care of himself and his family. No receipts are exhibited by him for any of said disbursements. This answer and statement, however, is not evidence, as we have shown. In addition to this, Nease yet owed the debt. He sold his home, his only land, and has failed to explain the transaction by his own evidence.

The rule as to proof of fraud is stated in 8 Am. & Eng. Enc. Law, 654, as follows: "It is not always necessary, however, that direct affirmative or positive proof of fraud be given. It may be and usually is proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will be sufficient, although it does not lead to a conviction of absolute certainty. The fraud need not be proved beyond a reasonable doubt." *Ballard v. Chewning*, 49 W. Va. 508, 519, 39 S. E. 170. It was incumbent on Lieving to show that the deed was made for a valuable consideration. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Childs v. Hurd*, 32 W. Va. 68, 9 S. E. 362; *Cohn v. Ward*, 32 W. Va. 34, 9 S. E. 41; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828. This he has not done. It also satisfactorily appears from the facts and circumstances in this case that the deed is fraudulent as to plaintiff's demand. *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Hogg's Ex. Prin.* § 180; *Id.* §§ 187, 188.

There is no error in the decree complained of. It is therefore affirmed, and the cause must be remanded to the circuit court of Mason county, to be therein further proceeded with according to the rules and principles governing courts of equity.

DENT, J. (concurring). I concur in the syllabus and conclusion in this case, but not in all that the reasoning or language used may import. Section 59, c. 125, Code 1899, applies only to bills for relief, and then only to the effect of a denial in an answer of a material allegation contained in a bill, and provides that such denial shall only "put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or jury of the truth thereof shall be sufficient to establish the same." This does not change the former practice, except as to the quantity of proof required to overcome the denial in an answer of an allegation contained in a bill. 2

Tuck. Com. 493. In all other respects the force of an answer remains unchanged. This statute does not apply to bills purely for discovery. It would be a strange anomaly to permit the plaintiff to apply for a discovery, and then, after the discovery is had, permit him to proceed to overcome it by proof in the same suit. He may not use the discovery obtained, but, if he does use it, he vouches for its truth; otherwise he would be permitted to prove and disprove at the same time. Where a discovery is sought in a bill for relief, the plaintiff is bound by the answer in so far as it is responsive to the bill and free from evasion, unless it is overcome by evidence which satisfies the court that it is false. This clearly is within the meaning of the statute. In *En. Plead. & Prac.* 914. So this court held in the case of *Johnson v. Riley*, 41 W. Va. 147, 23 S. E. 698. A wrong construction entirely is put upon section 38, c. 125, Code 1899, which reads as follows: "If the plaintiff desire the defendant to answer the bill on oath, he must verify his bill by affidavit, and if the bill be so verified, the defendant must in like manner verify his answer. But if the bill be not verified the defendant need not verify his answer, and if he does so, it shall not be entitled to any more weight in the cause than if it had not been verified." By a misconstruction the latter clause of the last sentence is made to apply to the first sentence so as to make it read: "If the plaintiff desire the defendant to answer the bill on oath, he must verify his bill by affidavit, and if the bill be so verified the defendant must in like manner verify his answer, and if he does so it shall not be entitled to any more weight in the cause than if it had not been verified." This construction is so unjustifiable as to be almost humorous. The meaning of the statute is too plain for any such misconception, and this is that, if the bill be verified, the answer must likewise be verified, and, if so, it has the same force and effect as it always had, except as modified by section 59, cited. But, if the bill be not verified, the answer need not be, and, if it is, it shall have no more force and effect than if it were not so verified, for the very good reason that the plaintiff, in not verifying the bill, has not appealed to the defendant's conscience. If, however, the plaintiff does verify his bill, and thereby appeals to the defendant's conscience, there is no good reason why the answer, in so far as responsive to the bill, should not be taken as true until impeached by evidence satisfactory to the court. And there is good reason why it should be taken as true until overcome by satisfactory proof, and this is that the defendant as to such matter has been virtually made a witness of by the plaintiff who put him to his oath, and, having thus testified, it would be merely productive of delay to require him to again testify, unless the plaintiff shows by satisfactory proof that his r

sponses to his interrogatories are false at least in some particular. If the plaintiff cannot do this, it must be presumed that, if the defendant is again interrogated, his responses will be to the same effect. One of the objects of having the bill verified is to do away with the necessity of taking proof, and, if the defendant has purged his conscience, and the plaintiff can show nothing to the contrary, why delay the case for further proof? This is a long established practice, which the statute has merely emphasized, except as to the amount of proof required, instead of having overthrown; and it is a practice that should be retained for the expeditious disposition of causes and the dispatch of business.

(53 W. Va. 292)

**SIBLEY v. STACEY et al.**

(Supreme Court of Appeals of West Virginia,  
April 18, 1903.)

**EQUITY—LACHES—LIMITATIONS—DEED—COVENANT OF WARRANTY—RIGHT OF ACTION—FRAUDULENT CONVEYANCE—RES JUDICATA.**

1. A legal demand sued on in equity is subject to the statute of limitations, and not laches.

2. A deed which sells, grants, conveys "2855 trees 30 inch and up & 1733 trees 22 to 30 inch yellow poplar, 31 trees 30 inch & up and 50 trees 22 to 30 inch cucumber, & 46 trees 30 inch & up, 21 trees 22 to 30 inch Ash trees 22 inches and upwards in diameter, marked thus, K, now sound and growing upon the lands of the" grantor, imports a covenant or warranty that such trees exist, of the kind and character named, as the language used is not a mere descriptive recital, but is the essence of the conveyance.

3. On such covenant or warranty a suit may be maintained for a deficiency in the number of the trees conveyed, within 10 years from the date thereof.

4. A conveyance fraudulent as to one creditor is void as to all others of the same class, and a decree adjudicating the fraudulent character of such conveyance as to one such creditor inures to the benefit of all other creditors of the same class who take advantage thereof in proper time by proper pleadings.

5. When the evidence relating to fraud is conflicting, and tends to support the decree of the circuit court, such decree will not be disturbed, unless plainly wrong.

6. A decree in a debtor's suit, to which creditors are not parties, directing the payment of a certain fund to the attorney by virtue of an assignment thereof made to him by the debtor, is no bar to a suit by a creditor attacking the withholding and appropriation of such fund by the attorney as made with intent to delay, hinder, and defraud the creditors of such debtor.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Bill by Hiram W. Sibley against John E. Stacey and others. Decree for plaintiff, and defendant Carrie E. Thomas appeals. Reversed in part.

H. S. Rucker and Rucker, Anderson & Hughes, for appellant. Henry & Graham and Brown, Jackson & Knight, for appellees.

¶ 4. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 974.

DENT, J. Carrie E. Thomas appeals from a decree of the circuit court of Greenbrier county, entered on the 1st day of August, 1900, in favor of Hiram W. Sibley, and presents for determination the following two questions: First. Was the claim of the plaintiff against John E. Stacey barred by laches or the statute of limitations? Second. Was it error to hold appellant's deed from said Stacey, dated September 9, 1895, fraudulent?

The facts as to the first proposition are as follows, to wit:

On the 13th day of September, 1889, John E. Stacey executed to plaintiff the following deed, to wit:

"This indenture, made and entered upon this 13th day of September, 1889, by and between John E. Stacey and Louisa Stacey, his wife, of the county of McDowell and state of West Virginia, parties of the first part, and Hiram W. Sibley, of the county of Monroe and State of New York, party of the second part,

"Witnesseth: That the parties of the first part, for themselves, heirs, and assigns, for and in consideration of the sum of \$3,834.00 to us in hand paid, the receipt of which is hereby duly acknowledged, have bargained and sold, and by these presents do hereby bargain and sell, release, grant and convey with covenant of general warranty of title, unto the parties of the second part, their heirs and assigns, 2855 trees 30 inch and up & 1733 trees 22 to 30 inch yellow poplar, 31 trees 30 inch & up & 50 trees 22 to 30 inch cucumber, & 46 trees 30 inch & up, 21 trees 22 to 30 inch Ash trees 22 inches and upwards in diameter, marked thus, K, now sound and growing upon the lands of the parties of the first part.

"And it is further agreed that the parties of the second part shall have their own time to take the said trees of, and have the right of ingress, egress and regress for the purpose of cutting and removing said timber, together with the right of way over and through the lands of the said parties of the first part, and the use of such stone and timber as may be necessary to make roads and dams necessary for removing said timber by hauling or floating the same; with the right to make, build and erect the same necessary for hauling, splashing or floating the said timber off of said lands, or any timber on adjacent lands, or any other timber which the parties of the second part may have to float or move over or through said lands, except damage to growing crops, which shall be paid for by the parties of the second part.

"The lands on which said timber stands being as follows, to wit: A tract of land lying on Bull Creek, a tributary of Tug river, lying in McDowell county, West Virginia, and being about 1600 acres and deeded to John E. Stacey by one William Williams, deed, dated Jan. 17, 1887, and recorded in the Register's Office of McDowell county, in Deed Book No. 12, pages 44 and 45; also a



tract of land lying in McDowell county on Panther creek, a tributary of Tug river, and was deeded to William Stacey by John E. Stacey, dated Oct. 15, 1875, deed recorded in Deed Book No. 3, page 84 in Register's Office of McDowell county, W. Va., and was patented in the name of Isom Blackenship, patent dated June 3d, 1843, calls for 10 acres; and Alfred Blackenship dated May 30th, 1845, and call for 60 acres; said land on Panther creek was this day deeded back to John E. Stacey by William Stacey and wife. It is mutually agreed that there shall not be any splash dams built above Mr. J. E. Stacey's dwelling house where he now lives on the right hand fork of Bull Creek.

"And in consideration of the foregoing premises, the parties of the first part do hereby agree to protect and take care of said timber as long as it may remain upon said premises.

"In testimony whereof, the said parties of the first part have hereunto set their hands and seals this 13th day of September, 1889.

his  
"John E. X Stacey. [Seal.]

mark  
her  
"Lovice X Stacey. [Seal.]  
mark

"Witness: W. H. Dotson, W. H. Coleman."

The plaintiff was a citizen of the state of New York, and purchased this timber as an investment, through an agent. In the year 1898, having discovered within 10 months previous thereto that he had been deceived as to the number and size of the trees, he instituted this suit to require Stacey to make good the deficiency. There seems to be no question but that the deficiency exists, and that Stacey fraudulently took advantage of plaintiff's agent by his representations as to the quantity and size of the timber. The decree ascertains the deficiency to be \$1,589, less two credits amounting to \$125.

This claim is a legal, and not an equitable, one, and is therefore governed by the statute, except in so far as the fraud of Stacey may have delayed or prevented its prosecution. It is founded on a written contract, and is not barred within less than 10 years from the date of such contract. Section 6, c. 104, Code 1899. This contract covenants, in express words, that the number of the trees sold, marked with the letter "K," are "now sound and growing upon the lands of the parties of the first part." If there was no other provision in relation thereto, the statute would begin to run from the date of the contract as to the covenant of quantity or quality, express or implied. 8 Am. & En. En. Law (2d Ed.) 63, 223. The number of the trees fixed is not a mere descriptive recital, but is of the essence of the contract. This deed, however, contains the further covenant that the party of the first part will "protect and take care of said timber as long as it may remain upon said premises"; thus virtually retaining dominion over the

property until possession thereof is taken by the grantees. So that it may be a question whether the statute begins to run until the grantor fails to place the grantee in possession of the property on demand. This question, however, it is not necessary to decide, as 10 years had not elapsed from the date of the deed at the time of the institution of the suit. For the same reason, it is not necessary to consider the fraudulent concealment of the right of action. The claim being legal, and not barred by the statute of limitations, laches would not defeat it.

The second question—as to the fraudulent character of the deed—appears to have been settled in the prior case in the same court of Bank of Ronceverte against this appellant and others. This is a solemn adjudication that appellant's deed was fraudulent and void as to the bank debt, and this adjudication, remaining unreversed, cannot be called in question by the appellant in any collateral proceedings. It may be said that plaintiff was not a party to such suit, and has no right to take advantage of such adjudication. When fraud is once established against a conveyance as to one creditor, it vitiates such conveyance as to all other creditors of the same class. As is said in *Bump on Bankruptcy*, § 34: "If there is an intent to delay, hinder, or defraud a particular creditor, it is not necessary to establish an intent to delay, hinder, or defraud all creditors. It is not, on the other hand, necessary to establish a specific design to delay, hinder, or defraud the particular creditor who assails the transfer, for the intent to delay, hinder, and defraud one creditor renders the transfer void as to all." *Lockhard & Ireland v. Beckley et al.*, 10 W. Va. 87. Plaintiff was not required to show a fraudulent intent to defraud him, but only to show that the deed was fraudulent as to a creditor of the same class; that is, one whose debt was prior to the conveyance. In short, plaintiff had only to show that the deed was fraudulent as to the debt of the Bank of Ronceverte, to avoid it as to his debt. This he could not show by stronger evidence than by an adjudication already made to this effect. Appellant tries to escape the effects of such adjudication by claiming that, for certain reasons, she consented to such decree. This cannot possibly destroy the effects of such adjudication. It is the solemn determination of the court, whether made with her consent or without. If with her consent, it is her admission of record, which she is forever afterwards estopped from denying, it matters not what her purpose in making it may have been. Without regard to this adjudication, however, the badges of fraud and circumstances of suspicious character, including the relationship of the parties and their various dealings, the marriage contract, the original fraud of Stacey, his failure to answer the amended bill or testify in the case, are so numerous and glaring that it would be impossible for

this court to say that the conclusion reached by the circuit court was plainly wrong. Nor will it serve any good purpose to recite and comment on these various transactions at length, but it would only be an unnecessary incumbrance of the record. *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854.

Plaintiff insists, as a counter assignment of error, that the following part of the decree, to wit: "So far as the subject-matter of litigation presented in this cause between plaintiff and defendant H. S. Rucker is concerned, relating to the fund in McDowell county, West Virginia, which the said H. S. Rucker claims under contract and assignment from his codefendant John E. Stacey, the court is of opinion, and doth so adjudge, order, and decree, it is not liable or subject to the plaintiff's debt, as it appears to the court, by a decree of the circuit court of said county of McDowell, in a cause lately therein pending, in the name of John E. Stacey v. G. W. Doak, Trustee, et al., that said fund was disposed of in that court to said defendant H. S. Rucker, and that such action of that court concerning that fund cannot be inquired into by this court, and that, so far as this court is concerned, the matter is *res adjudicata*. Wherefore the court doth adjudge, order, and decree that the said H. S. Rucker be and he is dismissed as a defendant to this cause; this court, however, not meaning or intending to interfere with any further rights of the plaintiff, if any he has, to contest the matter further in the circuit court of McDowell county, and to this end this decree is without prejudice to the plaintiff"—should be reversed and annulled, and that H. S. Rucker should be required to pay the amount referred to therein and received by him upon the plaintiff's debt. There is nothing in this record to show that the question of the fraudulent receipt of such money by Rucker was ever involved in the litigation in McDowell county, or in any wise passed upon, or could have been passed on, in such litigation. But this question is presented for the first time by the bill in this cause. It therefore could not be a question of *res adjudicata*, nor can its adjudication be avoided by sending the parties to McDowell county to litigate it. The question of fraud involved must first be determined by the circuit court.

The decree is clearly erroneous in this respect, and to this extent it will be reversed and annulled, and otherwise affirmed.

(53 W. Va. 422)

#### FLETCHER v. PARKER.

(Supreme Court of Appeals of West Virginia.  
April 28, 1903.)

#### INFANT—POWER OF NEXT FRIEND—COMPROMISING JUDGMENT.

1. A next friend of an infant cannot compromise a judgment recovered in action in the

name of the infant by such next friend, and, on part payment, release the judgment.

2. In a writ of error in this court from a judgment, an order is made reciting that it appeared from a writing filed that the "matters in difference herein" have been settled, and dismissing the writ of error "agreed" on motion of the plaintiff in error; such order is not a bar against the judgment, and does not discharge it.

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County; J. M. McWhorter, Judge.

Bill by Louise Fletcher, by her next friend, against J. A. Parker. Decree for defendant, and plaintiff appeals. Reversed.

John Osborne and Thompson & Lively for appellant. Miller & Read, for appellee.

BRANNON, J. Louise Fletcher, an infant, by Frank Lively, as her next friend, filed a bill against J. A. Parker in the circuit court of Summers county, stating that, suing by her next friend, J. R. Fletcher, she had recovered in said court a judgment for \$750 against Parker; that Parker obtained from the Supreme Court a writ of error to the judgment, but, before it was passed upon on its merits, Parker effected a compromise with said next friend, Fletcher, by which Fletcher agreed to take \$200 in full payment of the judgment, and that then Parker procured some order to be entered by this court, which was sent down to the circuit court, not saying what order, nor in fact filing it; that said next friend, Fletcher, had no right to make such compromise or collect the judgment; that, as the plaintiff was an infant, she was not bound thereby; that said judgment was yet unpaid. The bill stated that Parker was owner of certain real estate, and prayed that the judgment of the Supreme Court, and that of the circuit court (without saying what it was) pursuant to the order of this court, be set aside, as invalid, and that the real estate be sold to pay the judgment. Parker demurred to the bill and filed an answer. This answer sets up that Parker, at the request of said next friend, Fletcher, compromised said judgment, and that Parker paid Louise Fletcher and J. R. Fletcher \$200 in full settlement and discharge of said judgment and all their claim against him, and they executed a full and final release and discharge, and also made an indorsement and release on the margin of the record of the judgment, and executed an order to the circuit court to dismiss the suit. (None was pending.) The answer further set forth that then an order was entered in the Supreme Court dismissing said writ of error agreed. The order made by the Supreme Court reads thus, as exhibited with the answer: "It appearing to the court, by a written agreement duly signed by the parties interested in this case, and filed with the papers, that the matters and difference herein have been fully settled, and on motion of plaintiff in error, by Miller & Read, his attorneys, this case is dismissed agreed, at cost of plaintiff in error, ex-

¶ 1. See *Infants*, vol. 27, Cent. Dig. § 244.

cept statute fee, which is ordered to be certified to the circuit court of Summers county." The decree of the circuit court recites that the cause was heard on the bill, demurrer, pleas, and answer, and general replication, and that the court was of opinion that the bill was not good, and sustained the demurrer to it, and, the plaintiff not wishing to amend the bill, "the court having decided the merits, and the case being submitted to the court for its decision on the merits upon all the papers and proceedings aforesaid, and the court having considered said case on the merits, and being of opinion that the plaintiff is not entitled to the relief prayed therein, it is adjudged, ordered, and decreed that the plaintiff's bill be dismissed." The plaintiff appeals.

We have a bill plainly bad, for the reason that it does not show that execution was returned "no property found," or that two years had passed without execution. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. And it does not aver that the property sought to be sold would not, by rental, pay the debt in five years. So there was no error in sustaining the demurrer.

Does the bill show a sustainable case? That the contract of compromise is not valid to bind the infant against disaffirmance is plain. It operated to her prejudice, and can be repudiated by her. She could not compromise. 16 Am. & Eng. Ency. L. 286. She thus did not bind herself by her own act. Is the compromise by her next friend binding on her? It is not. "A next friend cannot compound a judgment, nor release nor discharge a cause of action, out of court. He has no power to settle or compromise without the express sanction of the court. But a compromise may be enforced by the court when made for the infant's benefit." 14 Ency. Pl. & Prac. 1040. In the present case the compromise lost to the infant three-fourths of the judgment. Why should the act of a next friend be binding in this instance? He is not a party, but the infant is the real party, to the suit. The next friend is one to prosecute and look after the suit. His duties and powers end with judgment recovered. He cannot receive pay of it, but payment must be made to the regular guardian or to the court. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344; 14 Ency. Pl. & Prac. 998, 1037; *Miles v. Kaigler*, 80 Am. Dec. 425; *Smith v. Redus*, 44 Am. Dec. 429. A compromise by a next friend may be made good, in a suitable case, by the court's approval in the case. *Tripp v. Gifford* (Mass.) 29 N. E. 208, 31 Am. St. Rep. 530. Many cases are cited in 44 L. R. A. 168. But no order of the circuit court appears. It could make none after judgment.

What becomes of the \$200 paid under the compromise? Shall it go to Parker's credit? No; because, to allow this, we have to affirm that the compromise was valid. We do not have to discuss in this case the nice questions as to whether an infant who has sold property or made a contract, and elects to dis-

affirm, must first repay the consideration and place the other party in statu quo. For such discussion, see *Mustard v. Wohlford's Heirs*, 15 Grat. 343, 76 Am. Dec. 209; *Gillespie v. Balley*, 12 W. Va. 70, 29 Am. Rep. 445; *Bedinger v. Wharton*, 27 Grat. 857. It does not appear what has become of the \$200. The question we have is simply whether an infant or a next friend can compromise and release a judgment, and accept payment of the compromise. To make this a partial payment, we have to decide that an infant or next friend can collect a debt. Would payment of a note or any other debt to an infant be valid?

What is the effect of the dismissal by this court of the writ of error from the judgment? It is claimed that it is res judicata, bars the judgment, satisfies it. We do not think so. In *Pethel v. McCullough*, 49 W. Va. 520, 39 S. E. 199, we held that an order dismissing a case in a court of original jurisdiction is a bar to another suit on the same cause of action. What does a dismissal "agreed," made in the Supreme Court upon a writ of error to a judgment of a circuit court, import? Such a dismissal in any court cannot cover any more than is involved in the case. In the circuit court it involves the whole controversy. In the Supreme Court, only error. The original controversy is merged in the judgment as a finality. Surely a dismissal in this court has no reference to the controversy, but leaves the judgment standing. Only reversal can affect it. A dismissal agreed of a writ of error, therefore, would purge error, would be a release of error, and bar another writ of error, as that error was involved in the suit called a "writ of error." Matters occurring after appeals, as payment, release of error, and the like, going to bar the appeal, may, in proper mode, be made in the appellate court, and issue made thereon. *Little v. Bower*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; 2 Cyc. 1007; *Hite's Heirs v. Wilson*, 2 Hen. & M. 268. In this instance the court simply recites that it appeared from a paper that the matters in difference had been settled, and dismissed the writ of error on motion of Parker. There was no issue of payment. The other side did not appear to the motion. It cannot be said that this court really passed on the fact of payment, and adjudged and found such payment, so as to make the dismissal res judicata on that fact. The paper referred to in the order recites the fact of payment, but shows no compromise on part payment. If there had been a controversy upon it, the court would have held it invalid as payment, as it was signed by the infant and next friend; but the dismissal was on motion of Parker, without appearance by the other side. There was no issue of payment. The court did no more than allow a dismissal. We do not think the order is a bar, but only a dismissal of the writ of error. Neither is it a ratification by this court of a compromise, because this was not the court to do this; the circuit court being the proper one before judg-

ment, but not after. And the compromise was not before this court—only a receipt.

The court erroneously decided the case on the merits, as the bill stated a claim for relief on the merits. The decree is not based alone on defects of the bill. The bill is not dismissed for that cause, but on the merits. Though the plaintiff declined to amend, seeing that the bill may be amended, we will reverse the decree, at the costs of the appellant, and remand the cause, with leave either to amend the bill in the respects pointed out, or to dismiss the suit without prejudice to the right of Louise Fletcher to bring another chancery suit to enforce the judgment or to collect it at law. *Van Winkle v. Blackford*, 33 W. Va. 588, 11 S. E. 26.

(53 W. Va. 106)

#### CROSSLAND v. CROSSLAND.

(Supreme Court of Appeals of West Virginia.  
April 4, 1903.)

#### INJUNCTION—SALE BY ADMINISTRATOR—TITLE OF PROPERTY IN DISPUTE.

1. V. C., administrator of the estate of P. J. C., filed her bill in the circuit court of T. county November 4, 1901, against G. T. C., late husband of P. J. C., in possession of the personal property on the real estate held by him by the curtesy, a part of which personal property defendant admitted the administrator was entitled to, but a part of which he claimed the title to himself; praying that defendant be restrained and enjoined from interfering with plaintiff in making sale of said property on the home premises, and that the writ of injunction be served on the morning of the day of sale, November 16, 1901, by the sheriff of T. county, or his deputies, and that he be directed in said injunction to prevent by restraint and arrest the said G. T. C. from violating such inhibition and injunction; and further praying that she also have the protection of the said sheriff to the auctioneer and to the people who might attend the said sale to bid on said property, and in pursuance of said sale to make removal of any property that they might purchase. *Held* error to grant the injunction "as prayed for in the bill," as it appeared from the bill itself that the title to the property sought to be sold was in question.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by Victoria Crossland against George T. Crossland. Decree for plaintiff, and defendant appeals. Dismissed.

O. O. Strieby, for appellant. Cunningham & Stallings, for appellee.

McWHORTER, P. Provy J. Crossland died on the 1st of February, 1901, leaving a husband, George T. Crossland, and nine children, and leaving some personal property, as well as real estate, all of which she disposed of by will. On the 29th day of August, 1901, America Victoria Crossland, one of the heirs, was appointed and qualified as administrator. The said George Crossland claimed a part of the personal property as his own, and objected to the appraisers appraising such parts of the property as he claimed to own individually, and objected to the sale thereof

by the administrator; and on the 28th day of October, 1901, the said George T. Crossland gave the administrator the following notice in writing: "To Victoria Crossland, Administratrix of Provy J. Crossland, deceased: You are hereby notified to come and take into your possession all of the personal estate of the said Provy J. Crossland, deceased, and to immediately remove the same from my premises, which said premises I now occupy as my home, and wherein I hold a life estate by virtue of being the husband of the said Provy J. Crossland, deceased. You are further notified that the major part of the property you have advertised for sale as such administratrix is my individual property, the possession and ownership whereof I have always heretofore enjoyed without having the title thereto called into question, and which I shall under no circumstances suffer you to sell or dispose of. You are further notified that I will not permit you to make sale of any property upon the said premises on the 16th day of November, 1901, and in case you should attempt the same you will be treated as a trespasser, and shall be dealt with in relation thereto according to law. Given under my hand this, the 28th day of October, A. D. 1901. George T. Crossland." On the 4th day of November, 1901, Virginia Crossland, the administrator, presented her bill against George T. Crossland, closing with the following prayer: "The plaintiff therefore prays that the said George T. Crossland be restrained, inhibited, and enjoined from interfering with her in making sale of said property on the home premises aforesaid, and that the writ of injunction be served on the morning of the day of said sale by the sheriff of said Tucker county, or his deputies, and that he be directed in said injunction to prevent by restraint and arrest the said George T. Crossland from violating such inhibition and injunction. She further prays that she also have the protection of the said sheriff to the auctioneer and to the people who may attend said sale to bid on said property, and in pursuance of said sale to make removal of any property that they may purchase, or any of them; and to carry out this sale she prays that the said Crossland may be inhibited and restrained by said injunction by the sheriff present, and that afterwards, in case of any violation of the injunction, the said Crossland be dealt with in relation thereto according to law. And she further prays that she may have such other, both special and general, relief to which she may be entitled, and that in the end such injunction and inhibition be made perpetual. And she will ever pray"—upon which bill the judge awarded an injunction "as prayed for." The bill alleges that the defendant, as plaintiff was informed, had refused to renounce the will as to his curtesy in the real estate, but under the will took possession of the two horses that were left to him by the deceased; that after the

death of plaintiff's mother, the testator, plaintiff went to their home in Canaan valley, in Tucker county, and there attempted to preserve and take care of the property of which her mother had died possessed, and to care for her two younger brothers; but after a long stay of five or six months her father, the defendant, made it so unpleasant for her and her sister, Samantha, who was assisting her in taking care of the property and family, that finally she concluded to administer and sell the property, and disburse the proceeds according to the will, and as provided by law; that, after her appointment as administratrix, the defendant became much more abusive and vindictive towards her and all of her brothers and sisters; that within the then last week she and her sisters were compelled to go away from home; that on the 17th of October, the date of the appraisal, defendant obstructed, interfered, and denied her right of having said property appraised; that it was finally done after great difficulty and embarrassment to the appraisers as well as to herself and all the parties concerned. Plaintiff charges defendant with being very eccentric, having a terrible temper, and absolutely irreconcilable when he "takes a notion," and charges him with being of intemperate habits to a considerable extent, and, when drinking, was very violent; that, if the estate was not permitted to be administered, he would take possession of it, and in a short time it would be entirely dissipated, destroyed, and otherwise misappropriated; that defendant was obstructing and hindering her in the course of her administration of said estate by threatening violence, and had given her written notice that she should not sell the property on the premises, and ordered her to immediately remove it, but claimed much of the property as his own, and files as an exhibit with her bill, the written notice which is copied above; that she had advertised the property for sale on the 16th of November, but believed she would be prevented from making the sale at that date through the conduct of the defendant without the interference of a court of equity; alleging that the property advertised for sale belonged to the estate of the decedent, and filed certain affidavits of several of her sisters and brothers setting forth that fact; that all of the heirs that were present were urging her to make sale of the property, and would, if she did not administer on it, hold her responsible on her bond; that she had been unable to administer on said estate through fear of personal and bodily injury, not only to herself, but to others who attempt to purchase or remove any of said property; that defendant would undertake to do violence, and in all probability excite at said sale riot and bloodshed; that she had been advised that under these circumstances a court of equity would aid and assist her by prohibiting, restraining, and enjoining said defendant from interfering; that, in connection with this, "she char-

ges that the said defendant is not financially liable for any of the estate that he may dissipate and misappropriate, for he owns nothing except a half undivided interest in said 25 $\frac{1}{4}$  acres of land, the whole of which is valued at about \$150, and the two horses aforesaid, and possibly some other trinkets of property which do not amount in value to over \$100 to \$150." After expressing the reluctance she had in pursuing this course against her father, follows the very remarkable prayer to the said bill. Although this injunction was granted on the 4th day of November, 1901, the request contained in the prayer that the injunction should be served on the morning of the day of sale was followed to the letter, and served at the time indicated. On the same day the defendant gave notice, in writing, of a motion to dissolve the injunction on the 21st of November. The defendant filed his answer, in which he denies all the material allegations of the bill, setting up his claim to the title of the property advertised to be sold, and prays the dissolution of the injunction, and that he be reinstated in his rights, and that his property which was sacrificed by the sale made by plaintiff on the 16th of November, under his own eyes, be restored to him, or that he be redressed in a legal manner for the conversion thereof; and filed affidavits in support of his answer; and to which answer there does not appear to have been a replication. The cause came on to be heard on the 27th of November, when the following decretal order was entered: "This cause came on this day to be heard upon the motion of the defendant to dissolve the injunction heretofore awarded herein in vacation, upon the answer and affidavits filed therewith in support thereof to the bill of the plaintiff, and affidavits filed therewith in support thereof; also which bill was filed at November rules, 1901, and which motion to dissolve the said injunction the plaintiff resisted, and was argued by counsel; and upon consideration of said motion the court is of opinion that the same should be, and is hereby, overruled, and this cause is ordered to be matured at rules." From which order the defendant appealed, and says: "It was error for the court to have awarded the said injunction, for the allegations of plaintiff's bill are not subjects of equity interference," and "that the court erred in refusing to dissolve the said injunction, because (a) the bill was not sufficient in law; (b) after the extravagant allegations of said bill were wholly denied, in unambiguous terms, with no proof to sustain such allegations, it was the duty of the circuit court to have dissolved the said injunction," and also that the proceedings were in many other respects uncertain, informal, illegal, and erroneous.

It clearly appears, as well from the bill as from the answer, that the title to much of the property advertised to be sold was in question, and it also appears from the prayer

of the bill that the purpose was to use the process of the court to enable the administrator to make sale of the property without first settling the title thereto. "Where the object of the suit is a perpetual injunction, and there is a controversy as to the legal rights of the parties, the relief will be denied until the right is established by law." 10 A. & E. L. 799 (1st Ed.), and cases there cited. In 1 Spelling on Injunctions and other Extraordinary Remedies (section 180) it is said: "Although many cases appear to have deviated from the principle, yet it is the well-established policy and rule of courts of equity to refrain from interfering in controverted questions involving titles which may be settled in a legal forum. The inadequacy of legal remedies to afford protection is the principal ground of jurisdiction in all questions pertaining to real estate and in matters involving the title." And section 181: "A court of law is the proper tribunal to investigate the legal title, and a court of equity will only interfere to protect an equitable against a strictly legal title, or compel a discovery to protect a legal title. \* \* \* But, ordinarily, the injunction will be refused against a defendant in possession claiming title until the title is established by law." And cases there cited. And in section 333, under heading, "Title in Dispute": "In these, as in other, cases courts of equity will refuse to assume jurisdiction to try and determine legal questions which are controverted." Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Prentiss v. Larnard, 11 Vt. 135.

The bill is somewhat inconsistent with itself. One allegation is that, if the estate is not permitted to be administered upon, the defendant would take possession of it, and in a short time would dissipate, destroy, and otherwise misappropriate the same; clearly inferring that defendant was not then in possession. Another allegation is that the defendant, if permitted to remain in possession and control of said personal property, would dispose of it, dissipate and destroy and otherwise misappropriate the whole of the personal estate. We would infer from this allegation that he was already in possession of it, and that is the true state of the case. The defendant was in possession of the whole of it, but claiming title to only a part. He conceded the title to the administrator to a part of it, and asked her to take possession of it, as she admits in her bill. In Spelling on Injunctions (section 24): "Equity has no jurisdiction to interpose for the prevention of crime or to enforce moral obligations, nor will it interfere for the prevention of illegal acts merely because they are illegal. \* \* \* One reason for noninterference is a fundamental want of jurisdiction; another is the existence of an adequate remedy at law. In other words, the subject-matter of equity jurisdiction is the protection of civil rights and private property, and not the punishment or prevention of crime or immoral acts, when not

in connection with violation of private right." In Schoonover v. Bright, 24 W. Va. 698, it is held: "An injunction will be dissolved on the hearing if the answer fully, plainly, and positively denies all of the material allegations of the bill upon which the injunction was founded and there is no proof to establish said allegations." And in Kester v. Alexander, 47 W. Va. 329, 34 S. E. 819 (Syl., point 1): "When a case is heard legally on a bill and answer (the answer denying the material allegations of the bill), and general replication exhibits, and upon a motion to dissolve an injunction, in the absence of evidence tending to prove the material allegations of the bill it is error in the court to refuse to dissolve the injunction." From the allegations and prayer of the bill it clearly appears that the object and purpose of the suit and proceeding was to wrest the possession of the property from the defendant, and to hold him in arrest, if need be, until the property could be sold; without giving the defendant an opportunity to assert his rights to the title and possession of the property in a proper proceeding and under the process of the court. The property was taken from his possession and sold immediately without the rights of the parties being settled. Defendant certainly had his right to a day in court before thus being deprived of property of which he was possessed, and to which he claimed title. Section 10, art. 3, of our Constitution, provides, "No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers." In this case this vital and salutary provision of our fundamental law was clearly violated. The allegations of the bill admit that defendant claimed title to the property, while the prayer was that defendant should be restrained from interfering with the sale of the same, and that he have no notice thereof until the morning of the sale, and that the sheriff be directed in said injunction to prevent by restraint and arrest the said defendant from violating such inhibition, and injunction, and the injunction was granted "as prayed for in the bill," and literally carried out. The sheriff, figuratively speaking, held the defendant while the administrator sold the property. In Schoonover v. Bright, supra (Syl., point 2), it is held: "To warrant the interference of a court of equity to restrain a trespass, two conditions must coexist: First, the plaintiff's title must be undisputed, or established by legal adjudication; and, second, the injury complained of must be irreparable in its nature." Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. 171. It is not claimed under the bill that the first condition exists, for the claim of the plaintiff to the property, as shown by the allegations of the bill, was neither undisputed nor established by legal adjudication. Nor does it appear from the allegations of the bill that the second condition is met; on the contrary, the bill files as an exhibit a

notice to the administrator in writing, by the defendant, served upon her, "to come and take into your possession all of the personal property of the said Provy J. Crossland, deceased," and was notified in the same paper that the major part of the property, as advertised for sale by the plaintiff, was claimed to be the defendant's individual property. Defendant admitted in this notice that a part of the property belonged to the estate to be administered, and expressed a willingness to give it up, and at the same time notified plaintiff of his (defendant's) rights; and to get possession of the property of the estate illegally held by defendant, if any, the plaintiff had an adequate remedy at law, and the defendant was entitled to make his defense at law, and establish his title, if any he had.

It is insisted by appellee that the decree in this case is not appealable, and she bases her contention on *Robrecht v. Robrecht*, 46 W. Va. 739, 34 S. E. 801. The case cited cannot help the plaintiff in this cause. That was an injunction merely ancillary to the relief sought; its object being to preserve the status of the property until the final disposition of the case. In this case the bill was purely a bill of injunction, and was so prepared that it served its whole purpose in the mere execution of the order of injunction. In all my experience and observation I must say it is the most complete, self-executing, legal proceeding I have ever seen. The order here appealed from comes clearly within the purview of clause 7, § 1, c. 135, Code 1899. The bill has no equity, and is wholly insufficient upon which to grant an injunction. The bill had no other object than to assist the administrator in making sale of the property without first settling the title to the property proposed to be sold in the manner provided by law. The bill had accomplished its purpose, and there could be no reason for directing the same to be matured at rules. The injunction was improperly awarded, and should have been dissolved on motion on the bill and answer.

The order of the court refusing to dissolve the injunction is reversed, and this court, proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the injunction granted in this cause be, and the same is hereby, dissolved, and the bill dismissed, and that the appellant recover against the appellee the costs of his appeal, as well as the costs of his defense in the circuit court.

(52 W. Va. 420)

#### STATE v. TUCKER.

(Supreme Court of Appeals of West Virginia.  
March 14, 1903.)

CRIMINAL LAW—CORRECTION OF RECORD—  
BILL OF EXCEPTIONS—GRAND JURY—  
SUMMONING—HOMICIDE—EVIDENCE.

1. Where the record shows that "T., who stands indicted for felony, was this day set to

the bar in custody of the jailer of W. county; thereupon the said prisoner for plea says he is not guilty as in the indictment against him is alleged, and of this he puts himself upon the country, and the prosecuting attorney doth the like, and issue is thereon joined," and on the 14th day of February the jury rendered a verdict of guilty on said plea, and, on the 14th day of March following, defendant moved the court to correct the record of the plea of not guilty entered January 30th, and tendered affidavits of defendant, of defendant's counsel, and others in support of the motion to show that the plea of not guilty was entered by defendant's attorney and not by him in person, *held*, not error to refuse the filing of such affidavits.

2. The office of a bill of exceptions is to call the attention of the court to some specific matter as to which error is claimed; and when the exceptant relies upon the bill of exceptions he must show by means of it the error complained of clearly and affirmatively; and in order to have relief he must further show that such error was to his prejudice.

3. Where the record shows that on a certain day "V., gentleman, foreman, this day appointed by the court as such" (and 15 others, naming them) "were impaneled and sworn a grand jury of inquest, in and for the body of the county of W., and, having been charged, were sent to their room to consider of the business before them," and no irregularity in summoning or convening the grand jury is pointed out in a bill of exceptions, it will be presumed that no such irregularity existed.

4. It is not error to exhibit to the jury on the trial of a homicide the deadly weapon or instrument with which the act was committed, the same being identified as the one so used.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Thomas Tucker was convicted of murder, and brings error. Affirmed.

J. F. Laird, for plaintiff in error. H. H. Moss, Jr., Atty. Gen., for the State.

McWHORTER, J. Thomas Tucker was convicted, in the criminal court of Wood county, upon indictment for the murder of Mary Beall, alias Mary Bell, alias Mary Helmick, on the — day of January, 1902. Defendant applied to the circuit court of Wood county for a writ of error, which was refused on the 16th day of May, 1902. He then applied to and obtained from one of the judges of this court a writ of error and supersedeas to the execution of the judgment rendered by the said criminal court. In the course of the trial the defendant, by counsel, took seven separate bills of exceptions to the rulings of the court. The first bill of exceptions sets out that after the jury had returned their verdict in the case the prisoner moved to set aside the verdict and grant him a new trial on the ground that the verdict was contrary to the law and the evidence, and on the further ground of after-discovered evidence, and filed in support of his motion the affidavits of J. L. Frankling, John Carter, and W. A. Smith. The court overruled the motion, to which ruling the defendant excepted. J. L. Frankling, the first witness sworn in the case, says that when Tucker came home that evening the white woman, Mary Bell, was there waiting for the defendant,



"She" came at half past seven, and waited there until a quarter after eight, waiting for him to come home; and no sooner than he had been in he threw off his hat and pulled off one shoe to go to bed, and called to his ma to give him some tobacco; and this woman said, 'Come on, and go with me up street,' and he didn't answer, and he started to make a cigarette, and he raised up and spoke to her, and she never answered him; and she said, 'Come on, and go with me to the corner anyhow'; and he said, 'All right,' and went to the porch; and he said, 'It is raining too hard out there'; and she says, 'Come on,' and he went back, and they pitched into quarrelling, and I could not understand what was said; and she says, 'Come on,' and he says, 'I will go with you to the corner if it will do you any good,' and she started off, and says, 'Come on, and go up to the corner; I will make it all right; I will fix you.' Q. When did you first see him again? A. Well, in about twenty minutes after that he came back hollering, and he said, 'Ma, I am ready to die now; I have killed Mary Bell'; and she said, 'No, you haven't.' I got up then, and started after an officer to manage him. I goes up street— Well, I started after an officer, and in going up it was very dark and raining, and I fell over this body, which I supposed was a body until I struck a match; so I undertook to light a match and see what it was, and I saw that there was something lying there, but I could not tell what it was; my match went out. Q. When you first struck the match what did you see? A. I thought it was a person. I goes to headquarters, and an officer came down with me. He threw his light on the body." He and the officer then went to the house, and in answer to the question, "What occurred when you got to the house?" he testified: "Well, I do not know what occurred; why, we just found Tom hollering as usual. The officer got in ahead of me, and when I got in I saw he was full of blood. I did not know where it came from. Q. When Tom first came home did you notice any blood on him? A. He had a little blood on his hand and on his cuff. Q. Did you notice anything in his hand? A. He had a razor." The razor was shown the witness, and identified as being the same that the prisoner had. John Carter said he was attending church that night, and was sent for and went upstairs where Tom Tucker was; that he was going through the room, and Tom's stepfather had Tom by the arm. "He says, 'Uncle Jack, I done it; I killed the woman, and want to die.' I says, 'No, you will not kill yourself.' Mr. Tucker took hold of his arm. Then he repeated to me, 'Give me my revolver; I want to kill myself'; and I says, 'No, Tom, as you did not do yourself up while you was at it, you can't do it now.' And then they went for the doctor. He says, 'Did you ever love a woman?' and I says, 'No, never enough to kill her and kill myself.'"

And then he says, 'Well, I killed her for love, and want to kill myself.' And it was all I could do to hold him. I stayed there until the policemen came." W. A. Smith testified as follows: "Well, on the night of the murder I was at the depot, B. & O. depot, at the 10:30 train. Q. What position do you occupy, if any? A. Lieutenant of police. I went ahead, and met Mr. Frankling on the corner. I went ahead down to the corner of Sixth and Ann streets; just a few steps below, the woman was lying there. I had a flash light in my pocket, and I flashed it on her. Her throat was cut. I went ahead after Tom Tucker down to his father's house, and he was there walking the floor, and I went in, and he was talking something about writing a letter to his brother. I says, 'What is the trouble here, Tom?' He says, 'I killed her because I loved her.' Mr. Carter was in there. I told him to take hold of him and make him sit down. He sat there a few minutes and wanted to see his mother. She said she didn't want to see him, the condition he was in. He wanted to send and get some beer. He wanted to send for some of his friends, the boys he had been running with. Some officers came round. I had them go and telephone for an undertaker, and for a cab to take him away in. He did not look able to walk. I also had them telephone for Dr. Keever, and Dr. Keever came in, and he said to take him to the county jail. Q. What was the matter with him? A. He had cut a gash in his throat. Q. Well, now, you say when you would not let him send for the beer it angered him? A. Yes, sir; anything that we crossed him in he seemed to get angry, and tried to tear loose from us." He further stated that: "After we had started to jail with him—we got around the corner about 30 steps I presume—he says, 'I killed her, and I ought to go to hell for it.'" J. E. O'Neal, a city policeman, says: "I got orders from the night clerk to go down on Sixth street; that there was a woman killed. I got down, and run right on the woman, and seen her laying there on her back, with her eyes open and her throat cut. I went down to Tucker's home, and went in. As I went in, Tom says, 'Hello, Jim!' and shook hands with me. Q. Who did? A. Tom Tucker. Lieutenant told me to go and telephone for an undertaker and the coroner, and told me to take charge of the body. I went back down and took hold of Tom, and got his coat on, and took him to jail. Q. State whether or not the defendant exhibited any temper there that night. A. No; I do not know. Q. What was he doing? A. He said he wanted to see his mother, and wanted to write a letter to his brother. I believe he did write some words to his brother. Every little bit he would say, 'I want to see my mother. I want to see my mother.' We took him out, and when we got up street he pulled his coat up this way (indicating). When we got around by Camp's house he says, 'I will go to hell for this.' I says,



'How is that?' He says, 'I will go to hell for this. I ought to go for this.' I told him to walk faster. He says, 'I can run if you want me to.' Q. Was he talking sensible? A. Oh, yes, he acted sensible. He acted like he was drunk. I could smell the whisky on his breath. He was not boisterous or any-ways dangerous or anything." Dr. W. S. Keever, coroner, states that he found the body of the woman on the pavement on Sixth street, and Mr. O'Neal guarding the body; that he had information that the man who killed her was in the last house on Sixth street; that he went to the house, there was some gentleman there with a lantern who went to show him the house; when he went in there were three men holding Tucker; that he asked Tucker why he killed this woman. "He turned round and began to curse me. He did not make any reply about that. Landstittle was sitting on one side of him, and Ford had him by the collar. He was sitting in a chair. He climbed up into the bed, and then they took him back and set him down in the chair again, and he wanted me to get out of there. Then I asked him what this woman's name was, and he said, 'Mary Beal,' and I said, 'Mary Beal who?' and he said that was all the name she had; and I asked him how to spell it, and he said 'Mary B-e-a-l. or double l.' The chief of police asked me where to take him, and I said over to the county jail. I sent the police to get the knife that he cut her with. His father got the cover and gave it to me. I looked around on the floor, and found the razor on the floor in Tucker's house. And after that the same night we had the inquest. Q. Over the murdered woman, did you? A. Yes, sir. Q. Please state if she was dead when you saw her. A. Yes, sir; she was dead. Q. State what wounds were on her. A. The razor entered her throat on the left side of her body. The man that used the razor had it in his right hand. I would say that the cut started from behind the left ear, extending clear around under the throat up, and to even with the right ear. Q. How deep was it? A. It cut her head nearly off to the back of the spine. The cut was as deep as from one ear to the other, right straight through. It cut both the carotid arteries, both jugular veins, cut the windpipe in two, cut the esophagus in two. Q. Let me ask you what you did with the razor and cover. A. I filed it in the circuit clerk's office of Wood county. Q. Look at this razor, and state if that is the razor. A. Yes, sir; that is the razor. We found, also, a letter upon the table. Q. You say they held an inquest? A. Yes, sir. Q. Look at the envelope now shown you, and state what that is. A. That is the testimony and coroner's verdict of the inquest held over the body of Mary Beal." John Tucker, the father (or stepfather) of the defendant, testified that Mary Bell came to his house the night of the killing, as she frequently came there of evenings; that she

was very angry; that she was about half drunk, and she was always drunk when he saw her; that she was there when Tom came home. "He was in a pretty bad condition, more than I ever seen him when he ever came home." "He looked like he was kind of drunk, crazy or something. He acted kind of funny." "The first time I ever saw him in that condition in my life." "His habits, so long as I have known him, and I have known him ever since he was a kid, he always had good habits, and always worked for good people." Fanny Tucker, the mother of the prisoner, stated that Tom was 18 years old the previous August; that Mary Bell looked to be about 35 years old, maybe older; that she "was a kind of a bad woman, she drank a great deal, and come to the house drunk, and I got her away from the house as easy as possible." "She was coming after that boy. I told her that I had no boy for her." That "she came about every other night; she would come around and ask for the boy." The testimony of J. W. Mather, who was in the jewelry business, was that he had Tom in his employ as porter for over three years; that he had been "a good boy, an exceptionally good boy"; and stated: "He has had every opportunity to be otherwise in my place, but I found him trustworthy, honest, and industrious, and everything else that would go to make a good boy for that position." Others testified to his general good character and habits.

It is insisted by counsel for plaintiff in error that, because it does not appear what occurred between the deceased and the defendant from the time they left the house to go up the street until his return, he is entitled to the presumption that the murder was of the second degree. The jury had before it his acts and declarations immediately after the commission of the crime, and there is no intimation from him in any way of any provocation to induce the act. He says, "I killed her because I loved her." He certainly had a very emphatic way of expressing his love. He returned to the house with the razor in his hand—evidently the weapon with which he committed the deed—and had made one cut therewith at his own throat, but it seems that his courage failed him, and he did not complete the work upon himself. As to whether the evidence and circumstances are sufficient to overcome the presumption that it was murder in the second degree, that is purely a question for the jury, and they are the judges of the weight of the evidence. The affidavits mentioned in the bill of exceptions No. 1, in regard to after-discovered testimony, refer to the fact that while Tucker was in the house soon after the commission of the crime, and in custody, he asked for a pen or pencil, stating that he wanted to write a letter to his brother. Carter says he handed him a pencil; then Tucker said he did not want a pencil, but he wanted a pen; that Carter then got him a pen, and

with the pen and ink which was on the table Tucker wrote on the back of a book which was lying on the table, covered with a piece of wrapping paper, a letter to his brother, which Carter recollected as reading, about as follows: "Dear Brother: I have killed myself; come at once. I am in a serious condition." or words to that effect. W. A. Smith, in his affidavit, says Tucker said: "Give me a pencil, or pen and ink; I want to write to my brother;" that Frankling got Tucker a pencil, and Tucker picked up a story book lying on the table, which had been covered with yellow wrapping paper, and on said cover started to write a letter to his brother. After he had written some of it he started up and began "holloaing," and, among other things, said, "I want to see my mother; where is she?" and his actions were so very violent that Roy Ford and Jack Carter had to hold him, and after a short time Tucker quieted down and finished writing the so-called letter to his brother; that as far as affiant could recollect the letter read: "Dear Brother: I have killed myself. Come at once. I am in a serious condition;" that he was a witness on the trial of Tucker on behalf of the state, and was not asked by the prosecuting attorney nor by the attorney for the prisoner anything about the letter; that if he had been asked in regard to the same he would have stated all about it. Mr. Frankling's affidavit was about to the same effect. He stated that he was a witness on the trial, but was not asked in regard to the letter; that during the trial affiant saw a big role of papers in front of the prosecuting attorney, but did not discover or see the letter written on the said piece of yellow paper; that affiant could not read or write, but recognized the letter from the color of the paper, and for the reason that it was torn from the book cover, as before stated. The writing of this letter to his brother by Tucker was mentioned by the witness J. E. O'Neal on the trial, who said that Tucker "wanted to write a letter to his brother. I believe he did write some words to his brother." There is nothing in the record to show that defendant did not know of this letter at the time of the trial, or that he could have known, and there is nothing to show why the facts stated in the affidavits were not brought out on the trial; besides, they are only cumulative, I take it; an effort to show the mental condition of the defendant at the time, and were not such facts, if proved, as could have affected or changed the verdict. In *State v. Betsall*, 11 W. Va. 703 (Syl., point 5), it is held: "To authorize the granting of a new trial on the ground of after-discovered evidence, four things are necessary: (1) The evidence must have been discovered since the former trial. (2) It must be such as reasonable diligence on the part of the party asking it could not have secured at the former trial. (3) It must be material in its object, and not merely cumulative, corroborative,

or collateral. (4) It must be such as ought to produce on another trial an opposite result on the merits." *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020 (Syl., point 3): "Newly discovered evidence, apparently insufficient to change the result, will not justify a new trial."

The second assignment of error, as set out in bill of exceptions No. 2, is that, after the verdict of the jury had been rendered, the defendant in error moved the court to correct its record of January 30th according to the facts; that the prisoner pleaded to said indictment by counsel, and not in person, and offered in support of his motion the affidavits of the defendant, his attorney, W. F. Smith, John F. Laird, and W. E. McDougle; which affidavits being objected to, the court refused to permit them to be filed, and refused to make a change in the record, which shows that the defendant, "Thomas Tucker, who stands indicted for felony, was this day set to the bar in custody of the jailer of Wood county; thereupon said prisoner for plea says he is not guilty, as in the indictment against him alleged, and of this he puts himself upon the country, and the prosecuting attorney doth the like, and issue thereon is joined." There is no dispute about the fact the defendant was present in person in court when the plea of not guilty was entered. The plea was entered in open court in the presence of the court, and the order entered up showing the entry of the plea and the presence of the defendant, and it was the duty of the court to see that its orders were properly entered, and it is very improbable that he would accept a plea of not guilty from the attorney. When the indictment is read to the prisoner the question is put to him personally, "What say you, guilty or not guilty?" There is no mention in the order of any motion to quash the indictment in connection with the entry of the plea which defendant's counsel insists that he made. The plea was entered on the 30th of January, and no motion was made to correct the record or to call in question its correctness until the 14th day of March after the rendering of the verdict on the 14th day of February, 1902. To permit attorneys to come in, weeks after the record has been entered up and after verdict has been rendered, and change the record on affidavits based on recollection of what occurred in open court, would establish a very pernicious practice. Under the rulings in the case of *State v. Allen*, 45 W. Va. 65, 30 S. E. 209 (Syl., point 4), the record sufficiently shows that the defendant pleaded in person.

The third assignment of error, as set out in bill of exceptions No. 3, is that, after the court had overruled the motion to grant a new trial on the ground that the verdict was contrary to the law and the evidence, and had refused to correct the record, the defendant moved the court in arrest of judgment on the ground that the grand jury which found

the indictment was not legally and properly impaneled and sworn, and for other errors apparent on the record, which motion was also overruled and excepted to. The office of a bill of exceptions is to call the attention of the court to some specific matter as to which error is claimed. 11 Cyc. 714; and in 3 Enc. Pl. & Pr. 409. "The duty rests upon the appellant or party claiming to have been prejudiced to prove the alleged error. He must, when he relies upon the bill of exceptions, show by means of it the error complained of, clearly and affirmatively; and he must further show, in order to have relief, that such error was prejudicial." The bill of exceptions relied upon moved the court in arrest of judgment on the ground that the grand jury which found the indictment in this case was not legally and properly impaneled and sworn. It fails to point out in what respect the impaneling of the grand jury was illegal or irregular. The record shows: "On January 27, 1902, W. Vrooman, gentleman, foreman, this day appointed as such by the court, and J. R. Reynolds [and fourteen others, naming them], were impaneled and sworn a grand jury of inquest in and for the body of the county of Wood, and having been charged were sent to their room to consider of the business before them." The impaneling of the grand jury seems to have been regular, and the bill of exceptions fails to point out any particular irregularity therein. In the absence of anything showing to the contrary, the presumption is that the proceedings in summoning the grand jury were regular. It is insisted by defendant that, under his motion in arrest of judgment, a general instruction given by the court on its own motion, after having given the instructions asked by the state and by the defendant, can be brought in review, although the said instruction is mentioned in no bill of exceptions, yet it is copied in the record as having been given. The instruction is in the words following: "Upon the indictment you may find the defendant guilty of murder in the first degree, and, if so, you may say so in so many words; or you may add to that verdict a recommendation that he be confined in the penitentiary for life. You may also find a verdict of murder in the second degree; also a verdict of manslaughter and involuntary manslaughter. You may find any one of these verdicts." It is insisted in defendant's brief that this instruction plainly implied the guilt of the prisoner, entirely disregarding the presumption of innocence until he was proven guilty by competent evidence and beyond all reasonable doubt. But bill of exceptions No. 4, which gives the instructions asked by the state and by the defendant, and also includes two instructions given by the court in addition to those asked, omits the instruction in question. Under the rulings of this court, as held in *Park v. Petroleum Co.*, 25 W. Va. 108, and in other cases since, the said instruction

cannot be considered by this court as having been made a part of the record. The instruction complained of, even if given and made a part of the record, could not mislead the jury, as they had just been instructed, on motion of the defendant, that "it is the duty of the state to establish the charges contained in the indictment, and each and every material allegation thereof, by competent evidence beyond all reasonable doubt"; and they had also been instructed, on motion of the defendant, "that where a homicide is proven the presumption is that it is murder in the second degree. If the jury believe from the evidence that the accused was so intoxicated as to render him incapable of forming a deliberate and premeditated design to take human life, or was so drunk as to render him incapable of doing a willful, deliberate, and premeditated act, then the jury cannot find the accused guilty of murder as alleged in the indictment." So that the instruction complained of, if given, was simply to indicate to the jury the various degrees of crime of which he might be found guilty in case the evidence should warrant it, and under the evidence and circumstances of this case the instruction was favorable to the defendant, rather than prejudicial.

The fourth assignment of error is set out in bill of exceptions No. 4, overruling defendant's objections to the nine instructions given for the state. The first instruction given for the state is taken from Mayo's Guide, 347, 348, defining murder, and what it takes to constitute it, and correctly propounds the law. The second instruction given for the state set out in this bill of exceptions is as follows: "The court instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased. If the jury believe from the evidence that the prisoner was guilty of cutting, with a deadly weapon, the deceased, and of killing her, the intent, the malice, and the willfulness, deliberation, and premeditation may be inferred from the act, and such malice may not be directed against any particular person, but such as shows a heart regardless of social duty and fatally bent on mischief." This instruction seems to have been prepared from the first instruction given in case of *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. It is there said by Judge Brannon, in delivering the opinion of the court: "The first sentence of this instruction propounds the law correctly; the latter part of it, after the word 'act,' also lays down the law; but that portion which says, 'If the accused was guilty of striking with a deadly weapon another, and of killing him, the intent, the malice, and willfulness, deliberation, and premeditation may be inferred from the act,' is not the law. This instruction was taken from the first syllabus of the *Douglass Case*, 28 W. Va. 297, but inserts the words, 'willfulness, deliberation, and premeditation.' In the *Douglass Case*

there was a verdict of murder in the second degree, and the syllabus referred to makes out a case of murder in that degree." The instruction in the Welch Case is discussed at length, and, after giving the circumstances of the case, the court concludes that there was no error in giving the instruction. It is further said in that opinion: "These being the circumstances, was it error in law to tell the jury they might find the presence of willfulness, deliberation, and premeditation from the use of a deadly weapon? If there be a homicide, and it be with a deadly weapon, and the jury should find it to be murder in the first degree, could a court set aside the verdict as without sufficient evidence? I think not. Then an instruction that they may infer willfulness, deliberation, and premeditation from the use of such a weapon cannot be erroneous. If a man shoot another with a gun, what does he mean? We may say he intends to kill. Using a deadly weapon, he is taken to intend the reasonable, natural consequences of his act. Cain's Case, 20 W. Va. 681; Hill's Case, 2 Grat. 594; Murphy's Case, 23 Grat. 960. The use of a deadly weapon has always been treated by courts as a material circumstance or factor in passing on the degree. Cain's Case, supra; Hill's Case, supra; Mitchell's Case, 33 Grat. 878; Wright's Case, Id. 895; Wright's Case, 75 Va. 920; Jones's Case, 1 Leigh, 598. And in Honesty's Case, 81 Va. 295, Judge Richardson says: 'It is clear that a jury may presume premeditation from the giving of a mortal blow with a deadly weapon in the previous possession of the slayer, leaving him, as this instruction leaves him, to repel the presumption by proof of extenuating circumstances.'"

It cannot be said from the evidence in this case that the verdict of the jury was not sustained. We have the repeated voluntary confession or statements of the defendant, who returned to the house with the bloody razor in his hand within 20 minutes after he and the deceased had left together, and with blood upon his clothes, that he had killed Mary Bell; that he killed her because he loved her; that he had killed her, and ought to go to hell, and wanted to kill himself, but at no time intimated that she had given him even slight provocation for the act.

The third instruction mentioned in the bill of exceptions is to the effect that if the jury believes from the evidence that the defendant, with a deadly weapon in his possession, without any or upon slight provocation, gave the deceased a mortal wound from which she died, the defendant was prima facie guilty of willful, deliberate, and premeditated killing, and the necessity of showing extenuating circumstances rested upon the defendant, or they must appear from the case made by the state, otherwise he was guilty of murder in the first degree, although no motive for the crime was disclosed or any ill feel-

ing shown to have existed between the parties. This is substantially the instruction given in the Welch Case before cited, and there held to be good; citing Cain's Case, 20 W. Va. 681, Hill's Case, 2 Grat. 594, and Honesty's Case, 81 Va. 292, 295.

The fourth instruction is to the effect that no particular period is necessary that malice should have existed, or that a person should have contemplated homicide in order to constitute murder, and, if the intent to kill is executed, the instant that it springs into mind the offense is as truly murder as if it had dwelt there for a longer period; and the sixth instruction is to the same effect, and held to be good law in the Welch Case. The fifth instruction is to the same effect as the third.

The seventh instruction is "that the question of whether or not a particular weapon or instrument is deadly is one of law for the court, and, further, that a razor, such as shown in the evidence given to the jury, is a deadly weapon." The first part of this instruction I regard too broad as a general proposition of law; yet the authorities differ on this. See section 320, Bishop on Statutory Crimes (3d Ed.), which rather supports the instruction, but the cases there cited are not all in accord with it. But in any event it is rendered utterly harmless to prejudice the defendant, by the last part of the instruction, which applies it to the weapon shown in the evidence to have been that with which the crime was committed.

Instruction No. 8 is based upon substantially the same as point 3 in syllabus in Robinson's Case, 20 W. Va. 713, 43 Am. Rep. 799.

Instruction No. 9 is substantially to the same effect as No. 8.

Instruction No. 10 relates to what constitutes under the law a reasonable doubt, and is sufficient; and, after giving the instructions asked by state and the defendant, the court instructed the jury that, if they "believed from the evidence that the accused was intoxicated at the time of the killing, such evidence is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation."

The fifth assignment of error, as set out in bill of exceptions No. 5, is to the ruling of the court on permitting the witness for the state, W. A. Smith, on being recalled, to be asked the question by the state: "I want to ask you, after you left the house, whether you heard any remarks of the defendant here on your way to jail;" and was answered, "Yes, sir; I forgot that when I was on before. After we had started to jail with him—we got around the corner about 30 steps I presume—he says, 'I killed her, and I ought to go to hell for it.'"

It is claimed by defendant's counsel in his brief that Smith had been examined in chief, and was re-

called without the permission of the court; that the question was improper and leading. There is nothing in the record to show that the court's permission was not had to recall the witness, and the fact that the court overruled the objection to the question shows that the court permitted it. This witness was recalled, before the state had closed its evidence in chief, to supply an omission, which was not improper. It was a matter for the exercise of a sound discretion of the court. *Howel's Case*, 5 Grat. 664.

The sixth assignment of error, as set out in bill of exceptions No. 6, is an objection to the evidence of witness for the state E. L. Landsittle being asked whether he knew Thomas Tucker, defendant, how long he had known him, and whether he was acquainted with his habits and disposition, and what he had noticed about him. He answered that he had known him about five years, and was asked: "What was his character as you observed it in regard to being quarrelsome or peaceable? A. Well, I have noticed when he was drinking a little he was naturally quarrelsome." This testimony was given in rebuttal, the defendant having offered proof in relation to his character and disposition, and was not improper.

As to the seventh assignment of error, as set forth in the seventh bill of exceptions, exceptions were taken in the examination of witness J. L. Frankling, where he was asked: "Q. When Tom first came home did you notice any blood on him? A. He had a little blood on his hand and on his cuff. Q. Did you notice anything in his hand? A. He had a razor. Q. Look at the razor now showp you, and see if that is the same razor. A. I think that is the same razor. Q. Just show it to the jury." And the razor was shown to the jury and inspected by them. The defendant objected and excepted there to. The razor was identified by the witness as the same brought home by the defendant in a few minutes after the killing. It was also identified by witness Dr. W. S. Keever. The razor was properly shown to the jury. The weapon or instrument by the use of which a homicide or other felony is committed, when the same can be identified, is invariably exhibited to the jury. The only question which can be raised is as to its identity. And the evidence of the blood on defendant's hand and cuff as stated by witness Frankling was proper to go to the jury. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639. In *State v. Welch*, 36 W. Va. 690, 15 S. E. 419 (Syl., point 7), it is held: "The question whether a particular homicide is murder in the first or second degree is one of fact for the jury. Where a jury has found the case to be one of murder in the first degree, as in other cases, the court should not disturb the verdict, unless the finding of murder in the first degree be plainly and manifestly contrary to or without sufficient evidence."

I can understand why counsel for a de-

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fendant in case of murder or other felony should seek to have the court instruct the jury on all conceivable points, in the hope, perhaps, of having the court in the hurry and possible confusion of business refuse a proper instruction, thereby laying a foundation for a new trial for his client; but why a prosecuting attorney should cumber the record with innumerable instructions to the jury, often endangering with doubtful instructions a case otherwise so plain that a jury could scarcely err, is to me an enigma. Under our system of constituting juries, the average jury should be presumed to have at least a reasonable degree of intelligence and fitness for the responsible duties imposed upon them by the law.

There is no reversible error shown in the record, and the judgment must be affirmed.

(53 W. Va. 501)

# LOWTHER OIL CO. v. MILLER-SIBLEY OIL CO.

## URPMAN v. LOWTHER OIL CO.

(Supreme Court of Appeals of West Virginia.  
May 2, 1903.)

OIL LEASE—TITLE OF LESSEE—CANCELLATION — ABANDONMENT — CONSTRUCTION — SPECIFIC PERFORMANCE — ESTOPPEL — RESCISSION OF CONTRACT—BONA FIDE PURCHASER—NOTICE.

1. Title under a lease only for production of oil and gas is inchoate and contingent, and for purposes of search only until oil or gas is found. If not found, no estate vests in the lessee, and his right, whatever it is, ends when the unsuccessful search is abandoned. If found, then the right to produce becomes a vested right upon the terms of the lease. Point 2 of syllabus in *Oil Co. v. Gas Co.*, 42 S. E. 655, 51 W. Va. 583, explained.

2. Power of chancery to cancel oil leases for delay of development.

3. To constitute abandonment by the lessee of a lease for oil there must be both an intention to abandon and actual relinquishment of the leased premises.

4. Where an oil and gas lease is for a given term, "and as much longer as oil and gas can be produced in paying quantities" to the lessee, if a well pays a profit—even a small one—over operating expenses, it produces "in paying quantity," though it may never repay its cost, and the operation as a whole may result in loss. The phrase "paying quantity" is to be construed with reference to the judgment of the operator, when exercised in good faith.

5. Equity will not grant specific performance of a contract to convey land when the vendee has unreasonably delayed in performing the contract and asking relief, and conditions have changed, and it would work hardship and loss to the vendor or other persons affected thereby.

6. When a vendee has not possession under an executory contract of sale of land, in order to have equity to grant specific performance, he is held to greater diligence in performing the contract and asking performance than is the case of a vendee in possession under the contract.

7. Estoppel from conduct discussed.

8. A written contract, sealed or unsealed, may be rescinded by word of mouth by common consent of its parties. If no possession has been taken under it, and the parties agree to rescind, and, in execution of the agreement to rescind, the vendee surrenders the writing to the vendor,

the rescission is complete, and the contract at an end.

9. An executory contract for the sale of land, made with intent on the part of both parties to defraud creditors, will not be specifically enforced in equity at the instance of the guilty vendee, or one to whom he has sold the land.

10. One who buys a mere equitable title to land is not a bona fide purchaser without notice, but takes only such title as his vendor has, and subject to all defenses good against him, though in fact such purchaser had no notice of them.

11. Actual possession is notice to purchasers of the rights of him in possession.

(Syllabus by the Court.)

Appeal from Circuit Court, Calhoun County; Warren Miller, Judge.

Actions by A. W. Urpman against the Lowther Oil Company, and by the Lowther Oil Company against the Miller-Sibley Oil Company. Actions were consolidated. From the decree, Urpman and the Miller-Sibley Oil Company appeal. Affirmed.

Reece Blizzard, Northcott & Perry, and Mr. O'Brien, for appellants. T. P. Jacobs and John M. Hamilton, for appellees.

BRANNON, J. Two chancery suits in the circuit court of Calhoun county were consolidated by order of the court (as I think they should not have been, as they involved distinct subjects), and were heard together, and a joint decree made in the two cases. One was a suit by the Lowther Oil Company against the Miller-Sibley Oil Company; the other, a suit by A. W. Urpman against the Lowther Oil Company. A joint appeal from that decree was taken by Urpman and the Miller-Sibley Oil Company.

#### The Miller-Sibley Case.

James Metz made a lease, May 24, 1897, to Miles, for oil and gas purposes, of a tract of 250 acres of land in Calhoun county. The lease was to continue three years from date, "and as much longer as oil and gas can be found in paying quantities." It contained no provision for rental or forfeiture. It provided for payment to Metz of a royalty of one-eighth of oil produced, and \$200 yearly for each gas well. It provided right to the lessee to remove machinery, and to "at any time surrender this lease and be relieved from all liability thereunder." Miles assigned the lease to the Miller-Sibley Oil Company, and it bored a well and found some oil, but by reason of tools becoming fastened in the well, or from an invasion of salt water, this well was abandoned, and another well was bored, and in it a small quantity of oil was found, its quantity being a matter of controversy, but, say, from 2½ to 5 barrels per day. This well was pumped for oil. Two tanks were partly filled—one of 250, the other 60, barrels. The quantity of oil does not appear. The first well was pumped some, and a little oil obtained from it. The second well was pumped several months. The operations

were suspended. The last pumping was in January, 1899, but a witness says that a little pumping was done in March, 1899. Some of the casing was pulled from the first well. Nearly all the casing was drawn from the second well and taken away. No tools were left. The rigs were left to decay. There were an engine and boiler left at the first well, but parts of the engine taken away, and then an order was given to Warden by the agent of the Miller-Sibley Company authorizing him "to remove the engine, boiler, and tanks, casing, tubing, sucker rods," etc. Warden at once moved the engine only. This order was dated December 11, 1900. The two rigs were left, and a boiler and some other articles used in the business. The company owned leases on other land in the vicinity, making up, in all, 800 or 1,000 acres. This tract is stated in the lease to be a part of a block of 800 acres of leased land owned by Miles. The company drilled two wells on these other lands in developing the territory. These wells were not far from the tract of 250 acres. One of the wells produced gas, not oil. No royalty was ever paid to Metz by the Miller-Sibley Company. On January 9, 1900, Metz executed to Lowther a lease of the same tract for oil and gas purposes, and Lowther assigned this second lease to the Lowther Oil Company, and in June, 1900, that company went upon the land and endeavored to utilize the first well which had been bored by the Miller-Sibley Company, but failed, and then went to the second well bored by that company, and cleaned and pumped it, but did not succeed in producing oil in paying quantity—only one barrel a day—and then bored it to greater depth and produced oil in paying quantity. Then the Lowther Oil Company brought a chancery suit in the circuit court of Calhoun county against the Miller-Sibley Oil Company to restrain the latter company from entering on the land or interfering with the possession of the Lowther Oil Company of said land, and to declare the first lease, that made by Metz to Miles, no longer in force, and to cancel it. The decree of the circuit court avoided and canceled the first lease, and the Miller-Sibley Company appealed.

The first question is whether there was any estate so vested in the Miller-Sibley Company when Metz made the second lease. The lease requires no rent, only a share of oil, and gives absolute right to the lessee to surrender it, and under *Eclipse Oil Co. v. South Penn*, 47 W. Va. 84, 34 S. E. 923, gives no present vested estate, and might be ended at any time by either party, and a second lease would end it. That is the character of this lease. But when once the lessee under even such a lease begins work, whilst he yet has no vested estate, still he has right to go on in search of oil, and the lessor cannot then at mere will destroy his right. An ordinary oil lease, making the lessee pay a consideration, binding him to some obligation, vests

¶ 9. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 537.

only an inchoate right—that is, right to explore for oil—but no actual other estate than right to develop; and, if he gets no oil, he still has no vested estate, but, if he does get oil, he has a vested estate. Such a lease calls for the right, not to oil in place, but to extract it. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Lowther Oil Co. v. Guffey*, 52 W. Va. —, 43 S. E. 101; *Bryan on Petro. & Gas*, 174, citing *Venture Oil Company v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Colgan v. Oil Co.*, 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695. Just so with the lessee under a lease without rental or obligation after he has begun or after he has obtained oil. When he has obtained oil, he has a vested interest according to the lease. In *Oil Co. v. Gas Co.*, 51 W. Va. 583, 42 S. E. 655, in point 2 of syllabus, is language that “mere discovery of oil by exploration under it vests no title to it in the lessee.” This language is inadvertent, and does not express the meaning intended, as on page 591, 51 W. Va., page 658, 42 S. E., it is stated that discovery of oil does vest title. As above stated when the Miller-Sibley Company discovered oil, an estate vested in it according to the lease, which it could lose only by terms of the lease or by abandonment.

It is said that the oil was not in paying quantity, and therefore no estate vested. Whether the oil is in paying quantity is left to the judgment of the lessee, and I do not see that, where oil is found, its quantity is material in deciding whether any estate vested under the lease. We must therefore see whether this estate has been lost. The lease contains no provision of express forfeiture. Under some circumstances of delay or fraudulent evasion of duty of development, equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even if there be no express clause of forfeiture. *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Bryan on Petro. & Gas*, § 182, citing *Western Pa. Co. v. George*, 161 Pa. 47, 28 Atl. 1004; *Elk Fork Oil Co. v. Jennings (C. C.)* 84 Fed. 839. But this doctrine cannot apply under the facts of this case. We must inquire whether there has been an abandonment, for an oil lease can be lost by abandonment. The loss of valuable property by mere abandonment is not easily shown or readily held by the courts. “To constitute abandonment in respect of property, there must be a concurrence of the intention to abandon, and an actual relinquishment of the property, so that it may be appropriated by the next comer.” “In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no abandonment without the intention to abandon.” 1 Cyc. 4, 5. It appears to me that abandonment may be more

readily found in case of oil leases than in most other cases. An oil lease is a venture, a right of exploration only, giving its owner no other rights, worthless if the search is not successful. In this instance the Miller-Sibley Company bored a well, pumped it several months, got but little oil, not filling the tanks, and abandoned that well. True, it is said that the tools getting fastened caused its abandonment; but it gave poor prospect. Then the company bored a second well, yielding from 2½ to 5 barrels a day, though pumped for months. The company moved its tools and appliances off the Metz farm to other undertakings several miles away. It left nothing at the well very valuable to use in further efforts. The rigs remained; but in that timber country it would not be profitable to transfer them. The casing was mostly pulled out. An engine and boiler were left for awhile, but the engine was partly dismantled, and later taken away. The agent gave an order to remove practically all left on the premises. He left the state. Wells bored on other tracts some distance away produced only gas. The search for oil in four wells in that section was unsuccessful. It was a new field—what oil men call, in homely but expressive language, “wildcat territory.” March 15, 1900, Lowther wrote Miller & Sibley saying that he held various oil leases in that section, and proposing to put them in with those of Miller & Sibley, and on March 19, 1900, the Miller-Sibley Oil Company, by its president, wrote in reply, acknowledging receipt by date of this particular letter, saying, “We have decided not to operate in W. Va. for the present, and consequently do not take advantage of your offer.” The Miller-Sibley Company quit work in January, 1899, practically in November, 1898, and the Lowther lease was January 9, 1900. There had been a cessation of work for a year. The lease went to record March 19, 1900. The Lowther Oil Company began work in June, 1900, more than 15 months after the Miller-Sibley Company ceased work. The oil in the tanks was not marketed, but wasted; the derrick and other parts of the rig went to decay. These circumstances, taken together, establish abandonment by the Miller-Sibley Company.

It is argued that there was no pipe line nearer than 10 miles to convey oil, and that the company made fruitless efforts to get the Eureka Pipe Line Company to extend a line to that section. This would put into the lease a condition for excuse not in it. The first lease gave Metz not a cent of return except a share of oil. His motive in making it was therefore only development. It is not reasonable, but unjust, that an oil company should thus bore two wells, discontinue work, remove implements, do nothing for a year, give plain sign of no intent to go on, and yet hold Metz's land tied up. How long would it remain bound

up so as to prevent him from contracting with others to develop? True, this may not alone show intent to abandon; but it tends to show that we ought not demand any more evidence than is manifest in the case to establish abandonment. If, as is claimed now for the purposes of this case, oil in paying quantity was found, where did the company get right to indefinitely suspend, and not pay Metz his share of oil? Not from the lease. His right was to have the wells worked or surrendered. Must we not conclude that the company regarded its search on this tract as vain, and gave it up? "Title under an oil lease is inchoate, and for purposes of exploration only until oil or gas is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." *Calhoun v. Neely*, 201 Pa. 97, 50 Atl. 967.

It is contended for the Lowther Company that oil was not produced in paying quantity, and that when it went upon the premises the three-years term of the first lease had expired. To this it is answered that the lease gave a term of three years, "and as much longer as oil and gas can be produced in paying quantities." What is meant by that provision? It means paying quantity to the lessee. "If the well pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation, as a whole, may result in a loss. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator and by his judgment, when exercised in good faith." *Young v. Oil Co.*, 194 Pa. 243, 45 Atl. 121; *Bryan, Petro. & Gas*, 109. The case further says that if oil or gas is not found, and the lessee is not willing to go on and incur further expense, the condition stipulated for the termination of the lease has come. So, if he finds oil, but it ceases to pay expense of production. The lessor cannot determine whether oil is in paying quantity; neither can a subsequent lessee. There is no strength in the argument that the lease ended alone from want of oil in paying quantity. Still, we may consider quantity in coming to a conclusion as to whether the lessee abandons.

It is suggested that the word "can," in this quantity phrase, is different from the word "is," commonly used. I do not see any appreciable force in the suggestion. Does it import a power in the lessee to leave the wells and premises indefinitely? I see no error in the decree so far as respects this case.

#### The Urpman Case.

James W. Metz, father of John W. Metz, made a written agreement, January 22, 1892, selling and binding himself to convey to John W. Metz a tract of 70 acres of land for \$800, of which the document says \$450 was

paid in mules, cows, and a wagon, and for the balance John W. Metz gave three notes, payable yearly thereafter, which agreement was recorded on its date. The tract is a part of the tract of 250 acres leased by James W. Metz to Miles, and then to Lowther, and operated by the Miller-Sibley Company and then by the Lowther Oil Company, as stated above in the Miller-Sibley case. By deed dated February 16, 1901, John W. Metz conveyed said 70 acres to A. W. Urpman. Urpman brought a chancery suit against the Lowther Oil Company, James W. Metz, and others to enforce specific performance against James W. Metz of said executory contract of sale made by James W. Metz to John W. Metz, by compelling James W. Metz to pass a legal title to the 70 acres to Urpman. James W. Metz having leased the tract of 250 acres to Lowther for oil, including said 70 acres, and Lowther having assigned the lease to the Lowther Oil Company, and the said company having gone upon the premises and bored and found oil a short time before the date of the conveyance of the 70 acres from John W. Metz to Urpman, Urpman's chancery suit also sought to enjoin the Lowther Oil Company from taking oil, and to annul the lease under which it was operating as a cloud on Urpman's title. The Lowther Oil Company answered Urpman's bill, relying upon the validity of the lease from James W. Metz under which it was operating, and in turn prayed that the agreement of sale between James W. and John W. Metz, and the deed from John W. Metz to Urpman, be canceled and annulled and declared void as to its rights. The decree did declare them void as to the Lowther Oil Company and James W. Metz, and Urpman appealed.

The contract between James W. Metz and John W. Metz being on record, the rights of Lowther and the Lowther Oil Company under the second lease would be later and subordinate to rights under that sale agreement, if enforceable. No possession was taken under it by John W. Metz. This is an important fact bearing on delay in failing for more than nine years to enforce the agreement; for, when a vendee is in possession, delay is more excusable, and time does not so soon bar his right. *Abbott v. L'Hommiedieu*, 10 W. Va. 678; *Pomeroy on Contracts*, § 404; *2 Warv. on Vendors*, § 746; *Tate v. Pensacola (Fla.)* 20 South. 542; 53 Am. St. Rep. 251; *Fry on Specif. Perform.* § 738. When in possession, we can almost say time is no matter; but, when he is not, it is far different. Why, if he has a just right to possession, is he not in? If John W. Metz had good claim for the 70 acres, why remain out of possession over nine years, and buy and live on another tract in the neighborhood, as he did? His delay constituted confession of no just right. The application for specific performance of a contract is addressed to the sound discretion of the court. He who asks it must have shown himself prompt



and willing to comply with the contract on his part, and it will not be granted if it would be inequitable and work hardship towards the party against whom it is asked. *Dyer v. Duffy*, 39 W. Va. 148, 159, 19 S. E. 540, 24 L. R. A. 339. The rule is more strictly applied in specific performance than in suits for account. *Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. If since the contract the value of the land has greatly increased, and the condition changed, or the vendor is in a condition where enforced performance would greatly damage him, and especially where the purchaser is chargeable with the delay by reason of failure to perform, equity will refuse to compel the vendor to convey. *Bootten v. Scheffer*, 21 Grat. 474; *Patterson v. Martz*, 34 Am. Dec. 474; *Vall v. Nelson*, 4 Rand. 478. In volume 1, p. 181, of that late valuable equity work, *Am. & Eng. Dec. in Equity*, many instances of short delay barring relief are given and the subject discussed.

Let us pause to bring in some facts of the case in connection with these principles. The purchaser delays over nine years. He does not pay any of the \$325 deferred purchase money, and thus was never in a condition to call for a deed. About five or six years after the sale, oil interests increase the value beyond comparison with the value of the land at the date of the sale. The purchaser still pays nothing, but lets four more years go by without asking performance—he right near his father in the neighborhood; his father all the time in possession, using the land as his own; this son and purchaser being weekly at his father's, and knowing of his father's use of the land. In fact, he rents the land of his father one or two seasons for cropping, paying a share of the crop. His father leases the land to Miles for oil, and under the lease the Miller-Sibley Oil Company bores two wells. The purchaser utters not a whisper against it, though well knowing it, and often visiting the land during oil operations. The father makes a second lease to Lowther under which the Lowther Oil Company develops oil. The purchaser is present when this lease is made, well knowing of it, frequently on the land during the operations, standing by and seeing the oil company spend large amounts of money, and giving forth not a whisper of protest; even when oil gushed out as from a cornucopia of wealth, asking no deed from his father. Suppose this purchaser were himself to ask a court to compel his father to make a deed. What court would give him a deed? Urpman has only Metz's rights—no more. His father had made a binding covenant by his second lease, which would ruin him if broken by giving a deed to the son or Urpman. And then it would entail great loss on the Lowther Oil Company in favor of John W. Metz, when he stood silent on the ground when it was spending thousands of dollars. As to the oil company, a decree of perform-

ance would violate that principle of estoppel in pais which says: "No principle of equity seems better established, or more readily applied in equity, than that if a person, knowing his rights, stands by and encourages or permits an innocent party to purchase his property or to make valuable improvements upon it without making known to such purchaser his rights in the property, he is estopped from afterwards asserting any claim to it." *Heavener v. Godfrey*, 3 W. Va. 433; *Norfolk & Western Railroad Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. We must not think that the rights of a stranger to the contract are not to be considered in a contest as to its performance between its parties; for often the fact that its enforcement will impose loss on a stranger will deny a decree to enforce it, even where no such estoppel as that just mentioned is present. *Anthony v. Leftwich's Representatives*, 3 Rand. 238.

Another reason against the decree of performance is that the agreement of sale, if ever complete, was rescinded by both vendor and vendee. The contract states that the price of the land was paid in stock and a wagon and in three notes. James Metz never got the stock, but his son took it off to Roane county and sold it for his own use, and he never executed the notes, and he never took possession of the land, and he later surrendered to his father the written agreement. The motive of sale was base. John W. Metz, being in debt, in order to get the personal property out of his hands, away from creditors—to delay them until he should become able to pay them—went through the form of paying it to his father on the land, making a sale document, and recording it. He did not deliver the personal property. Was it ever a consummated contract? It seems not. If so, no rights come from it. But pass that feature. They afterwards rescinded. But was that oral rescission good? It is not a deed passing legal title. That can only go back by deed. Such a written contract may be rescinded by word of mouth, if the contract be destroyed pursuant to agreement, or possession be returned. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998. Now, the surrender to its maker of the written contract with intent to rescind is surely tantamount to actual destruction. "It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in affirming that a contract in writing may, in equity, be rescinded by parol; and this even though the contract may have been under seal. Such rescission may be effected not only by an express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract. It may consist either of words or acts and all the circumstances attending the

transaction may be shown to prove intention; but, if evidenced by acts alone, they must be such as to leave no doubt as to such intention." 2 Warv. on Vendors, § 826. See Ballard v. Ballard, 25 W. Va. 470, and Straley v. Perdue, 33 W. Va. 375, 10 S. E. 780, holding these principles. Not merely James W. Metz, but John W. Metz, waived, abandoned, and ignored this contract long ago,—long before Urpman got his deed,—and this abandonment defeats specific performance. Payne v. Graves, 5 Leigh, 561. "The rule seems to be well established that specific performance will not be decreed of a contract which the parties have treated as rescinded, or which has once been repudiated by the parties." Warv. on Vendors, § 758. In section 759 such rescission is stated to be a bar to specific performance.

There is another all-sufficient ground to refuse Urpman specific performance. The contract which he asks equity to enforce is not executed, but executory. It was made with intent to defraud creditors, and equity will neither enforce nor cancel it, but leave the parties alone. "This rule applies not only to the original parties to the fraudulent transaction, but also to their heirs and all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties." McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 818. See Silfer v. Howell's Adm'r, 9 W. Va. 391. There are other reasons, however, for a decree declaring this agreement void as to the Lowther Oil Company. It is true, Urpman had no notice of the fraud infecting the sale contract, but his deed conveyed only an equity, and a purchaser of only an equity gets only such title as the vendor has. Such a purchaser, knowing that the legal title is outstanding, is not a bona fide purchaser, like one getting legal title. The fact that the legal title is not in his vendor is notice of the risks he assumes in buying a mere equity, and he takes only what his vendor can convey, or that which his vendor can call upon a court of equity to convey to him. He takes the equity with all its infirmities upon its head, subject to all defenses to which it was subject in the hands of his vendor. Briscoe v. Ashby, 24 Grat. 478; Walton v. Hargroves, 97 Am. Dec. 429, note 433; York v. McNutt, 67 Am. Dec. 607.

In view of the several reasons ample of themselves to justify the decree denying Urpman relief by specific performance, I will add another equity principle, and that is that specific performance in courts of equity is not a matter of absolute right, as arising from a debt of justice, but lies only in a sound discretion of the court. The court has a right to look at all the circumstances, and say whether justice and right demand a grant of performance of it. Hogg's Eq. § 396; Abbott v. L'Hommiedieu, 10 W. Va. 677. Surely, under all the facts, we cannot say

that such discretion was improperly exercised.

It is argued that as the sale agreement was on record, and the rescission of the agreement was not, the latter cannot prevail, as there is no notice to Urpman. The record of the agreement has nothing to do with the case. It would only concern purchasers from James W. Metz, not John W. It is no factor on the questions whether the agreement was rescinded, or was fraudulent, or whether there was laches. Of course, the rescission, being oral, could not be recorded.

Under the above-stated legal principle that specific performance rests in the sound discretion of the court, in addition to the facts already given, as further reason to justify denial of relief to Urpman I state that no injustice is done to him because he purchased when he had notice of the right of the Lowther Oil Company by their lease on the open record, by actual possession of the land by the Lowther Company, and by communications from John W. Metz. Why did he buy knowing of the possession of the Lowther Oil Company, and its operations? As Judge Green beautifully expressed the doctrine in Frame v. Frame, 32 W. Va. 478, 9 S. E. 907, 5 L. R. A. 323: "The earth has been described as that universal manuscript open to the eyes of all. When a man proposes to buy or deal with realty, his first duty is to read this public manuscript—that is, to look and see who is there upon it, and what are his rights." Possession is notice to the world of the rights of the occupant. Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183. "Besides notice constructive, Urpman was actually on the ground and saw the Lowther Company operating. And besides, Urpman, seeing the sale contract on record, conceived the project of defeating the Lowther Oil Company by purchasing of John W. Metz, sent for him to come to Grantsville, and proposed to purchase of Metz, when Metz told him he had no right—did not own the land; but Urpman said, "We think you have," and insisted on buying, and had Metz to execute a deed with special warranty, he refusing to warrant, for the consideration of \$1,500, when the land was worth thousands more, and, it being then night, took a notary upwards of three miles to Metz's home, and got his wife's signature at the midnight hour, seeming fearful that the Lowther Oil Company or some one might intervene. He gave checks to one Matthews to hold till the notary returned with the deed. Metz says he was intoxicated. This is denied by evidence. But say that he was lured by this amount of money—to him, an unlettered mountaineer, a big sum. He soon repented of bringing trouble upon his aged, decrepit father, afflicted with dropsy, and asked Urpman to take back his checks, as he would lose nothing. It seems the money is in the hands of Matthews, and that Metz has never received it. These things

Metz swears to, and Urpman did not go on the stand to deny. What has Urpman lost? Where is injustice done to him? Anyhow, no one is to blame but himself; for he, not John W. Metz, conceived the transaction and was the active agent. It was a speculation that failed. That is all.

We must therefore affirm the decree.

(53 W. Va. 479)

**TOMPKINS v. PACIFIC MUT. LIFE INS. CO.**

(Supreme Court of Appeals of West Virginia.  
May 2, 1903.)

**ACCIDENT INSURANCE—PHYSICAL EXAMINATION—MISCONDUCT OF AGENT—LIABILITY OF INSURER—WEIGHT OF EVIDENCE.**

1. Only a right of examination, as to an injured person entitled to a weekly indemnity under an accident insurance policy, is conferred upon the company issuing the policy, by the following clause contained therein: "Any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any injury or cause of death in such manner and at such times as he may require."

2. The relation of master and servant subsists between the company and its medical adviser in the exercise of such right of examination, and the company must answer for injuries resulting from the negligence or misconduct of its agent in the premises.

3. Though the insured is not bound to submit to such examination, and may refuse at the risk of loss of his indemnity, or of litigation on account of his refusal, he may submit to it without losing his right to exact care and skill in its exercise; and it is no defense to his action that he consented to examination in a particular manner, if he did so in pursuance of a request or demand that it be so made.

4. Between the physician and the insured, in such case, the law governing the relations of physician and patient does not apply.

5. Where the injury of the insured is a sprain of the foot, requiring a plaster cast or similar appliance to hold the injured ligaments in place until they heal or regain strength, and the agent, in making the examination, removes, and fails to replace, such appliance, and injury results therefrom, he is guilty of negligence for which his principal must answer in damages.

6. The court properly refuses an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, when a witness against him is deeply interested in a moral sense, and no such direction as to his testimony is included.

(Syllabus by the Court.)

Error to Circuit Court, Cabell County; **R. S. Doolittle**, Judge.

Action by **George H. Tompkins** against the **Pacific Mutual Life Insurance Company**. Judgment for plaintiff. Defendant brings error. Affirmed.

**Simms & Enslow**, for plaintiff in error.  
**Harvey, Wiatt & Switzer**, for defendant in error.

**POFFENBARGER, J.** On the 30th day of September, 1898, **George H. Tompkins**, a resident of Clifton Forge, Va., instituted an action in the Circuit Court of the United States in the District of West Virginia against the **Pacific Mutual Life Insurance Company**, a California corporation doing business in West Virginia, for the recovery of damages for an alleged wrong, on an alleged cause of action accruing to him in October, 1897, in which action he recovered a judgment, which was afterwards reversed by the United States Circuit Court of Appeals, and the action directed by said court to be dismissed for want of jurisdiction, which was accordingly done by the said Circuit Court. Within one year after the dismissal aforesaid, to wit, on the 3d day of November, 1900, said Tompkins instituted this suit in the circuit court of Cabell county for the same cause of action, alleging in his declaration the prosecution and dismissal of said former action, and that this action was brought within one year after said dismissal. To the declaration, and each count thereof, the defendant demurred, after having hadoyer of the writ and return, which demurrer was overruled, and thereupon a plea of not guilty was entered. The defendant pleaded also the statute of limitations, and the plaintiff was permitted to file his replication in writing to said plea, setting up the pendency of said former suit for the same cause of action, its dismissal for want of jurisdiction, and the commencement of this suit within one year thereafter. Trial was had, and a verdict rendered for the plaintiff, assessing his damages at \$2,000, and, after overruling a motion to set aside the verdict, judgment was rendered accordingly.

Said replication was filed under section 19 of chapter 104 of the Code of 1899, which reads as follows: "If any action, commenced within due time, in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her death or marriage, or if, in an action commenced within due time, judgment (or other and further proceedings) for the plaintiffs should be arrested or reversed, on a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be plead in bar of an action, of the loss or destruction of any of the papers or records in a former suit which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal or other cause, or after such arrest or reversal of judgment, or such loss or destruction but not after."

In support of its contention that the court erred in permitting said replication to be filed, the plaintiff in error relies upon two

Virginia decisions and one Tennessee decision, and the defendant in error relies upon a decision of the Supreme Court of the United States construing the Tennessee statute, and an Ohio decision construing a similar section of the Ohio Code. The first Virginia case is *Gray's Adm'r v. Berryman*, 4 Munf. 181. The Virginia statute construed in that case provided that, if judgment for the plaintiff be reversed by error, or judgment be given against the plaintiff upon matter alleged in arrest of judgment, that he take nothing by his plaint, writ, or bill, a new action might be commenced within one year after such reversal or judgment against the plaintiff. The other case is that of *Manuel v. Railroad Co.*, 37 S. E. 957, construing the present Virginia statute, which provides that if an action commenced in due time abate by the return of no inhabitant or by the death or marriage of the defendant, or if, in such action, judgment for the plaintiff be arrested or reversed upon a ground which does not preclude a new action for the same cause, or the plaintiff shall proceed in the wrong form or bring the wrong form of action, and judgment be rendered against him solely upon that ground, a new action may be brought within one year after such reversal or judgment. In the first of said two Virginia cases a suit in equity had been brought and dismissed for want of jurisdiction, and it was held that an action at law for the same cause of action thereafter commenced was not within the exception. In the second, the plaintiff had taken a nonsuit, and thereafter instituted another action for the same injury, and it was held that that case was not within the exception to the statute of limitations.

The Tennessee statute reads as follows: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff and upon any ground not concluding his right of action, or where the judgment or decree is rendered against the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest." The Supreme Court of Tennessee, in *Sweet v. Electric Light Co.*, 97 Tenn. 252, 36 S. W. 1090, held that a suit commenced in a court having no jurisdiction, and dismissed for want thereof, was a nullity, and that as, in such case, no action had been commenced within the meaning of the statute, such proceeding did not prevent the running of the statute, nor bring the case within the exception. That is the contention of the plaintiff in error, this cause of action having been first set up in a court having no jurisdiction, and there dismissed on that ground, and then sued on in the state court more than one year after the accrual of the right of action, but within one year after the dismissal of the proceeding in the federal court.

In *Smith v. McNeal*, 109 U. S. 426, 3 Sup.

Ct. 319, 27 L. Ed. 986, the Supreme Court of the United States construed the same Tennessee statute, and arrived at a conclusion seemingly in conflict with that announced by the Tennessee court. Said case was decided in 1883, and the Tennessee case of *Sweet v. Electric Light Co.* in 1898, and, strange to say, the Tennessee court did not even notice the former decision of a similar question upon the same statute by the Supreme Court of the United States. There is a distinction between the two cases, however. In *Smith v. McNeal* the dismissal was for want of the allegation of a jurisdictional fact which actually existed, and which, if alleged, would have given jurisdiction. In the Tennessee case the former action had been brought in a court in which jurisdiction could not have been shown in the declaration. The construction given the statute in *Sweet v. Electric Light Co.* may be said to find some countenance in the opinion delivered by Mr. Justice Woods in *Smith v. McNeal*, where it is said: "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute; as, if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

The latest case bearing upon the question is *Railroad Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745, decided in January, 1901, construing the Ohio statute, which reads as follows: "If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or if he die and the claim of action survive, his representatives may commence a new action within one year after such date—and this provision shall apply to any claim asserted in any pleading by a defendant." There, the status of the case was very much like that of this one. The action had first been brought in the federal court and dismissed for want of jurisdiction, and then brought in the state court, and it was held that the right of action was within the saving clause of the statute of limitations. The opinion delivered is very exhaustive, and shows that the matter has been thoroughly considered. It analyzes fully the opinions in *Smith v. McNeal* and *Sweet v. Electric Light Co.*, construing the similar Tennessee statute. Among other things, that opinion says: "In no text-book, and in no reported case cited to us save *Sweet v. Electric Light Company*, supra, is there any statement or intimation that the question of the jurisdiction of the court has any potency whatever in determining what is, and what is not, an action, and we are convinced that in Ohio, whatever may be the

rule elsewhere, there is no authority for the distinction which counsel seek to draw, and we are equally clear that it rests upon no substantial ground."

Our statute seems to be somewhat broader, or, to say the least, more positive and affirmative in the expression of the width of its scope, than any of the other statutes; for it says, "if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action," a new action may be brought within one year after the dismissal. It is a highly remedial statute, and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one, who has brought his suit within the time limited by law, from loss of his right of action by reason of accident or inadvertence; and it would be a narrow construction of that statute to say that, because a plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it. In this connection, *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925, is relied upon by plaintiff in error. That was a case in which the plaintiff failed, after having brought his suit, to file his declaration within three months, by reason of which his action was dismissed at rules. He claimed the benefit of said section 19 of chapter 104 of the Code of 1899, and it was held that he was within the letter of it, but that he could not claim the benefit of it for the reason that the dismissal was wholly imputable to his voluntary abandonment of the suit. In the opinion of the court, delivered by Judge Brannon, it is said: "He either intentionally abandoned his first suit, or neglected it, which operated in law to discontinue it. It is a voluntary dismissal, or, call it a discontinuance, by reason of the plaintiff's nonaction." Here, it cannot be said that the plaintiff below had voluntarily dismissed his former action in the federal court, for he prosecuted it to final judgment and defended the writ of error in the appellate court, and went out of the court, not by reason of his failure to prosecute, but by force of the strong hand of the court, pronouncing the law against him on the question of jurisdiction. The two cases are not analogous unless we adopt the reasoning of the Tennessee court whereby a distinction is made upon the very narrow and technical grounds which have been declared by another reputable court, upon an apparently more mature and thorough consideration, to be unsound.

In support of the demand set up in this action, the principles of law imposing upon a master liability for the acts of his agent are relied upon; it being insisted that the injury for which damages are claimed from the defendant is the result of a negligent act of the defendant by its agent. Defendant below (plaintiff in error) insists that the

injurious act, if done by its agent, was outside of the scope of his agency or authority. These contentions, upon the peculiar facts involved, present a novel case, and a question rather difficult of solution.

Tompkins, a brakeman on the Chesapeake & Ohio Railway, holding an insurance policy issued by the defendant company, providing, among other things, for the payment of a weekly indemnity of \$10, in case of such injury, by external, violent, and accidental means, as should, independently of all other causes, immediately, continuously, and wholly disable and prevent him from engaging in any work or occupation for wages, stepped on a peach seed at Huntington, W. Va., on the 2d day of July, 1897, whereby his right foot and ankle were so wrenched and sprained that, after having, subsequently made three trips as brakeman, the injury required attention, and his physician placed his foot in a plaster of paris cast to keep it and the muscles and ligaments rigidly in a certain position, upon the theory that the ligaments supporting the lower part of the foot had been badly strained, lacerated, or broken loose, and must be in some way held in place long enough to permit them to heal and regain sufficient strength to support the lower part of the foot. This was done by Dr. Geo. S. Bonner, of Clifton Forge, on or about the 5th day of September, 1897, who says his conclusion, upon his diagnosis, was that the injury was "nothing more than the weakness which usually follows a sprain, and the susceptibility to rheumatism, or something of that sort." On or about the 8th day of October, 1897, said cast was taken off by Dr. James F. Hughes, who was the examining surgeon or medical adviser of the insurance company, and had come to Tompkins' house for the purpose of making an examination of Tompkins in respect to the injury, under a clause in the policy requiring the insured to allow such examination in such manner and at such times as the medical adviser might require. After making the examination, Dr. Hughes left without replacing the cast or putting on another, and the plaintiff's foot soon became worse, and he has partially lost the use of it, although, after the lapse of considerable time, an effort was made to restore it to health and strength by again encasing it as before, and other treatment. There is sharp conflict as to what occurred between the plaintiff and Dr. Hughes at the time the examination was made; the claim on the part of Tompkins being that the casing was taken off against his protest and by his unwilling submission to the exercise of the company's right of examination as proposed and executed, and on the part of the company that Tompkins consented to the removal of the support and the discontinuance of its use.

This explanation suffices to fairly indicate the nature of the objection made to the declaration, which sets out, in varying language,

in its four counts, matter which is substantially covered by the foregoing statement, and alleges the duty of the defendant to use care, skill, and a due regard for the interests and welfare of the plaintiff in the exercise of its right of examination, and its failure so to do, as well as its wrongful and negligent conduct in removing the plaster cast and failing to restore it, and in requiring and causing the plaintiff to let it remain off.

The objection on demurrer, as indicated in the brief filed for plaintiff in error, is that "in various counts in the declaration alleging negligent and unskillful manner of making the examination there is interwoven alleged malpractice, bad medical advice and treatment subsequent to the removal of the cast and examination." The charge is to some extent borne out by the language of the declaration, but that does not make it faulty on demurrer. No recovery would be permitted on that part of the declaration. It must be treated as surplusage—irrelevant matter—not vitiating the declaration, but objectionable on the ground that it incumbers the record. "*Utile per inutile non vitiatur.*" 4 Minor, Inst. 1264; St. Pl. 424.

Further assignments of error are predicated upon the rulings of the court in giving and refusing instructions and in refusing a new trial. A résumé of the evidence is necessary to an intelligent disposition of them.

The testimony of the plaintiff, aside from the particulars of his original injury and treatment of it prior to the removal of the plaster cast, is, in substance, as follows: At first he refused to allow Dr. Hughes to remove the cast until he should consult his physician. Dr. Hughes insisted that it be taken off, and he finally consented. Dr. Hughes represented that the insurance company had sent him there to examine the injury, and, if he was not permitted to do so, the company would not allow him anything. He yielded to this, thinking it best to allow the examination to be made. After the cast was taken off, Dr. Hughes told him he did not see anything the matter with the foot, and to get up and walk across the floor. He attempted to do so, but could not. Before its removal, he could get around with the aid of a cane. Dr. Hughes told him to go to the window, and that there was nothing the matter with his foot, and in a few days he could throw his cane away. He told him he could not walk to the window and back. Dr. Hughes insisted next morning that he get up and throw away the cane, and go down town. He made the examination on the 3d or 4th of October, and on or about the 8th the foot had become so much worse that plaintiff went to see Dr. Hughes about it, and told him he could not walk on it, and was directed to paint it with a solution of iodine, which was done. As the foot continued to grow worse, he told him to use crutches, and finally that he did not know what to do, as he had never seen a sprain

turn out to be so serious. He kept going to Dr. Hughes until about the 25th of the month, when he told Hughes he saw no use in depending upon him further, to which Hughes assented, and then went back to the physician who had first treated him, and who declined to have anything further to do with the case, as the injury had become so serious. Dr. Hughes then advised him to go either to Baltimore to a hospital, or to Dr. McGuire at Richmond. He went to Richmond, and was directed by Dr. McGuire to put a plaster cast back on the foot. On his return, Dr. Hughes was requested to put it on, which he did in an imperfect manner. Then Dr. Bonner was sent for, who procured a suitable bandage, and put it on, and it remained on the foot until in February, 1898. As the foot was then found to be in bad condition, plaintiff went to McGuire's hospital, where he was treated specially and by various methods, which resulted in some improvement; but a perfect cure was not effected, and plaintiff now finds it necessary to wear steel braces to support the foot. Plaintiff had received a letter from the state agent of the defendant company, dated September 7, 1897, requiring him to "call at once upon Dr. Jas. F. Hughes of Clifton Forge, Virginia, surgeon of this company, that he may make an examination and report of your injuries." When Dr. Hughes came, he told the plaintiff he had been sent there by the insurance company both to make an examination of the foot and to give it treatment. When the cast was taken off and the foot examined, he said he thought it was getting along all right, and he could see nothing the matter with it, and plaintiff thought it was getting along all right until he attempted to walk on it. He did not hesitate to make the attempt when told to do so, as he wanted to know how it was; and that plaintiff may have asked Dr. Hughes what sort of treatment he should give the foot, but does not remember.

Dr. Hughes testifies substantially as follows: He is a physician and surgeon of 30 years' experience, and was then, and had been for 13 years, a surgeon of the Chesapeake & Ohio Railway Company. Under direction from the defendant company and another insurance company, he went on the 8th day of October, 1897, to see Tompkins, and make an examination, and report condition to the insurance companies. He had been there before, when Tompkins was absent from home. He found plaintiff sitting in his room with his foot and leg encased in the plaster cast; told him what his business was; explained that he came under orders from the company, and that, as the plaster cast was on the foot, he could only report what he saw. Plaintiff asked him if he thought the cast ought to come off, to which he replied that he did not like to take it off. Plaintiff then asked if he thought it had been on long enough, and aft-

er counting up the time, which was four weeks and five days, and some further conversation, plaintiff said he had first sent for witness, but, as he was not at home, he had gotten Dr. Bonner to put the bandage on, and he had not been there for about three weeks, and plaintiff did not like that, and told witness then, that if he saw proper, to take it off, and said, "Hereafter I want you to do my practice and attend to my foot." Dr. Hughes did not say he would do it, but took off the plaster cast, which he did not expect to do when he went there. He saw little or no swelling, but did see a dark red spot on the foot which was very tender, and plaintiff looked at it, and said, "I think I will soon be able to go to work again," and witness said he thought so too. Dr. Hughes suggested to him—just merely suggested—that he did not think it necessary to put the bandage back, and advised him to bathe the foot in hot water two or three times a day, rub it with the points of the fingers, and subject it to passive motion by taking hold of it and working it gently. He did not tell plaintiff to throw away his cane and walk on his foot, but to use his crutches and not put the foot on the ground at first. Dr. Hughes had not then made up his mind to treat the foot, feeling a delicacy about interfering with the case, as plaintiff's regular physician had charge of it. He did not think, from the general appearance of the foot, that the bandage ought to be replaced, or he would have put it on. He was not acting for the company beyond the mere matter of examination, and said nothing to justify a conclusion on the part of plaintiff that he was treating him as the physician of the company. His only duty was to visit, examine, and report. After the cast was removed, plaintiff called on Dr. Hughes two or three times, and the first time walked into the office with a stick or crutch, at which witness expressed surprise, and told him he ought not to walk on the foot. These visits were for the purpose of consulting him in relation to treatment, but no charge was made for it, as witness was the physician for the railway company, and it was his duty, as such, to treat railway employes, for which he was paid by the railway company. He had made the examination in obedience to a letter from the state agent of the insurance company directing him to do so.

Dr. R. S. Wley testified that, under direction from the state agent of the defendant company, he called on the plaintiff January 4, 1898, to make a further examination of it, when he found it enveloped in a plaster paris cast, which the plaintiff refused to permit him to remove under advice from Dr. McGuire and his legal adviser; and that plaintiff told him he might remove the cast and make the examination if he would replace and put the foot back in the condition in which it was, but he declined to do that. He further testified that on the 6th of Feb-

ruary, 1898, under direction of said state agent, he went to make another examination, when he found the cast had been removed, and he did so, finding the foot considerably swollen in the instep and on each side thereof.

When called in rebuttal, the plaintiff denied having made the statements attributed to him by Dr. Hughes.

Several physicians testified in the case as experts, as did also Drs. Bonner, Hunter, McGuire, and Stewart McGuire, who had personal connection with the treatment of the injury. All of them substantially agreed that the treatment first given the injured foot by Dr. Bonner was proper, and that the nature of the injury required the same or similar treatment.

Plaintiff in error excepted to the giving of the following instructions at the instance of the plaintiff below:

"(1) The court instructs the jury that if you believe from the evidence in this case that Dr. J. F. Hughes, as the agent and representative, called upon the plaintiff by reason of the provision in the insurance policy issued by the defendant to the plaintiff, authorizing the defendant to have its surgeon make such examination as he deemed proper, and that said Dr. Hughes, acting under said provision, did make an examination of plaintiff's foot and ankle, and that said Dr. Hughes made such examination, and negligently and improperly failed to replace the plaster cast removed by him, and that such examination, or failure to replace such cast or a similar support, resulted in an injury to the plaintiff, then you should find for the plaintiff, and assess his damages at what you deem proper under all the circumstances.

"(2) The court instructs the jury that if you believe from the evidence in this case that the examination required in the insurance policy issued by defendant to plaintiff comprehended and included, by the practice of reasonably skilled surgeons, such an examination as would leave the injury to plaintiff's foot and ankle, and the cast about such injury, in the same condition in which it was found by the defendant's surgeon, Dr. Hughes, who made such examination, and that said Dr. Hughes, as such surgeon, failed to leave said foot and ankle, and such cast and treatment therefor, in the condition he found them, and that by reason of said failure on the part of said surgeon an injury resulted to the plaintiff, then the defendant is liable therefor.

"(3) The court instructs the jury that if they find and believe from the evidence that the defendant, through its agent, acting upon his own judgment, and not at the request or at the instance of the plaintiff, removed the plaster dressing from the plaintiff's foot before the plaintiff had entirely recovered, and without replacing said dressing, or substitute therefor, directed the plaintiff to use his foot, and that the use of the foot as

directed, without any bandages, support, or dressing, caused the injuries complained of, then the defendant is responsible for all damages sustained by the plaintiff, directly caused by the removal of the dressing and the use of the foot as aforesaid."

The clause of the policy under which the examination was made, and in connection with which the rulings of the court must be considered, reads as follows: "Any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any injury or cause of death in such manner and at such times as he may require." This confers upon the company a right of examination, and nothing more. It also confines the authority of its agent within the same limit. That right, and the agent's authority, however, extend to the making of the examination "in such manner and at such times" as the agent may require. It confers no right to treat the injury, and the insured was not bound to submit himself to any course of treatment at the hands of any physician that the company might indicate. If he had bound himself to that, the obligation would have carried with it his voluntary submission to the ordinary risk to which the law holds all persons who submit themselves to treatment at the hands of physicians, and he could make the defendant company liable only upon such grounds as would enable him to recover damages from a physician employed by him. In such case a physician is held to the exercise of such care, skill, and diligence as are ordinarily possessed by the average of the members of the profession in good standing in similar localities, regard also being had to the state of medical science at the time. 22 Am. & Eng. Ency. Law (2d Ed.) 799; Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700; Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17.

This construction of the clause in question, which seems to be rather acquiesced in by counsel for plaintiff in error, undoubtedly creates the relation of master and servant between the defendant company and Dr. Hughes, and applies the principle respondeat superior between the company and Tompkins. "The term 'servant,' as used in this sense, is not, however, restricted to persons engaged in menial, or even in domestic, service. It is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists." Thomp. Neg. § 578. There was no contractual or other relation which forbade the absolute control of the agent in the exercise of the right of examination, except the power of the insured to refuse to permit it by surrendering

his right to the indemnity due him under the policy. This he was not bound to do, the reserved right of examination being a reasonable provision, compliance with which, in the absence of negligence, would result in no detriment to anybody. He was entitled to insist upon the payment of his indemnity, and upon the use of care and skill in the exercise of the right of examination, if the company insisted upon that as a condition precedent, as it was entitled to do.

Having the right to examine in such manner and at such times as it saw fit, the company did no unauthorized act in removing the plaster cast, if its removal was necessary or desirable in making the examination, and not injurious. As to this there is no controversy. Nor does it seem to be disputed that, in the absence of directions or assent to the contrary, on the part of the insured, it was the duty of the company's agent to replace the bandage. Clearly, it was, for by leaving it off the status was changed, and no right to make such change was given by the contract. In a sense, that would have been going entirely beyond a mere examination, and performing a work in the nature of treatment of the wound. The contention of counsel for defendant in error well illustrates the importance of this restriction. Tompkins had sought medical advice and attention, and secured just the kind of treatment the nature of his injury required, according to the opinions given by the physicians and surgeons who testified in the case, and, had it not been disturbed, he, no doubt, would have fully recovered. Whether he so succeeded by a wise choice in selecting the surgeon, or by mere accident, or whether it was due to the skill of the surgeon or a chance selection of remedy by him, is wholly immaterial. When the company went to him to make the examination, it found a condition—a status—which it had no right to alter, and which it was bound to preserve, at the peril of having to answer for any injury that might result from disregard of duty in that respect, whether foreseen and contemplated as such result or not. It is not a case of breach of contract by nonperformance. It is an act beyond and outside of the contract, working injury, and intent or knowledge is not a material element in such a case. "The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, although such an injury may have been purely accidental and unintentional. To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant; but the mere lawfulness of the act from which the injury resulted is no excuse for



the negligence, unskillfulness, or reckless incaution of the party." *Tally v. Ayres*, 3 Sneed (Tenn.) 677; *Cate v. Cate*, 44 N. H. 211; *Bruch v. Carter*, 82 N. J. Law, 554.

To this view and interpretation of the contract, the plaintiff below adhered in the progress of the trial, and the circuit court, regarding it as sufficiently supported by the terms of the contract, and the evidence introduced by the plaintiff, to call for its submission to the jury, as one theory of the case, which should govern and control them in finding a verdict, if they should find the facts to be as contended for by the plaintiff, accordingly gave the three instructions above quoted, all of which are in perfect accord with that theory, and the law as hereinbefore stated.

The defendant below held to a different theory, which, it must be admitted, is partially, at least, expressed in the following instructions, given as instructions requested by the defendant below, and modified by the court:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of the removal of the plaster cast from his foot, requested Dr. J. F. Hughes to treat him for his injury, and that the said Hughes, upon said request and with the consent of the plaintiff, and not at the instance and with the approval of said Hughes, removed said cast, and then gave plaintiff directions how to treat and use his said injured foot, that then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant."

"(3) The court instructs the jury that the principal is not responsible for the acts of its agents outside of the scope of his agency, and that all parties dealing with an agent are bound to know the scope of the agency; and, if the jury believe from the evidence that the authority and power of Dr. J. F. Hughes from the defendant company was limited to an examination of and report upon the injuries sustained by the plaintiff, the plaintiff was bound to ascertain the extent of said Hughes' authority to represent the defendant company, and in so far as, if at all, he permitted any action by, or acted upon any advice of, said Hughes, not embraced in said authority, he cannot, for such advice or action, or for injuries resulting therefrom, recover damages from the defendant."

"(8) The court instructs the jury that if they believe from the evidence that the injury complained of was the result of treatment by Dr. Hughes at the request of the plaintiff, and not at the instance and upon the advice of said Dr. Hughes, then the plaintiff cannot recover."

The first of these was modified only to the extent of inserting the words "from his foot," the words, "and not at the instance and with the approval of said Hughes," and the words, "and the jury should find for

the defendant." The only modification of defendant's instruction No. 8 was the striking off from the end of it the words "but that in such case the right of action by the plaintiff, if any, is against the physician alone." Defendant's instruction No. 8, as requested, was modified by inserting the words, "and not at the instance and upon the advice of said Dr. Hughes, then," before the words, "the plaintiff cannot recover."

Defendant's instruction No. 5 was given, and reads as follows: "The court instructs the jury, that if the directions of the principal to his agent are specific—to do some specific thing—and the agent disregards his specific instructions, and goes about doing something else not reasonably within the scope of the authority given, the principal will not be liable for such acts of the agent, unless they are afterwards ratified by him."

As to the modification of instruction No. 8, there can be no cause for complaint. It remained unchanged, save only that the suggestion that plaintiff might have a right of action against Dr. Hughes was stricken out. In so doing, the court rightfully eliminated an irrelevant and immaterial issue injected, to the benefit of which the defendant was not entitled, and which could have performed no function other than to mislead and confuse the jury.

The other two modifications consisted of the insertion of the clause, "and not at the instance and upon the advice of said Dr. Hughes," and the clause, "and not at the instance and with the approval of said Hughes," which are, in substance, the same. In order to throw upon the plaintiff the responsibility for the consequences of the removal of, and failure to replace, the plaster cast, was not the defendant bound to show that it had not been removed at the instance of its agent, he having actually taken it off? Plaintiff was bound to consent to its removal, if the agent demanded that it come off, for the contract required him to allow the examination in such manner as the agent required. Mere consent on the part of Tompkins was not enough to relieve the defendant from responsibility. It must have been a consent without a previous or contemporaneous demand for the removal. Consent under such demand or request was within the strict letter of the contract. Had the defendant a right to an instruction exonerating it upon proof of less than it was bound to prove in order to be relieved? Can it complain of the action of the court in adding the omitted element of relief which the defendant was bound to establish? Complete refutation of these propositions is found in the mere statement of them. This point goes to the very root of the controversy. If the cast had been removed solely at the request of Tompkins, he would have no cause of complaint, either on account of its removal, or of the failure to replace it. It would have been an act of his own volition. But the company had the right to take it off, and plaintiff was bound to ac-

cede to its demand, or, at least, could do so without forfeiting his right to have the examination made with requisite care and skill. Plainly, the position of the defendant in error in the court below was that Tompkins had himself, independently of the clause in the insurance policy, and without any reference thereto, employed Dr. Hughes, or requested him, to remove the plaster cast. If the evidence established that fact, then Dr. Hughes would have been the agent of Tompkins in performing that work, or, more accurately speaking, he would have been an independent contractor, employed by Tompkins. That is the gist of the argument in this court. First, it is insisted that under the doctrine laid down in *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, and *Lawson v. Conway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, governing the relation and duty of the physician to his patient, the defendant is not liable, under the evidence in the case. Next, the principle enunciated in *Pearl v. Street Railway Co.*, 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 828, 79 Am. St. Rep. 302, is invoked. That case holds that a physician who, at the solicitation of a street railway, examined a person who, claiming to have been injured by the negligence of the company, had sued it, and in making such examination caused the plaintiff to try to stand on the alleged injured leg, in doing which he fell, and afterwards became afflicted with hysterical trouble, as an alleged result of the examination and fall, was not an agent or servant of the railway company, but was an independent contractor, for whose negligence the railway company was not responsible.

Passing, for the present, the question whether the present case assimilates itself to the Massachusetts case, and assuming that Dr. Hughes was not an independent contractor, unless it appears that the removal of the cast was not in pursuance of his request or demand that it be taken off, the inquiry is whether the question as to whose instance it was at which the casting was removed was fairly submitted to the jury by the instructions given for both plaintiff and defendant. If so, the court did not err in giving the instructions requested by the plaintiff, nor in modifying, and giving as modified, the instructions requested by the defendant. There can be no doubt that the question was so submitted, nor that if instructions Nos. 1 and 8, asked for by the defendant, had been given without such modification, a wholly different and improper question would have been submitted, namely, whether Tompkins consented, at the instance and upon the demand of the company, and not whether he directed the removal of the cast without such request.

Ten other instructions, asked for by the defendant, were refused; the whole number requested having been fourteen.

Instruction No. 2 so refused asked that the jury be told that if, before the examination, the question of removing the cast was submit-

ted to the plaintiff for decision, and he asked for and received the advice of the agent, then the physician became his agent, and was not the agent of the company. It was bad because it completely ignores the evidence relating to the practically admitted fact that a virtual demand had previously been made for the removal of the bandage.

Instruction No. 6 was on the subject of agency, and the extent to which an agent can bind his principal. The court was not bound to give it, because its subject-matter is fully covered by instruction No. 3, which was given.

Instruction No. 7 states the law relating to the degree of care and skill due from physicians to their patients. It embodied law wholly inapplicable to the case. What Tompkins' rights were as against Dr. Hughes is not a proper inquiry in this case, as has been shown, and its submission would have tended to confuse and mislead.

Instruction No. 9 presented a mingling and confounding of the law embodied in No. 7 with the law of agency, and would have been clearly misleading.

Instruction No. 10 was to the effect that the plaintiff was not bound to allow the removal of the cast, though demanded, and that in consenting thereto he exercised a choice, took the risk, and so cannot complain of the consequences. The construction given the contract entirely shuts out this contention.

Instructions Nos. 12 and 13 are to the effect that the treatment or the giving of advice by Dr. Hughes was outside of his agency, and no recovery can be had for injury resulting therefrom. Their subject-matter is substantially embodied in instruction No. 3, which the court was not bound to repeat. That instruction distinctly told the jury that, if the plaintiff had acted upon any advice of Dr. Hughes not embraced in his authority, he could not, for such advice or action, or for injuries resulting therefrom, recover damages from the defendant. No. 3 said, if the jury believed that the agent's authority was limited to examination, he could not recover for treatment or advice. No. 12 said the same thing in slightly different language. Defendant cannot complain of its failure to ask the court to tell the jury, as matter of law, that such advice or treatment was beyond the scope of the agent's authority. No. 13 was actually bad because its last clause embodied the principle of No. 7.

By instruction No. 14 it was proposed to inform the jury that if Dr. Hughes took the cast off, either at plaintiff's request or by his consent, and made the examination without then and there injuring plaintiff, he was not entitled to recover. For a reason several times repeated, this instruction was bad. It ignored a previous request by the defendant. It introduces, however, another element, namely, that, if the mere examination did not injure, no recovery could be had. That was a ground entirely too narrow, and wholly at variance with the contention of

both sides. It was not pretended by anybody that the examination itself did any injury, but that injury resulted from leaving off the plaster cast after the examination. Hence a submission of that question could have performed no function other than to lead to a confusion and distraction of the minds of the jury from the real question in the case.

Instruction No. 11 proposed the submission of a question somewhat different from that presented by the instructions already passed upon. It was that if Dr. Hughes, as agent of the defendant, had given the plaintiff advice and instructions such as a surgeon or physician would sanction, and that the plaintiff negligently failed to observe such instructions and advice, and that his negligence and disobedience in that respect had directly contributed to his injuries, he could not recover, though the jury might believe that want of skill on the part of Dr. Hughes also contributed to the injury. The instruction was properly refused because it does not state the law. Such negligence is no bar to the action, but may be set up in mitigation of the damages. This instruction did not say that the jury should reduce the quantum of damages which the plaintiff would have been entitled to recover but for such negligence on his part, as the defendant was entitled to have the jury instructed. It proposed that the court tell the jury he could not recover at all if he had been guilty of such negligence. See *Am. & Eng. Ency. Law* (2d Ed.) 692.

Instruction No. 4 presents a question very different from any other suggested by the other instructions. It reads as follows: "The court instructs the jury that while the law makes the plaintiff a competent witness in his case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as, in your judgment, it is fairly entitled to, and in view of the interest of the plaintiff." Under some circumstances this instruction might be proper, if broad enough to be free from the objection of giving too much prominence to the fact to which it relates. But in view of the evidence in this cause, the instruction is open to that objection. No other witness had any pecuniary interest, perhaps, in the result of the trial, but Dr. Hughes, upon whose evidence and that of the plaintiff the vital question of fact in the case turned, had an interest, in this: that, if any negligence should be fixed upon his company, the result would be injurious to his principal, resulting from his negligence or overzealousness, which would clearly affect him in a moral sense, at least. As the plaintiff was not the only witness interested, it would have been improper to instruct the jury to consider his interest in the controversy without directing attention to the interest of the witness on the other side of the case, upon whose testimony the

defendant must win or lose. In *Insurance Company v. La Pointe*, 118 Ill. 384, 8 N. E. 353, just such an instruction as this was held bad upon the same ground.

As the case of *Pearl v. Street Railway Co.*, 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 826, 79 Am. St. Rep. 302, is relied upon as an authority controlling this case, a distinction between them is to be noted. In the Massachusetts case the court directed a verdict for the defendant. Just what the evidence was does not appear. In the opinion it is said: "In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise, and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him." In another place the court says: "The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself into the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest, and who had no authority of any kind." From the construction hereinbefore given to the contract, and from the evidence set out, it is equally clear that the two cases are not similar. There was no evidence tending to show that the plaintiff was under any obligation, by contract or otherwise, to submit himself to the examination made by the physician, nor that the physician had any right to examine him. All that was done was voluntary on the part of the plaintiff in the Massachusetts case, and not in submission to any duty he owed to the defendant.

Another case relied upon is *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329, holding, upon the grounds that the laws required the vaccination of immigrants, and that a shipowner who provides a competent surgeon, whom the passengers may employ or not, as they choose, is not liable for his negligence, that a foreign steamship company is not liable in an action for assault and battery, predicated upon the action of the ship's surgeon in vaccinating an immigrant steerage passenger, who made no objection to the operation. The principle of that case is manifestly distinct from the one governing the case under consideration. If the passenger was under any duty to submit to vaccination, it was a duty imposed by law. Moreover, it required a submission to treatment and surgical operation, not mere examination. If the law did not impose a duty, the court held that the evidence was such as to show that the plaintiff had voluntarily submitted to the operation, and of course took the ordinary risk of injury attendant upon such operations, even when the surgeon exercised the ordinary care and skill peculiar to his profession.

But one question remains, and that is whether the court, in overruling a motion for

a new trial, erred. That depends upon whether the verdict is against the clear weight of evidence, as there is no error in the rulings of the court upon the trial. Only two witnesses testify as to the facts upon which the crucial question in the case turns. They are Dr. Hughes and the plaintiff. One swears positively that the plaintiff, without any solicitation or demand that the cast be taken off, directed it to be removed. The other swears equally positively that he yielded to the demand of the company's agent. Therefore, it is simply a question as to which statement the jury ought to have accepted. Under such circumstances, there is not even a shadow of ground for saying that the verdict is against the clear preponderance of the evidence. To reverse the judgment on this ground, the court would simply be compelled to put itself in the place of the jury, and say that it ought to have found the contrary of what it did find, notwithstanding the fact that the evidence clearly warrants a finding either way on the question submitted.

There is no error in the judgment, and it must be affirmed.

(53 W. Va. 448)

DESPARD et al. v. BENNETT et al.  
(Supreme Court of Appeals of West Virginia.  
May 2, 1903.)

APPEAL—RECORD—BOND—TRUSTS—ESTOP—  
PEL—ACQUIESCENCE.

1. Prior to chapter 78, p. 164, Acts 1901, the appellant was allowed five years from the date of the decree appealed from in which to deliver the record to the clerk of the appellate court, and to give the required appeal bond.

2. Said chapter 78 (page 164, Acts 1901) is not retroactive.

3. Where two or more persons purchase or acquire lands under a specific agreement between themselves, and, pursuant to such agreement, the legal title to the lands is taken in the name of one of them, the holder of said title is a trustee for the others to the extent of the interests of such others in said lands.

4. Acquiescence in a transaction may bar a party of his relief in a very short period. Where one has knowledge of an act, or it is done with his full approbation, he cannot undo that which has been done; and, if he stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. Where his silence permitted or encouraged others to part with their money or property, he cannot complain that his interests are affected. His silence is acquiescence, and it estops him.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bills by C. S. Despard and others against Diana Despard and others, and by J. M. Bennett against Allen Stalnaker. The suits were consolidated. Decree for defendants, and plaintiffs appeal. Affirmed.

Linn & Hamilton, for appellants. Louis Bennett and Henry M. Russell, for appellees.

MILLER, J. We are met at the threshold by an objection to the hearing or consideration by this court of the appeal herein, because, as appellees allege, no appeal or supersedeas became effective within two years from the date of the decree appealed from. The said decree was made and entered by the circuit court of Harrison county on the 25th day of January, 1899. The appeal, with supersedeas, was allowed on the 25th day of August, 1900. A bond in the penalty of \$500 was required, which was given on the 3d day of August, 1901. A copy thereof was received by the clerk of this court on the 7th day of August, 1901. More than two years had elapsed from the date of said decree until said bond had been given as aforesaid. Appellees contend that because appellants did not give the required bond within two years from the date of the decree the appeal did not take effect. They assert that the statutes in existence prior to the year 1899, when given the proper construction, made it necessary, in order to effectuate an appeal, that not only the petition therefor should have been presented within two years after the decree was rendered, but also that the bond should have been given within the same period.

Chapter 135 of the Code of 1868 made no limitation for the allowance of an appeal or writ of error. That was a matter of right where the appeal or writ of error would lie upon execution and delivery of the undertaking prescribed in section 2. The limit for giving and filing the undertaking was five years next after the date of the decree, judgment, or order appealed from. Chapter 17, p. 567, of Acts 1872-73, was a new enactment, covering the whole subject of appeals, writs of error, and supersedeas. It provided for a petition assigning errors, thus giving the power to the court to refuse the writ. It limited the presentation of the petition to five years from the date of the decree or judgment. In order to have a limit on the time of giving the appeal bond, section 17 was enacted. If five years had elapsed from the date of the decree or judgment before the record had been delivered to the clerk of the appellate court, no process could be issued by him. Therefore no bond could be given. Taking the sections together, they required the appeal to be perfected within five years from the date of the decree. Said section 17 was re-enacted in the act of 1882 (page 509, c. 157). Appellees contend that, as the act of 1882 covered the whole subject of appeals, writs of error, and supersedeas, and repealed all acts and parts of acts coming within its purview, or inconsistent therewith, it repealed section 17, c. 17, p. 61, of Acts 1872-73. But it did not omit section 17. It retained both sections 3 and 17, as found in chapter 17, pp. 57, 61, Acts 1872-73. It is strange that the Legislature retained that section and at the same time repealed it; that a later act repealed a section of a former act,

yet the later act retains that section; that when a former act contained two sections, which were literally re-enacted by a later act, one section is repealed, and not the other. It might be asked which section is so repealed. We must allow both of said sections to stand, and give to each a meaning and effect if that can be done.

Section 3 of chapter 157, p. 506, Acts 1882, provides that no petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree, or order which had been rendered or made more than five years before such petition was presented, if the judgment, decree, or order mentioned in the petition had been rendered or made before said chapter, as amended, took effect; but, if such judgment, decree, or order was rendered after said chapter took effect, such petition should not be presented after two years from the date of such judgment, decree, or order. It may be, as contended by appellees, that the Legislature intended by the act of 1882 to limit an appeal, in any event, to two years from decrees and judgments rendered after that act took effect; and that by inadvertence section 17 was not repealed, while section 3 was amended by limiting the presentation of the petition to two years. Be this as it may, as section 3 then stood it limited the application for an appeal to two years; but section 17 gave five years within which to perfect the appeal by bond and delivery of the record to the clerk. If we were required to find a reason for the difference in time allowed by sections 3 and 17, we would say that there should be some time given after the granting of the appeal in which to execute and deliver the bond. The appeal may be allowed on the last day of the two years. The bond must be given before the clerk of the circuit court wherein the decree was rendered. Without sufficient time to do this, the appeal would be useless. The Legislature may have given too much time; but it was so enacted.

Section 3 of chapter 14, p. 63, Acts 1899, is now section 3 of chapter 135 of the Code of 1899. Although the Legislature of 1899 saw proper to amend and re-enact certain sections of said chapter 135 of the Code, it left section 17 as it had theretofore stood. Said chapter 14 was and is an act amending only sections 3, 18, and 19 of chapter 135 of the Code of 1899. By chapter 78, p. 164, of the Acts of 1901, said section 17 was amended and re-enacted, and changed the time for giving the bond and filing the record from five to two years. Said chapter 78 was passed February 22, 1901, and took effect 90 days thereafter. This chapter was the first express change made by the Legislature in said section 17. There is no repugnancy in the said sections 3 and 17 in all of the legislation referred to. The two sections relate to two different matters. One limits the time for the application for the appeal; the other limits the time for the execution of the bond and delivery of the

record to the clerk. Both can stand, with distinct operation.

It is further contended that chapter 78, p. 164, Acts 1901, amending section 17 of chapter 135 of the Code of 1899, by providing that the bond must be given and the record delivered to the clerk within two years instead of five, retroacts and vitiates this appeal. This proposition is contrary to the rule that laws do not retroact from mere implication. *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. When the bond in question was given, said section 17 of chapter 135 of the Code of 1899 had not been amended. Appellant, under it, had five years from the date of the decree within which to execute the appeal bond and file the record of the cause with the clerk. Said section 17 was not repealed or amended by the Legislature by implication. We see no reason for saying that chapter 78, p. 164, of the Acts of 1901, is retroactive. We must, therefore, hold that appellants have, within the time allowed to them by law, properly perfected their appeal.

The said decree appealed from was rendered in the cause of Charles S. Despard and others against Diana M. Despard, J. M. Bennett, and others, and in the cause of J. M. Bennett against Allen Stalnaker and others; both commenced in the circuit court of Calhoun county, but removed to the circuit court of Harrison county, and there consolidated and heard together. The bill in said first-mentioned cause was filed on the 22d day of October, 1879, by Charles S. Despard, Burton M. Despard, Laura E. Goff, and Nathan Goff, Jr., plaintiffs, against Diana M. Despard, Flora H. Despard, and Duncan Lee Despard, infant children and heirs at law of Burton Despard, deceased, and Jonathan M. Bennett (called in the proceedings J. M. Bennett), defendants, in which it is alleged that on the 2d day of October, 1874, said Burton Despard, then a resident of the county of Harrison, died testate, leaving, him surviving, the said Charles S., Burton M., Diana M., Flora H., and Duncan Lee Despard, and Laura E. Goff, wife of Nathan Goff, Jr., his children, and Gertrude Despard, his widow; that said Burton Despard, by his last will and testament, devised to his said children all of the real estate of which he died seised, and that said Gertrude Despard, widow, had released her right of dower in all of said land; that said release is filed as part of the bill; that at the time of his death said Burton Despard and J. M. Bennett owned jointly a tract of 110 acres of land in Calhoun county, granted to them by the commonwealth of Virginia by patent dated on the 28th day of February, 1849; that by four several patents, each bearing date on the 31st day of December, 1844, there were granted to said Burton Despard by the commonwealth of Virginia four separate tracts of land, to wit, one tract of 438 acres on Big Root waters, one of 1,500 acres on the

dividing ridge between the waters of the Little Kanawha river and the West Fork, one of 500 acres on Ball's Camp Fork of Pine creek, and the other of 1,200 acres on Nigh Cut run, all situate in Calhoun county; and that the plaintiffs believe and charge that said Burton Despard died seised of the last four mentioned tracts of land, except such parts as had been theretofore sold by him and his agents to other persons, but that they were informed that said J. M. Bennett claimed to be the owner of an undivided one-half interest in the same; and they call upon him to produce the evidence of his title thereto, if any he has.

The bill further alleges: That out of said 1,500-acre tract there were sold to Martha Luzzadder, on the 18th day of May, 1874, 86¼ acres for the sum of \$258.75; to Henry M. Knight, on the 25th day of July, 1874, a parcel supposed to contain 75 acres, at \$3 per acre; and to Emery Ball, on the 16th day of April, 1870, 112¼ acres for \$338. That out of said 1,200-acre tract there were sold to William M. Taylor, on the 18th day of August, 1874, 75 acres, at \$3 per acre; to Perry Bell and James T. Law, on the 23d day of June, 1872, 183 acres, at \$3 per acre; to William P. Haverty, on the 25th day of February, 1851, 285 acres, at \$1 per acre; to Susan Bell, on the same day, 100 acres, at \$1.25 per acre. That on the 21st day of September, 1867, there was also sold to James A. Ferrell, out of said 1,200 acres, and out of a 210-acre tract belonging to said Burton Despard, J. M. Bennett, and one G. D. Camden, 150 acres, for \$375. That on the 4th day of March, 1855, there was sold, out of said 1,200-acre tract, to Henry Stallman, 231½ acres for \$530.62½; to Alpheus Matthews, on the 26th day of December, 1856, 91¼ acres for \$203.13; and to Silas and Aaron Petit, on the 16th day of April, 1870, 136 acres for \$408. That out of said 500-acre tract, there were sold, on the 22d day of April, 1869, to Allen Stalnaker, 119 acres for \$625; on the same day, to Ahab and Allen Stalnaker, 88¼ acres for \$375; and on the 17th day of December, 1872, to Waitman T. and Eppa T. Hathaway, 263¼ acres for \$1,316. That out of said 438-acre tract there were sold, on the 10th day of June, 1857, to Robert Wilson, 162 acres for \$243; and on the 21st day of August, 1874, to W. G. Bennett, administrator of Morros S. Shanks, 148½ acres for \$445.50. The plaintiffs say that they know of no other real estate in Calhoun county owned jointly by said Bennett and said Burton Despard at the time of his death, and call upon said Bennett to discover and state in his answer to the bill whether any other tracts were so owned by them in said county, and to produce and file the evidence of his title thereto, so far as the same may be in his possession. Plaintiffs further charge upon information and belief that said Bennett had collected large sums of money on account of the sales of the lands made as

aforesaid, and they also call upon him to state fully what collections had been so made by him. They pray that all of the lands owned jointly by said Bennett and said Burton Despard in Calhoun county be ascertained and partitioned according to the respective rights of the parties interested therein; that an account be taken of the said sales; that said Bennett be charged with all of the moneys received by him, on account thereof; and for general relief.

On the 28th day of May, 1880, on motion of the plaintiffs, a rule was awarded by the court in said cause against said J. M. Bennett, requiring him to appear on the first day of the next term, and show cause why he should not be fined and attached for his contempt in failing to file his evidence of title to the said lands, if in his possession. On the 21st day of February, 1881, said J. M. Bennett filed his demurrer and answer to the bill. On the 25th day of October, 1883, an amended bill was filed in said cause, making Edwin Maxwell, as executor of said Burton Despard, a party defendant thereto. Thereupon said Maxwell, as executor as aforesaid, filed his answer, and the plaintiffs replied generally to the said answer of J. M. Bennett, which had been theretofore filed. At the same time, on motion of plaintiffs, it was ordered by the court that said J. M. Bennett appear on the first day of the then next term, and produce and file with the papers in the cause any contract in his possession made between him and said Burton Despard, respecting the interest claimed by Bennett in the said 438, 1,500, 1,200 and 500 acre tracts of land; also any written contract in his possession entitling him to one-half of all lands entered and patented by said Burton Despard in Calhoun and Gilmer counties. At the February term, 1884, of said court, an attachment was directed to issue against said Bennett for his failure to appear in obedience to the rule issued against him at October term, 1883, as aforesaid. Defendant J. M. Bennett, in his answer, admitted the joint ownership of himself and Burton Despard in the land as stated in the bill, and also averred and charged that the said four tracts of land containing 438, 1,500, 1,200 and 500 acres, respectively, were always owned by Despard and himself jointly; that the said Despard and his heirs and respondent held said lands jointly under contract for entering and patenting lands; that the said tracts of land were patented to said Despard, but that defendant Bennett owned one-half thereof; that the legal title to said four last-mentioned tracts was in said Burton Despard until the 14th day of December, 1870, when all of said tracts were conveyed to Despard and Bennett jointly in pursuance of a previous sale for taxes to them in their joint names; and that the deeds for said lands were recorded in Calhoun county. The answer further substantially avers that, in addition to said tracts, by a patent of the

commonwealth of Virginia bearing date on the 30th day of November, 1848, there was granted to said Burton Despard and J. M. Bennett, jointly and equally, another tract of land lying on the south side of the Little Kanawha river, opposite Big Ben, containing 1,000 acres, which tract covered a smaller one of 824 acres, previously purchased by Despard and Bennett of George Holbert; that prior to the 18th day of June, 1865, said Burton Despard had negotiated a sale of said last-mentioned 1,000-acre tract for \$2,000; that Despard, by letter, requested Bennett to convey said land to him (Despard), to the end that sale might be consummated; that accordingly Bennett did execute a deed for said 1,000-acre tract to Despard, but the sale thereof was never consummated; that said Despard often told Bennett that said deed should be returned to him, which was never done; that after the death of Despard the deed was found among his papers, and by his personal representatives or heirs placed on record.

On the 28th day of October, 1887, said J. M. Bennett departed this life, testate, and in and by his last will and testament devised all his real estate to his only children, to wit, W. G. Bennett, Louis Bennett, Gertrude Bennett, who afterwards intermarried with Fleming Howell, and Mary L. Bennett, who intermarried with Wm. B. Bowie. Said W. G. Bennett and Louis Bennett were named as executors in said will, and qualified as such. The said suit was revived against said Bennett's devisees and executors, and thereupon said executors filed their answer to the bill and amended bill in said cause, in which they, among other things, say that they are informed and believe that, before said tracts of land were surveyed and patents issued for them to said Burton Despard, said J. M. Bennett and said Burton Despard and one Michael H. Havery entered into a contract in writing, dated the 10th day of August, 1843, whereby it was mutually agreed between them that said Despard and Bennett, or either of them, should have and procure land warrants for the entry of lands on the Little Kanawha river and its waters; that said Havery should locate said warrants, and do or have done such surveying and local work as would be necessary to carry them into grant, and in such grants each was to have a one-third interest, though the patents should be issued in the name of one or more of them, as might be; that under said agreement said 110, 438, 1,500, 1,200, and 500 and some other tracts were respectively carried into grant, the first tract in the names of Bennett and Despard, and the others in the name of Despard; that afterwards said J. M. Bennett, by oral contract, acquired the interest of said Michael Havery in said lands, intending the same to be for the joint ownership of himself and Despard; that afterwards said Despard and Bennett purchas-

ed said land at a tax sale; that on the 14th day of December, 1870, the clerk of the county court of Calhoun county, by deeds of that date, conveyed said tracts of 438, 1,500, 1,200, 500, and a 250-acre tract, respectively, to said Despard and Bennett jointly; that said deeds were duly admitted to record in said clerk's office on the 31st day of December, 1870, and that afterwards said J. M. Bennett obtained a deed from the heirs of said Havery for his one-third interest in said lands, but intending said lands to be for the joint interest of said Despard and Bennett. The plaintiffs filed a replication to this answer in the main amounting to a denial of all the allegations thereof, and also alleging that by a writing under seal bearing date on the 10th day of January, 1848, the said Burton Despard appointed and constituted said J. M. Bennett his agent and attorney in fact, with power to make sale of any and all the lands which the said Despard then owned, or had right or title to, or interest in, lying in the counties of Gilmer and Braxton (said lands being then in Gilmer county), to make any compromise in relation thereto which said Bennett might deem proper, and to appoint subagents to act under him, giving to them such powers as he might see fit; that said agency extended to and embraced all the lands in the said answer mentioned; that said Bennett accepted said agency, took charge of said lands, and appointed Milton Norris a subagent with power to sell the same; that the said Bennett continued to act as such agent and attorney in fact until the death of said Despard on the 2d day of October, 1874; that said Despard lived at Clarksburg, in the county of Harrison, 70 or 75 miles from said lands; that said J. M. Bennett, who resided at Weston, in the county of Lewis, was a practicing attorney at law in the counties of Lewis, Braxton, Gilmer, and Calhoun, and regularly practicing in the circuit court of the last-mentioned county.

The bill in the cause against Allen Stalnaker was filed in the name of said J. M. Bennett, Edwin Maxwell, as executor, and the said children and devisees of said Burton Despard, deceased. Said executor and devisees were afterwards transposed as parties, and made defendants in said cause with Stalnaker. It is alleged in the bill that on the 22d day of April, 1869, plaintiff J. M. Bennett, together with Burton Despard, by their agent, Milton Norris, sold to defendant Allen Stalnaker 119 acres of land, which is the same 119 acres hereinbefore referred to in said first-mentioned cause, at the gross price of \$625; that said Stalnaker paid to said Norris on the day of sale \$325 on said land, and gave his single bill for \$300, payable on the 16th day of October, 1869, to said Burton Despard, specifying that it was given for 119 acres of land on Pine creek; that in fact said single bill was



for the joint benefit of Despard and Bennett; that said Stalnaker had made various payments, stating them, to said Norris, on said single bill; that at the time said Norris sold said land he executed a title bond to Stalnaker, whereby he bound said Despard and Bennett to convey said land to Stalnaker by deed with covenants of general warranty when the purchase money therefor and taxes thereon were fully paid. After certain other allegations, the bill prays for specific enforcement of said contract; that said Stalnaker be compelled to pay the balance of the purchase money due on said land, and also the taxes thereon, which had been paid by Bennett and Despard and his personal representative. The said executor and devisees answered said bill, denying that said Bennett had any authority to institute said suit in their names, disavowing any statements made in the bill claiming for Bennett an interest in said land or in said purchase money, and praying that the whole of said purchase money and taxes be decreed to them. Afterwards an amended bill by W. G. and Louis Bennett, as executors of J. M. Bennett, was filed in the cause, which substantially reiterated the allegations of the original bill. It then sets out the alleged contract between Despard, Bennett, and Haverty; the purchase of Haverty's interest in the said lands by Bennett for the joint benefit of Despard and himself; the purchase of the lands by Bennett and Despard at the tax sale, and the execution of the tax deeds to Bennett and Despard jointly by the clerk of the county court of Calhoun county; and many other matters and things tending to show Bennett's joint equal ownership with Despard in all of said lands.

Said Edwin Maxwell, executor, and the Despard devisees, in turn answered this amended bill, denying all the material allegations thereof, denying that said Haverty ever had any interest in said lands, and assailing the said tax sales and deeds thereunder. Numerous and voluminous depositions were taken and filed by the parties on both sides of the controversy; and, the causes being matured, consolidated, and heard by the court, it was adjudged and decreed that as to said 110 acres on Yellow creek granted to said J. M. Bennett and Burton Despard on the 28th day of February, 1849, and as to said 438 acres situate on Big Root, and the 1,500 acres situate on the ridge between the waters of Little Kanawha and the West Fork, and the 500 acres situate on Ball's Camp Fork of Pine creek, and the 1,200 acres situate on Nigh Out Run, all granted to said Burton Despard on December 31, 1844, and particularly described in exhibits filed with the original bill, the said J. M. Bennett and Burton Despard were the joint equal owners thereof, although the grants therefor may have been issued to said Burton Despard alone: that the said devisees of said J. M. Bennett, deceased, are the joint equal own-

ers, as heirs at law and devisees of said J. M. Bennett, of one undivided half of the residue of said tracts of land, after deducting said sales from the original tracts; and the said Despard's heirs and devisees are the owners of the other undivided half of the residue of said tracts, after deducting said sales from said original tracts, and in proportion, as between themselves, to their respective interests in the estates of said Burton Despard, deceased, and of Flora Despard, deceased; and that as to the land conveyed by said J. M. Bennett to said Burton Despard by said deed dated the 10th day of November, 1864, to wit, the one undivided half of the 1,000-acre tract, and of said 826-acre tract, originally so owned and held by said J. M. Bennett and Burton Despard, after deducting therefrom 156 acres thereof, sold to Samuel Haverty and Daniel S. Haverty, the said Bennett heirs and devisees are the joint equal owners of the one undivided half of the residue thereof, and the said Despard heirs and devisees are the owners of the other undivided half of the residue thereof, in proportion, as between themselves, to their respective interests in the estates of said Burton Despard and of Flora Despard, deceased. The decree also appoints commissioners, and provides for partition of said lands between the parties according to their respective interests therein.

In the said cause of Bennett against Stalnaker and others the court decreed that said Allen Stalnaker should pay to W. G. Bennett and Louis Bennett, as executors of J. M. Bennett, deceased, the sum of \$235.17, being one-half of the amount of the balance of purchase money, due from him for said 119 acres of land so purchased by him, and that he should pay to said Edwin Maxwell, executor of Burton Despard, deceased, the like sum of \$235.17, being the other half of said purchase money due from him, with interest on each of said sums from the 25th day of January, 1899. The decree makes other provisions as to costs and the sale of said land in case of default of payment by Stalnaker, and then refers the first-named cause to M. M. Thompson, one of the commissioners of the court, to raise and state an account between J. M. Bennett and Burton Despard, and between the executors of said Bennett and the executor of said Despard, respecting the sales of the parcels of land hereinbefore referred to, and to the collection of purchase money, the payment of taxes, and any other pertinent matter, and to report any balance which he might find to be due from the one to the other.

Appellants assign as error that the circuit court erred in holding that the four tracts of 438, 500, 1,200, and 1,500 acres of land patented to Burton Despard, or any part of either of said tracts, were originally owned jointly by J. M. Bennett and Burton Despard, and in directing a partition thereof, and in decreeing any part of the purchase money



due from Allen Stalnaker to the executors of J. M. Bennett, and more especially so without taking into account the collections made from Stalnaker, and ascertaining how the account stood between Bennett and Despard on account of the sale to Stalnaker, when by the same decree the cause was referred to a commissioner for settlement of the accounts between the parties relating to the collections of purchase money.

There seems to be no contention about the 110-acre tract. It appears that the said 826 acres are almost, if not altogether, covered and included in the 1,000-acre tract. The last-mentioned tract was originally located and entered by Michael H. Havery in the name of Burton Despard by a survey dated March 1, 1844. One George Holbert claimed that he had already acquired title to this land. A caveat was issued against Burton Despard. A compromise was then made, and Bennett and Despard purchased Holbert's claim on the 27th day of September, 1848. A patent for said 1,000 acres was then issued jointly to J. M. Bennett and Burton Despard, which bears date on the 30th day of November, 1848. No change appears in the title thereto until the year 1865. On the 15th day of June, 1865, Despard wrote and sent to Bennett the following letter: "I regret that I did not see you in Clarksburg. I did not know you were there till I was leaving for this place. I desire much to see you and arrange our land matters. I have conditionally sold the Holbert land & the 1,000 acre survey adjoining and suggest that you prepare and send me a deed for your interest in it, together with all the title papers you have in reference to that land—let the deed be made to me as I have furnished my agent with a deed of general warranty from me to be delivered when & if the contract is closed. If the sale is closed it will net us I think over \$15,000. I am glad you have returned & hope your old friends will treat you kindly." Attached to the above letter is the following: "The price conditionally fixed on 1,069 acres is \$20,000.00, but refused to pay Norris his com'n. and I never promised Mr. Fleming who is acting for me a very liberal com'n. He has been several times in Pittsburg and Gilmer seeing after our lands and demands a large compensation especially as he put in this land instead of his own, we can make him useful in other matters. It is very important and you put me in your deed to me and all the title papers as to the Holbert piece so if necessary I can show a clear title. Mr. Bailly claims an interest in this land & if I recollect what we agreed to he should have a part. What do you remember, but for the present do not say to him I am about to sell. I have been writing all day & am scarce of paper we have a large amt. of taxes to pay which must be done soon."

The foregoing letter, postscript, and signature thereto were proved before the clerk of

the county court of Calhoun county on the 21st day of October, 1882, by the oaths of Robert F. Fleming, Robert G. Linn, and William E. Lively, and thereupon the paper was admitted to record in said clerk's office. Judge Maxwell, as a witness in this cause, also proved the said letter and signature thereto to be in the handwriting of Burton Despard. J. M. Bennett, by his deed, acknowledged by him on the 3d day of August, 1865, in consideration of the sum of \$1, conveyed to said Burton Despard one equal undivided half of the tracts of land described therein, situate in Calhoun county, containing 1,000 acres, being a tract of land granted by the commonwealth of Virginia to said Despard and Bennett; also an equal undivided half part of another tract purchased jointly by said Despard and Bennett of George Holbert, and known as the "Holbert Farm," and is principally covered or lapped upon by the said survey first herein named. "This tract was granted to Alexander Harrison as a tract of five hundred acres, but is estimated to contain eight hundred and twenty-six acres by recent survey." The grantors, by said deed, warranted generally the property thereby conveyed. It appears that said contemplated land sale was never consummated; that said deed was found, after Despard's death, among his papers, and on the 7th day of November, 1877, was admitted to record in the clerk's office of the county court of Calhoun county—something over twelve years after its date, and more than three years after Despard's death.

Judge Maxwell also testified concerning the transaction referred to in Despard's letter of June 18, 1865, as follows: "I don't know anything about it personally, and I don't think I know anything about it at all, except what Col. Despard said to me." Again: "He said he was trying to sell a tract of land belonging to himself and Jonathan M. Bennett, situated in Calhoun county; that he had taken a deed from Bennett for the land, or for his interest in the land, so that he would be able to make title to it if he happened to make a sale, without taking time to get a deed from Mr. Bennett. He also said he had failed to make sale." It will also be observed that the deed upon its face is for the nominal consideration of \$1. It was executed by Bennett, and sent to Despard at his request, to supply and perfect the title to the land in case the sale thereof should be made by Despard as contemplated. The sale was not consummated. The deed failed in its purpose, and was never returned to Bennett.

The record shows that said Louis Bennett filed his bill in equity in the county court of Lewis county against Lemuel Havery and Daniel S. Havery, Jonathan M. Bennett, Edwin Maxwell, as executor of Burton Despard, deceased, and all of said heirs and devisees of said Despard, who were all duly served with summons in said suit, which was

afterwards transferred to and tried and determined in the circuit court of said county. The bill in said cause alleges the joint equal ownership of said J. M. Bennett and Burton Despard in the said 1,000 and 500 acre tracts of land, respectively; the sale of a portion out of both of said tracts, supposed to contain 150 acres, by a contract in writing, made by Milton Norris, as their agent, to said Havertys, at the price of \$4 per acre, to be paid by the vendees; the assignment by J. M. Bennett of his interest in said contract, with the right to receive the benefit thereof, to said Louis Bennett; that said Havertys were put in possession of said land under their said contract of purchase; that said vendees had failed to pay said purchase money; and it then prays for a decree and sale of said land. On the 12th day of March, 1889, a decree was made and entered in said cause by which it was adjudged that said Daniel S. Haverty and I. P. Knight, administrator of Lemuel Haverty, deceased, should pay to said Louis Bennett, plaintiff, as aforesaid, the sum of \$665.05, with interest thereon from the 4th day of March, 1889, and the costs of said suit; and to Edwin Maxwell, as executor of Burton Despard, deceased, the sum of \$665.05, with interest as aforesaid; and that in default of such payment within 30 days thereafter W. E. Lively, who was appointed a special commissioner for the purpose, should sell said land. The said special commissioner, under and by virtue of said decree of sale, did sell said land to said Louis Bennett and others, the devisees of said J. M. Bennett, one-half thereof, and to said Edwin Maxwell, as executor aforesaid, one-half thereof, for \$600, which sum, the record shows, was paid by said purchasers in hand to said commissioner; and thereupon said sale was confirmed by the court, and the commissioner was further authorized and directed to convey the land to the purchasers thereof according to their respective interests therein.

Milton Norris says that Bennett claimed an interest in the said lands since 1844. Other evidence shows that he made claim to ownership therein. Tax tickets for taxes assessed on said lands, duly receipted by the sheriffs for different years, were found with Bennett's papers, and are filed in the record. It is further shown that he exercised acts of ownership and control over, and expended money upon, said lands. It is contended, however, by appellants, that all these acts were done under, and by authority of, his power of attorney from Despard, bearing date on the 10th day of January, 1848. An inspection of this document shows that it does not specify what particular lands or interest therein Despard owned or claimed at that time. It may be inferred from the record that he had no definite information about the matter. It is claimed by appellees that Despard had not been in that section of country where the lands lay. There is

nothing irreconcilably inconsistent in this power of attorney and the claim of Bennett. The latter was a practicing attorney, and a regular attendant on the courts in the county where the lands are situated. It was convenient, no doubt, for Bennett to have authority to make sales of, and convey full title to, the lands, without the joinder of Despard, just as it was proposed in the contemplated sale by Despard of the 1,000 and 826 acres. It is further shown that Bennett paid charges and taxes on the land before the execution of the power of attorney. James Barr, who was sheriff of Calhoun county, says that said C. S. Despard paid one half of the taxes on the 1,000, 500, 1,200, and 438 acre tracts of land for the year 1875, and that witness was of the impression that he said Bennett was to pay the other half. On the 15th day of November, 1886, C. S. Despard wrote the following letter:

"Parkersburg, W. Va., Nov. 15th, 1886.

"J. M. Bennett, Weston, W. Va.—Dear Sir: I have just received a statement from Calhoun county of the Lands that B. Despard Heirs are interested in and were sold as delinquent Lands and I find that they were sold for the years 1883 & 1884 and the following lands were sold in the name of Bennett & Despard.

1500 acres on Rowels Run.....	\$108 11
1200 acres on Neigh Cut Run.....	44 77
123½ acres on Big Root.....	7 68
500 acres on Pine Creek.....	62 19

\$222 75

"As you have been paying ½ of these taxes and did not pay then according to the sale paid your ½ in all the rest of these lands that were sold for Delinquent taxes in which the Despard Heirs are interested in Calhoun, Braxton & Gilmer Countys I write you as I am going to redeem the Despard Heirs portion. Whether you knew that they were sold in your name I understood you to say you had paid your share. Whatever we do we will have to do pretty quick these lands were sold to the State and the time runs out to redeem them on the first of December. I have written my att'y. at Charleston to go to the Auditor's Office and get a full statement of the Delinquent lands which we were interested in and I expect to hear from him in a few days and we can settle them all together if you so desire it.

"Yours truly, C. S. Despard."

The deeds made by John C. Campbell, recorder of Calhoun county, to said Burton Despard and J. M. Bennett, for said tracts of 438, 1,200, 1,500, and 500 acre tracts, respectively, each bearing date on the 14th day of December, 1870, were duly admitted to record in the then recorder's office of said county on the 31st day of December, 1870. They each recite the assessment of the taxes to Burton Despard; the sale of said lands to Despard and Bennett; the report made by the county surveyor, specifying the metes and bounds thereof, and the grant to the

purchasers. No person in interest seems to have questioned them until they were assailed in this suit in 1897. There does not appear to have been any concealment by Bennett in this transaction. The deeds were placed on the public record a few days after they were executed, more than three years before the death of Despard. In a letter written by Despard to Bennett, dated June 21, 1874, in speaking of taxes, he said, "Let us sell our lands and be done with the trouble." There is also a statement in the record of sales of land made by Milton Norris, as agent for Despard and Bennett, which statement had been sent by Norris to Despard, and by Despard to Bennett, and bears date October 8, 1860. It shows the sale of said 281½ acres out of the 1,200-acre tract for Bennett and Despard to Henry Stallman; the sale to Alpheus Matthews of said 91½ acres, part of the 1,200-acre tract; the sale to Robert Wilson out of said 438-acre tract; and the receipt of \$50 on the sale of the 100 acres to Susan Bell out of said 1,200-acre tract. There are many other expressions of said Burton Despard showing that he had knowledge of Bennett's claim to ownership in said land, and it nowhere appears that he ever repudiated such claim.

Milton Norris further testifies that he commenced selling said lands as agent of Bennett and Despard in 1854, and sold parcels to Henry Stallman, Mrs. Matthews, James A. Ferrell, Silas Petit, Aaron Petit, Wm. M. Taylor, Mrs. Shanks, and Samuel Bell. On the 25th day of July, 1874, said Norris, as agent of J. M. Bennett and B. Despard, sold a parcel of said land, supposed to contain 75 acres, to Henry W. Knight. On the 18th day of May, 1874, Norris, as such agent, sold to Martha Lussader, 86¼ acres of the 1,500-acre tract; and on the 23d day of June, 1873, as such agent, Norris sold a parcel of said 1,200 acres to Perry Bell and Thomas Law. So far as we can ascertain, all of the sales hereinbefore specified were made by persons claiming to act as agents for both Despard and Bennett, and the purchasers went into possession of the lands thus purchased under their contracts so made. The material parts of the various records of chancery causes are filed. One is a suit by J. M. Bennett and Burton Despard in the circuit court of Calhoun county, instituted against Wm. P. Haverty, to enforce their alleged lien for purchase money. A decree of sale was made therein. The land was sold by a special commissioner, bought in by Bennett and Despard jointly, and the sale confirmed. As assignee of said J. M. Bennett, said Louis Bennett instituted suits against said Henry Stallman, Perry Ball and T. J. Law, Martha Luzzadder, Henry W. Knight, Emory Ball, and W. T. and E. T. Hathaway, respectively, for the collection of the purchase money due from the said purchasers upon said parcels of land bought by them as hereinbefore set out. In at least nine of said suits the claim of said

J. M. Bennett to a joint equal ownership in said lands with Burton Despard was distinctly and positively averred. The decrees therein were based upon that assumption, and to all of said causes exhibited, except the first mentioned, the said executor and devisees of said Burton Despard were parties, and served with process therein. Decrees were rendered therein in their favor for one half of the purchase money due, and in favor of said plaintiff for the other half. Under some of said decrees the lands were sold and bought in equally and jointly by the Bennett devisees and by Maxwell, executor, as aforesaid. None of said decrees, so far as this record discloses, was ever reversed or set aside.

There is a mass of testimony about the alleged agreement made on the 10th day of August, 1843, by Bennett, Despard, and Michael H. Haverty. What purports to be a copy thereof appears in the record. The original is shown to have been in the possession of said Haverty, and to have been found among his papers, but almost destroyed by rats. The fragments of it were not preserved. Lemuel Haverty, a son of said Michael H. Haverty, and other witnesses say that they saw the original, and that the paper produced is substantially a copy. The loss or destruction of the paper perhaps accounts for the failure of said J. M. Bennett to file it in obedience to said rule and attachment issued against him. Much testimony was taken tending to impeach, and also to support, Lemuel Haverty's evidence. It is difficult to say on which side the testimony preponderates. All of the evidence and circumstances bearing on the question seem to prove the contract as claimed by appellees. The circuit court has weighed the testimony, and no doubt reached the same conclusion. To say the least of it, such finding was not and is not plainly contrary to the weight of the evidence, and will not now be disturbed. *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. 352, and authorities there cited.

It also appears that Burton Despard was a lawyer, and we may infer that he understood his legal rights in the premises. A witness says that shortly before the Civil War Despard and Bennett were engaged together several days at the law office of Bennett in the town of Weston in making a list of the lands in which they were jointly interested. Witness' recollection was that the 438, 1,200, 1,500, 1,000, and 500 acre tracts were put on the list. Despard also joined with Bennett in certain deeds conveying portions of the land to purchasers. J. M. Bennett was a man prominent in affairs. He is shown to have been auditor of the state of Virginia before the War of the Rebellion. He was a lawyer, and visited and practiced in the courts of his section. He made claim publicly to the ownership of an undivided half interest in the lands in controversy. He had control thereof, and expended money thereon

in payment of taxes and otherwise. He appointed agents for Despard and himself, who sold parcels of the same, some of which sales are shown to have come to the actual knowledge of Despard; and the purchasers took possession of and acquired title to the lands bought by them under the contracts so made. It seems incredible that Despard was not fully cognizant of these transactions so vitally affecting his interests. He made no objection thereto. Herman on Estoppel and Res Judicata, vol. 2, § 1061, says: "Acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done. So, if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and it estops him." Again, at section 1063, he says: "When a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with property or incur expense under the belief that the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." Despard's devisees, at this late day, should not be permitted to enforce their claim of entire ownership of the land.

The pleadings in the suits above mentioned were prosecuted to collect the purchase money for integral parts of said tracts of land sold to various purchasers. The right of the plaintiff therein to recover was dependent in each suit upon the ownership in, and title of J. M. Bennett to, the lands. This was alleged positively and distinctly in each cause, and the decrees were predicated therein upon that fact, and upon proper proof of the indebtedness. It is nowhere denied that Despard's executor and devisees were parties to said suits. No steps, so far as known, were ever taken by them to reverse or set aside said decrees, or any of them. "Ignorantia juris neminem excusat." And so all men are presumed to take notice of proceedings in the courts of justice." Bennett on Lis Pendens, § 19. Other law writers say "that the proceedings in the courts of justice are notice

to the world." 2 Rand. 104. At section 19 of Bennett on Lis Pendens the following is noted: "After the bill is filed, and thus becomes a public record, and ample means are afforded for the public to become advised as to what property is involved in the litigation, there is much propriety in referring to the pending litigation as 'notice lis pendens' or 'notice of lis pendens.' It does not matter that few persons ordinarily acquire actual knowledge of the record of the suit, and thus of what property is involved in it. The opportunity is afforded, by use of diligence, of acquiring that knowledge; and a sound public policy will not thereafter excuse the purchaser of the property for not ascertaining the facts spread out upon the records."

Appellants cite a list of authorities to prove that the aforesaid decrees, if binding upon them for any purpose, are not adjudications of the title to the unsold portions of said land as between J. M. Bennett and Burton Despard, or as between the heirs and devisees of Bennett and the heirs and devisees of Despard. A discussion of this matter seems unnecessary here. All of the facts and circumstances in this cause, together with the conduct of the parties thereto, established the agreement between Despard and Bennett that Bennett was to have a joint equal ownership with Despard in the lands. The subsequent grants thereof by the commonwealth of Virginia to Despard alone did not divest Bennett of his interest therein. Despard, as to such interest, held the title as trustee for Bennett, and, in equity, a trust resulted in his favor for his proper proportion of the land. *Murry v. Sell*, 23 W. Va. 480; *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959.

The decree of the circuit court adjudicating the ownership of said lands is right.

We cannot see how appellants are prejudiced by the matter complained of by them in their second assignment of error. In the said suit against Stalnaker the balance of purchase money for the lands sold to him, due to Despard and Bennett, was ascertained, and decreed to the plaintiffs as their rights thereto were made to appear. This adjudication extended to no other purchase money. It is not shown that Despard, or his personal representative or devisees, has any specific lien upon this fund. Bennett's estate is not alleged to be financially unable to pay any balance which may be found due from it to appellants. There is no apparent reason why the Stalnaker purchase money should be brought into the matters referred to said commissioner for settlement. We find no error in this part of said decree.

For the foregoing reasons, the decree of the circuit court aforesaid must be affirmed.

BRANNON and DENT, JJ., absent.

(53 W. Va. 336)

**COLLINS & DAUGHERTY v. SHERWOOD et al.**(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)**RES JUDICATA.**

1. Where a decree of the court below grants the plaintiff the relief prayed for in his bill, and dismisses the answer of the defendant setting up new matter constituting a claim for affirmative relief, upon a full hearing upon all matters of law and fact in controversy between the parties, and, on appeal, that decree is reversed upon the ground that the defendant is entitled to the relief asked, and the plaintiff is not, clearly stated in the opinion, and the cause is remanded for further proceedings according to the principles announced in the opinion, the decision of the appellate court is *res judicata* of all issues passed upon and settled in the opinion.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County;  
M. H. Willis, Judge.

Bill by Collins & Daugherty against W. H. Sherwood and others. Decree for defendants, and plaintiffs appeal. Affirmed.

See 35 S. E. 840, 40 S. E. 603.

Davis & Son, for appellants. Merrick & Smith, for appellees.

**POFFENBARGER, J.** A third time this cause is here on appeal. On final hearing, July 3, 1900, upon the bill and exhibits, answer, general replication, order of reference, orders and decrees theretofore entered, commissioner's report, "proof and depositions taken and returned therewith," exceptions to the report, stipulations entered into and filed, amended answer in the nature of a cross-bill, exceptions thereto, and special reply thereto in writing, a decree was pronounced, granting the plaintiffs the relief prayed for in their bill, and dismissing the answer praying affirmative relief. From that decree an appeal was taken, and this court reversed it; holding expressly that the plaintiffs were not entitled to the relief asked for and granted to them, and that the defendant was entitled to the relief prayed for in his answer, and remanding the cause to the circuit court for further proceedings in accordance with the principles announced in the opinion, but not expressly decreeing as aforesaid. See *Collins & Daugherty v. Sherwood*, 50 W. Va. 133, 40 S. E. 603. When the cause went back to the circuit court such a decree was entered, upon all the papers and proceedings hereinbefore mentioned, overruling the exceptions of the complainants to the amended answer, sustaining defendant's exceptions to the commissioner's report, giving the tract of land in which the plaintiffs claimed an interest to the defendant in its entirety, and perpetuating the injunction against the plaintiffs. From this decree, *Collins & Daugherty* appeal, contending that the answer containing new matter constituting the claim for

affirmative relief should have been formally reinstated, and leave granted them to refile their special reply, or another one, and contest the whole case over again.

The decree of July 8, 1900, was a final decree on the merits, covering every issue of law and fact in the controversy, except the mere matter of the execution of a partition, to which the plaintiffs were held, by that decree, to be entitled. The appeal therefrom brought up all those issues, and they were fully and completely covered, disposed of, and settled in the opinion filed in the cause on that appeal. Plaintiffs had put in their pleadings and proofs, submitted their cause, and obtained a decree in their favor. Upon what principle of law or equity can it be said that the complainants have not had a hearing and adjudication of their cause on its merits? The argument is that the court, on July 3, 1900, only dismissed the cross-bill, as upon demurrer, for insufficiency. No such objection was made in the exceptions to it. They were grounded upon the contention that the former answer and the commissioner's report fully made out the defendant's case, rendering the amended answer unnecessary and useless, and that it was filed too late. Moreover, the court dismissed it, giving in its decree, as the reason therefor, that it was of the opinion "that the defendant W. H. Sherwood is not entitled to relief under his amended answer in the nature of a cross-bill," thereby expressly negating the contention that there was no action upon the merits, but only an adjudication upon the exceptions, even if they had been broader than they were.

Every issue of both law and fact in the case was passed upon and settled by the former decision of this court, as the finding, which was binding upon the court below in its further proceedings, clearly shows, and the decree pronounced upon the mandate of this court is in exact accord therewith, and, being so, it cannot be disturbed. All these matters are *res judicata*. This has been settled by several decisions of this court. See *Butler v. Thompson*, 52 W. Va. —, 43 S. E. 174; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644; *U. S. Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Board of Education v. Parsons*, 24 W. Va. 551; *Henry v. Davis*, 13 W. Va. 230.

Appellants have misconceived the nature and effect of the former decision of this court. In remanding the cause for further proceedings in accordance with the principles announced in the opinion, which fully covered and disposed of the cause on its merits, it was not expected or intended that there should be a relitigation of the matters so settled, but only that the court below should further proceed by entering a decree in accordance with the decision of this court, just as the case of *Butler v. Thompson* was remanded for the purpose of entry and execu-

tion of a formal decree of sale of the property in question.

For the reasons aforesaid, the decree complained of is to be affirmed.

(53 W. Va. 403)

**MOORE v. GAINER et al.**

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

**FRAUDULENT CONVEYANCE—EVIDENCE.**

1. When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of the bona fides of the transaction.

2. Point 3 of the syllabus in *Knight v. Nease et al.* (decided at the present term) 44 S. E. 414, applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by S. A. Moore against S. W. Gainer and others. Decree for defendants, and plaintiff appeals. Reversed.

W. T. George, for appellant. Harding & Harding, for appellees.

**MILLER, J.** On the 10th day of August, 1899, appellant, S. A. Moore, commenced his suit in equity in the circuit court of Randolph county against W. C. Gainer, S. W. Gainer, M. L. Gainer, J. N. B. Crim, and A. B. Coberly, and, at the September rules then next ensuing, filed his bill in the cause to set aside a certain deed, alleged to be fraudulent and void, executed by W. C. Gainer and wife to S. W. Gainer, bearing date on the 11th day of March, 1897, which conveyed to said S. W. Gainer 69 acres of land described therein. Said S. W. Gainer filed his demurrer to the bill, which was overruled. He then answered it, denying all of the material allegations thereof, to which answer the plaintiff replied generally. There was no appearance by any of the other defendants. Depositions were taken by both plaintiff and defendant S. W. Gainer, and filed in the cause. On the 4th day of May, 1901, the cause was heard upon the bill, answer of S. W. Gainer thereto, and general replication to the answer, bill taken for confessed as to all of the other defendants, and upon the depositions. Upon consideration thereof, the court dismissed the bill, and decreed that plaintiff should pay the costs of said suit. From this decree, Moore appeals, and assigns as error that the circuit court should not have refused him the relief prayed for, and should not have dismissed his bill.

It is alleged in the bill that on the 22d day of March, 1897, before one D. E. Coberly, a justice of said county, plaintiff recovered a judgment against said W. C. Gainer,

M. L. Gainer, and A. B. Coberly for \$254.53; that said judgment was for merchandise and cash furnished by plaintiff to said W. C. and M. L. Gainer during the years 1895, 1896, and 1897; that, at the time said credit was given by plaintiff, W. C. Gainer owned said 69 acres of land; that on the 11th day of March, 1897, said W. C. Gainer, with intent to hinder, delay, and defraud plaintiff in the collection of his said demand, fraudulently conveyed the whole of his said real estate to his uncle S. W. Gainer for a pretended consideration of \$650; that no part of said consideration mentioned in the deed was ever paid to said W. C. Gainer; and that said conveyance was a scheme on the part of W. C. Gainer and his uncle S. W. Gainer to cheat and defraud plaintiff out of his said demand. Plaintiff further alleges that, in addition to the above-mentioned judgment, said W. C. Gainer is indebted to him, as assignee of said J. N. B. Crim, upon certain notes then in judgment, amounting to about \$300. The answer of said S. W. Gainer denies all fraud or participation in any fraud, and all notice of fraudulent intent on the part of said W. C. Gainer in the execution or delivery to him of said deed, and avers that the said deed was made upon and for a valuable consideration, actually paid by him, in good faith, as set forth in said deed. The deed recites the consideration thereof to be all his (said S. W. Gainer's) right, title, and interest in one bond, of \$250, paid in stock by him to the Montrose Oil Company—\$200 to be paid in 12 months from that date, and \$200 to be paid on or before the 11th day of March, 1899, with interest on each of said last-mentioned sums from the date of the deed—and for which the grantee executed his two several promissory notes, payable to W. C. Gainer, as aforesaid, and to secure the payment of which a lien was reserved in the face of the deed on the land. The deed was prepared, and the acknowledgment thereof taken and certified by D. E. Coberly, justice, another nephew of S. W. Gainer, and cousin of W. C. Gainer. It was admitted to record on the 12th day of March, 1897. It is shown by the evidence that the two notes, shortly after their execution, and in the same month, were taken by W. C. Gainer to one C. C. Coberly, a son-in-law of S. W. Gainer, and cousin of W. C. Gainer, who lived some distance away, and sold and assigned to him for \$285 cash; but it is also shown by C. C. Coberly's evidence that he knew nothing personally about the sale of the land; that he had no knowledge or notice of W. C. Gainer's indebtedness, except that it was rumored that he was in debt; that he bought the notes at a discount of \$115, and paid W. C. Gainer \$285 therefor; and that he shaved or traded in paper to some extent. He also states that he was not requested by S. W. Gainer to buy the notes. After the assignment thereof, S. W. Gainer

¶1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 330, 801.

made a payment or payments to C. C. Coberly on one of the notes, and a proper credit was indorsed thereon. On the 4th day of October, 1899, S. W. Gainer made settlement with C. C. Coberly of the amount due on the notes, and then sold and conveyed to him, by deed of that date, the 69 acres of land for the consideration of \$500. This deed recites the payment of \$315 cash—\$85 to be paid October 4, 1900, and \$100 October 4, 1901, with interest on both of said sums from that date—for which sums said Coberly executed his two promissory notes to S. W. Gainer, and to secure the payment of which a lien was retained on the land on the face of said deed. The said \$315 cash payment was made up of \$50 or \$55 cash paid by Coberly to S. W. Gainer, the balance due on one of the \$200 notes, and the other one—principal and interest—in full. Said D. E. Coberly, justice, who was in the habit of preparing deeds in that neighborhood, also wrote the last-mentioned deed, and took and certified the acknowledgment of the signatures of S. W. Gainer and wife thereto. A notice of lis pendens had been duly filed on the 10th day of August, 1899, the day on which said suit was instituted.

As to said W. C. Gainer, it is shown that he was not only indebted to the plaintiff, and to said Crim, at the time of his conveyance of said land, in the amounts of said two judgments, respectively, but was also liable as surety for his brother M. L. Gainer. The amount of his last-mentioned liability is not definitely fixed, but was supposed to be about \$300. The land was worth, when conveyed by him to S. W. Gainer, about \$500. This was all the real estate owned by him. He also had two young horses, or, as a witness stated, one horse and one cow. Shortly before he conveyed the land to his uncle, he had offered to convey it to H. T. Lawson, another uncle; saying to Lawson at the time that he was on M. L. Gainer's notes "for a right smart of money"; that "the estate would not pay out, and that he was not afraid to trust Lawson on a sham; that he wanted Lawson to deed the land back to his [Gainer's] wife twelve months afterwards." Lawson, however, would have nothing to do with the matter. Gainer then offered to convey the land to C. J. Schoonover, another relative, making to him substantially the same statements which he had made to Lawson, but Schoonover also declined to take a deed. After his conveyance to said S. W. Gainer, he stated to or in the hearing of at least three persons that the said deed was a sham. There are other facts and circumstances disclosed by the record tending to prove fraud on the part of W. C. Gainer in this transaction. He did not testify as a witness in the cause. So far as W. C. Gainer is concerned, the evidence proves that he executed and delivered said deed to his uncle with intent to delay, hinder, and defraud the plaintiff and others

to whom he was liable, in the collection of their demands against him. However, it sufficiently appears that S. W. Gainer was and is a purchaser of the land for a valuable consideration; and unless he had notice of the said fraudulent intent of his grantor, W. C. Gainer, at the time of said conveyance, his title to the land is not affected thereby, and cannot be disturbed by this suit.

Plaintiff proves the kinship of all the parties to the transaction; that the deed was prepared by, and executed and acknowledged before, Justice D. E. Coberly, late in the evening of the 11th day of March, 1897; that it was taken to the clerk's office the next day by the grantee, and lodged for record therein; that all of the parties, except C. C. Coberly, lived in the same neighborhood; that plaintiff had mailed to the said justice, for suit and collection, on the 10th day of March, 1897, the note upon which said first-mentioned judgment was recovered, but that no action was commenced thereon until the 13th day of March, 1897. S. W. Gainer swears that he had no knowledge of said note at the time of the conveyance to him. It is proved that the trade about the land was made by W. C. and S. W. Gainer on the morning of the 11th of March; that W. C. Gainer soon thereafter transferred the notes of S. W. Gainer, given as part consideration for the land, to said C. C. Coberly; that said land does not join the lands of S. W. Gainer; that he expended no money or labor on the 69 acres while he held title to the same; and that he conveyed it to his son-in-law after this suit had been commenced.

At the time the justice, D. E. Coberly, prepared the deed, and took the acknowledgment of W. C. Gainer and wife thereto, it is not probable that he had received said notes for collection. He was a witness in the cause, and was not interrogated as to that matter. He was in the habit of preparing deeds for people who sought his services for that purpose. It would be a far-fetched inference that the justice then informed S. W. Gainer and W. C. Gainer that the note had been sent to him for collection. S. W. Gainer then owned two tracts of land, one containing 10 and the other 100 acres. He is shown to have been solvent and good for his debts. He agreed to give \$650 for the land. Two hundred and fifty dollars was in the stock of an oil company, which stock afterwards turned out to be worthless: but the \$400, being four-fifths of the value of the land, was collectible. It is further shown that before the conveyance W. C. Gainer had been talking to his uncle about selling the land, so that he could go to his father-in-law, who lived in another county. S. W. Gainer was solvent and amply able to pay the notes. In addition, they were secured by the lien reserved on the land for which they were given. The deed was placed on record at

the instance of the grantee, thus giving notice to any creditor of the grantor of the liability of the grantee. There was no concealment about any part of the transaction. S. W. Gainer, soon after he had obtained the deed, took possession of the land, except the dwelling house, which was reserved, as he says, by W. C. Gainer, until the following fall. He received the rents for the land for the year 1897. He also testifies most positively that he bought the land in good faith, without any notice of the indebtedness of the grantor, W. C. Gainer, or notice or knowledge of his fraud or intention of fraud.

In opposition to S. W. Gainer's testimony that he had neither knowledge of the indebtedness of W. C. Gainer, nor notice of his fraudulent intent, at the time of said conveyance, we have the equally positive evidence of J. N. B. Crim that prior to the 11th day of March, 1897, he had a conversation with Gainer about the two notes which he held, made by W. C. Gainer and others, one for \$175, and the other for \$100, both executed in 1896; that he also then had another note, for \$30, on the same parties; that he explained to Gainer these notes; that on the 20th day of April, 1897, Gainer gave (confessed) a judgment in favor of witness before W. G. Keys, a justice, for \$243.33, which judgment, by consent of S. W. Gainer, included said \$30 note. Witness further testifies that he talked to Gainer two or three times about these notes, and that Gainer assured him that he thought they were perfectly good. The plaintiff swears that S. W. Gainer had knowledge before the 11th day of March, 1897, of the said note which he held against W. C. Gainer and others, upon which his said judgment was recovered; that he had talked to S. W. Gainer about it, and asked him to become surety for the debt. S. W. Gainer admits that he had heard "rumors" about the indebtedness of his nephew. Gainer is thus contradicted on this material point by two witnesses. It seems that S. W. Gainer was not plethoric of purse at that time. He did not pay a cent in cash to the grantor on the land. He paid nothing for the stock in the oil company. He was to have it in consideration of the lease that he executed to the company, which never organized. C. C. Coberly says that at the time he got the Gainer notes he held other notes against his father-in-law for borrowed money, which he had held for three or four years. On the 4th day of October, 1899, at the time S. W. Gainer conveyed the land to Coberly, he owed \$315 of the purchase money therefor. By his agency, W. C. Gainer was enabled, for a time, at least, to put the land—which doubtless induced plaintiff and others to give credit to him—out of the reach of his creditors. The conveyance made W. C. Gainer insolvent, and left nothing for his creditors, while his uncle profited \$100 by the transaction. After he got the land, S. W. Gainer paid little or no attention to

it. He expended no money or labor thereon, and remarked, when asked about the rents, "That he guessed he hadn't much in it, anyway." He says that his nephew talked to him about buying the land prior to the deed, but no reason is given why the deal was not then closed. It seems strange that, on the morning after the note was sent to the justice for suit and collection, the terms of sale were so quickly agreed upon, and the deed so expeditiously executed, and conveyed by the grantee the next day, on horseback—21 miles—to the county seat to be recorded. Why was this seemingly undue haste? The uncle held title to the land up to October 4, 1899, and then conveyed it to his son-in-law for the consideration of \$500—in reality, \$100 more than he was to give for the land, because the \$250 stock cost him nothing and was worthless. The reason given by him for this conveyance to his son-in-law is that he had discovered that he was unable to attend to the land, and could not hire hands, and that he wanted to pay his debts. He was, indeed, a long time in making this discovery. His deposition shows that he was about 58 years old when he took the deed. No change in his then condition up to the time when he parted with the land is shown. No reason is given why W. C. Gainer was not sworn as a witness to corroborate his uncle's statements. He certainly knew all about the same transactions. Perhaps it was thought that little weight would be given to his testimony, if taken, because of the plight in which he had placed himself. In *Stauffer v. Kennedy et al.*, 47 W. Va. 714, 719, 35 S. E. 892, 894, the court says: "When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of the bona fides of the transaction." *Reynolds' Adm'rs v. Gawthrop's Heirs*, 37 W. Va. 3, 16 S. E. 364; *Burt v. Timmons*, 29 W. Va. 441, 452, 2 S. E. 780, 6 Am. St. Rep. 664; *Herzog v. Weller*, 24 W. Va. 199; *Bartlett v. Cleavenger*, 35 W. Va. 720, 14 S. E. 273. In *Ballard v. Chewning and others*, 49 W. Va. 508, 519, 39 S. E. 170, and in *Knight v. Nease et al.* (decided at the present term) 44 S. E. 414, it is held: "It is not always necessary that direct affirmative or positive proof of fraud be given. It may be, and usually is, proved by circumstantial evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud, it will be sufficient, although it does not lead to a conviction of absolute certainty. The fraud need not be proved beyond a reasonable doubt."

The evidence contained in the record, and the fair inferences deducible therefrom, lead us to the conclusion that S. W. Gainer did have knowledge of the intent of W. C. Gainer to delay, hinder, and defraud the plain-



tiff and other creditors at the time of said conveyance. We are of opinion that the said deed executed by W. C. Gainer and wife to S. W. Gainer, bearing date on the 11th day of March, 1897, should be canceled and set aside as to the plaintiff's said demands, and that said 69 acres of land therein described is liable therefor.

The circuit court therefore erred in dismissing the plaintiff's bill, and awarding costs against him. For the reasons stated, the decree of the circuit court aforesaid is reversed, and the cause remanded to that court for further proceedings to be had in said cause therein in accordance with the views herein expressed, and further according to the principles governing courts of equity.

(53 W. Va. 338)

VANCE v. RAVENSWOOD, S. & G. RY. CO.

(Supreme Court of Appeals of West Virginia. April 25, 1903.)

INTERLOCUTORY ORDER—FAILURE TO ENTER JUDGMENT—DEMURRER TO EVIDENCE—RAILROADS—ACCIDENT AT CROSSING.

1. An interlocutory order, omitted to be entered by neglect or inadvertence on the part of the clerk of a court, may be ordered by the court to be entered *nunc pro tunc*, by way of amendment, so as to make the record show what has actually transpired in the cause, upon clear and satisfactory evidence, consisting of uncontradicted affidavits, and papers filed, and orders entered in the cause.

2. A mere announcement by a judge in court of his opinion to sustain a demurrer to evidence, without an order or direction to the clerk to enter judgment accordingly, is not a sufficient rendition of judgment to warrant the entry of it as final judgment *nunc pro tunc*, when it further appears that absence of counsel was the reason for not ordering it to be entered at the time of the announcement.

3. By demurring to the evidence, the demurrant admits, in favor of the demurree, all inferences of fact that may be fairly deduced from the evidence.

4. V., having knowledge of the negligent practice of a railroad company in making "flying switches" over a street crossing, came to the crossing on a starlit but moonless night, just as an engine was approaching, and, after waiting for it to pass, stepped upon the side track on which the cars following the engine were, and was struck and injured by a box car, so following, without a light or person on it, and without any signal having been given. V. and his father, who was with him, testify that, after the passage of the engine and before proceeding, they looked down the track for cars, and saw none. As to the extent of the darkness, and whether lights in a passenger coach at the rear of the box cars could or ought to have been seen by them, the evidence is conflicting and uncertain. *Held* that, on demurrer to the evidence, judgment was properly rendered for the plaintiff.

(Syllabus by the Court.)

Error to Circuit Court, Roane County; Warren Miller, Judge.

Action by Joseph B. Vance against the Ravenswood, Spencer & Glenville Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Vandervort and J. P. Camden, for plaintiff in error. C. E. Hogg and J. G. Schilling, for defendant in error.

POFFENBARGER, J. The Ravenswood, Spencer & Glenville Railway Company complains of a judgment rendered against it by the circuit court of Roane county for \$525, in favor of Joseph B. Vance, in an action for personal injury inflicted upon him by the alleged negligence of the plaintiff in error; and one of the principal grounds of error is that the court entered a *nunc pro tunc* order.

The first order shows the overruling of the demurrer to the declaration; the second, the allowance of compensation to the stenographer; and the third, defendant's demurrer to the evidence, and plaintiff's joinder therein. They were made in April, and August, 1898. The next was made on the 19th day of April, 1901, as of the 29th day of August, 1898, upon the affidavits of the three attorneys for the plaintiff, showing that it should have been entered on said last-mentioned date, but had been inadvertently omitted by the clerk. That order sets forth the entry of the plea and joinder therein, the impaneling of the jury, demurrer to the evidence and joinder therein, and the conditional verdict. On the 27th day of August, 1901, the judgment herein complained of was rendered.

Between the date of the trial and the date of the entry of the *nunc pro tunc* order, Hon. Reese Blizzard, the judge before whom the trial was had, resigned, and was succeeded by Hon. Warren Miller, who entered said order and rendered the judgment. That there had been a trial, demurrer, and conditional verdict was not disputed by any counter affidavits upon the motion for the entry of the order. The affidavit filed was strongly corroborated by the former orders entered, the last one of which showed that there had been a demurrer to the evidence and a joinder therein, and concluded as follows: "And the court takes time to consider of its judgment on the demurrer to the evidence. By consent of the parties, the judgment of the court may be handed down and entered of record during the vacation, with privilege to either party to file bills of exception at any time before the last day of the next November term of this court."

As the record left no room for doubt that the interlocutory proceedings omitted from the record had taken place, the only inquiry is as to the power of the court, by amendment of the record, to make it speak the truth. At common law, the courts might amend their records so as to make them truthfully set forth what had occurred, while the proceeding was in fieri, but not after the term at which final judgment was rendered. This rule resulted in such great hardship that relief was given by early English statutes. Statute 1, c. 6, 14 Edw. III; statute 1, c. 4, 9 Edw. V; chapter 12, 8 Henry VI. See 17 Enc. Pl. & Pr. 919. The amendment com-

plained of here is not forbidden by even the common-law rule, for the reason that it was made before judgment. It was a mere interlocutory order. Whether, if final judgment had been entered, and the mistake had afterwards been discovered, the amendment could have been made so as to support a judgment already rendered, need not be decided. As, in that case, the amendment would be an alteration of the record after judgment, the rule might be different. In 17 Enc. Pl. & Pr. 920, it is said that the rule now very generally obtains that a court may amend its record as to clerical errors and misprisions as well after the term as during it, and, for this, decisions of a great many of the states are cited, including two in Virginia. *Commonwealth v. Winston*, 5 Rand. 546; *Marr's Adm'r v. Miller's Ex'r*, 1 Hen. & M. 204. That an interlocutory order may be entered nunc pro tunc has been decided by the Supreme Court of the United States in *Re Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865. After quoting from *Bishop on Crim. Proc.* § 1160, Mr. Justice Miller says: "An extensive list of authorities is cited in the footnote of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk had made no entry, the following cases directly affirm that proposition: *Galloway, Administrator, v. McKeithen*, 27 N. C. 12 [42 Am. Dec. 153]; *Hyde v. Curling*, 10 Mo. 374; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 3 McLean, 379 [Fed. Cas. No. 10,101]; *Bilansky v. The State of Minnesota*, 3 Minn. 427 [Gil. 313]." To this list may be added *Steenrod's Adm'r v. Railroad Co.*, 25 W. Va. 135; *Miller's Adm'r v. Cook's Adm'r*, 77 Va. 806; *Wright v. Strother*, 76 Va. 857; *Kendrick v. Whitney*, 28 Grat. 652; *Knefel v. People*, 187 Ill. 212, 58 N. E. 388, 79 Am. St. Rep. 217; *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172, where it is said: "But the court has authority to amend its records so as to make them conform to the actual facts and truth of the case, and may, in its discretion, receive and act upon any competent legal evidence;" *Davis v. Shaver*, 61 N. C. 18, 91 Am. Dec. 92; *Weed v. Weed*, 25 Conn. 337. The principal objection to the entry of this order seems to be that the date of the certificate of the stenographer to the evidence set forth in the demurrer is later than the date of the order, from which it is argued that the evidence in the case was not embraced in the demurrer to the evidence. The demurrer and joinder therein are formal and regular in all respects, and are made a part of the record, it being recited in an order entered August 30, 1898, that they were filed. The evidence is incorporated in them, and there is nothing to indicate that it is not the evidence adduced in the case but the late date of the stenographer's certificate. The record shows in-

ferentially that there was a stenographer sworn in the case, and the evidence incorporated in the demurrer is certified by the same person who was allowed compensation as stenographer, and the court, no doubt, had other evidence before it tending to show that the evidence inserted in the demurrer is the evidence given upon the trial, and its finding upon that matter cannot be overthrown because of the mere fact that the stenographer certified the evidence as of a later date. No authority is cited for the contention on this point, and it is not believed that there is any authority of that kind.

After said order was entered, the defendant moved the court to enter final judgment for it nunc pro tunc as of the August term, 1898, and the action of the court in overruling that motion and declining to make the entry is assigned as error. In support of this motion, the defendant presented the affidavit of the retired judge who had presided at the trial, setting forth in substance the proceedings, and stating that at said August term he had "rendered his opinion upon said demurrer to the evidence, and sustained said demurrer to the evidence," but "judgment was not entered in accordance with the opinion of the court so rendered, because counsel for the defendant were nonresidents of Roane county, and none of them were present to see that a proper order was prepared and to ask that the same be entered." In a valuable note appended to the report of *Ninde v. Clark*, 4 Am. St. Rep. 823, giving a long list of decided cases bearing upon the question, it is said: "There are two classes of cases in which it has been held proper to enter judgments and decrees nunc pro tunc. The first class embraces those cases in which the suitors have done all in their power to place the cause in a condition to be decided by the court, but in which, owing to the delay of the court, no final judgment has been entered. The second class embraces those cases in which judgments, though pronounced by the court, have, from accident or mistake of the officers of the court, never been entered on the records of the court." The cases falling within the first class mentioned nearly always arise from the death of one of the parties after submission of the cause and before judgment is actually rendered, and it becomes necessary to enter judgment nunc pro tunc in order to prevent the other party from being prejudiced by the delay of the court, and without fault on his part. So, in *Springfield v. Worcester*, 2 Cush. 52, while judgment was suspended to permit a hearing of reserved questions of law, the statute upon which the action was brought was repealed without a saving clause, and the court ordered judgment to be entered as of a day prior to the date of the repeal of the statute, as any judgment rendered subsequent to the repeal would have been subject to reversal. From the nature and purpose of this rule, allowing judgments nunc pro tunc of the

first class, it is manifest that, if no judgment was rendered at the August term, 1898, no sufficient ground existed for entering it as of that date. The second class of cases includes those in which formal judgment has been pronounced by the court, but not entered in the record by reason of some accident or mistake, or through the neglect, omission, or misprision of the clerk. The court which has ordered a judgment which the clerk has failed or neglected to enter in the record has power, even after the term at which it was rendered has passed, to order the judgment so rendered to be entered *nunc pro tunc*, provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it. The affidavit offered in support of the motion clearly shows on its face that the omission of the entry of the judgment which the judge says he rendered was not the result of negligence, mistake, or misprision of the clerk. He says that judgment was not entered in accordance with opinion because counsel for the defendant were nonresidents, and none of them were present to see that a proper order was prepared and to ask that the same be entered. The clerk was not ordered to enter any judgment, hence it cannot be said that any judgment was rendered, even if the court had announced his opinion that the demurrer should be sustained and his intention to render judgment. Whether, under conditions bringing a case within the rules above referred to, under which a great many of the courts enter judgment *nunc pro tunc*, this court would do so, and whether, if it did so, it would adopt those rules to the extent to which such judgments have been entered by other courts, cannot be decided here; but, even if those rules were adopted to their fullest extent, they did not warrant the entry of such judgment under the conditions existing at the time the court overruled defendant's motion therefor.

Next, it is insisted that the court should not have rendered judgment for plaintiff, after overruling the motion for judgment for the defendant, holding that the plaintiff was guilty of contributory negligence. The facts disclosed by the evidence are substantially as follows: The town of Spencer is the terminus of said railroad, which is a short branch road running from the town of Ravenswood. On it but few trains are run, and the trains carrying passengers usually consist of some freight cars and one passenger coach at the rear of the freight cars. At Spencer, in front of the station, there are three tracks, the main track running between two side tracks. It was the practice of the railroad employes, when coming into Spencer with such mixed train, to run down to the station, and, after letting the passengers off, run back on the track some 300 yards or more, and then, by means of making what is called a "flying switch," shift the cars

onto the said track next to the station, having first given them such momentum as would carry them to the station, while the engine kept the main track. This was always, or at least frequently, done immediately after the train came in. The plaintiff resided close enough to this crossing to enable him to see how this was done, and he knew that it was frequently done. He testified that he had seen it done a number of times; that he could sit at his house and see the engine cut the cars loose, and the engine go up the main track and the cars up the side track; that he could not say how often he had seen that done; and that "lots of times he did not notice, and so did not see it very much, but that as a general rule they put the cars in in that way." Near the station the three tracks so used crossed a public street, extensively used by the citizens. This street led from the main town of Spencer, across the railroad and a creek, to what is called East Spencer. On the 27th day of November, 1897, a few minutes after 8 o'clock p. m., the plaintiff started by this street to go from Spencer to East Spencer, where he lived. The train had just come in, and, as usual, had backed down for the purpose of shunting the cars on the side track as aforesaid. When plaintiff approached the railroad he stopped until the engine passed, and then stepped onto the side track in front of the approaching cars. As he did so, somebody standing at the station called to him, and he endeavored to get off of the track, but was unable to do so in time to avoid injury. The car struck him on the right shoulder, but the blow did not break any bones, although it is alleged, and there is evidence tending to prove, that his shoulder is permanently injured. It was dark, but a starlight night. All the witnesses say there was no moonlight, but it was not so dark but that persons could distinguish one another. The loose train of cars so shifted consisted of a passenger coach and two box cars, the box cars in front of the passenger coach. There was no light on either of the box cars, but the coach was lighted, and a brakeman stood on the platform of the passenger coach next to the second box car. Plaintiff testifies that he did not see the cars approaching him, not suspect their coming, and that, after waiting for the engine to pass, he started across, without any thought of danger.

It is very well settled that the practice of making flying switches is deemed by the courts as dangerous, and is negligence on the part of the railroad companies, especially when it is done at public crossings, and without any signals having been given. "The courts have held, with practical unanimity, and often with great emphasis, that the practice called making the 'running' or 'flying' switch, which consists of 'kicking' or 'shunting' cars forward, in breaking or making up trains, by moving them forward at a rapid speed, detached from the engine or from a

portion of the train, and then, by checking or increasing the speed of the engine, or of such portion of the train, allowing them to fly forward over public crossings without the usual warning signals by bell or whistle, or any means of giving such signals, and without any other signals than may be afforded by a brakeman standing on such 'running' or 'flying' cars, and sometimes even when such brakeman is not standing on the front car, or is on some other car, even the rear car—is negligence. Other courts have characterized it as gross negligence; and one court has characterized it as negligence of so gross a character as to overcome the defense of contributory negligence, where a boy was run over in this way while picking up pebbles from the street. The least that can be said in favor of the practice is that it presents evidence of negligence to be submitted to a jury." *Thomp. Neg.* § 1695. See, also, sections 1572, 1696, and 1697. The following cases, as well as many others which might be cited, fully sustain this proposition: *Nuzum v. Railway Co.*, 30 W. Va. 228, 4 S. E. 242; *Railroad Co. v. Dies* (Tenn. Sup.) 41 S. W. 860; *Carlson v. Lynn & Boston R. Co.* (Mass.) 52 N. E. 520; *Drain v. Railroad Co.*, 86 Mo. 574; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Phillips v. M. & N. R. Co.*, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364; *Baker v. Kansas City, etc., Co.*, 147 Mo. 140, 48 S. W. 838. In such cases, however, the plaintiff may be barred from recovery by contributory negligence. "But while the contributory negligence of the traveler will unquestionably be a defense in these, as in other cases, yet the solution of the question what is contributory negligence is undoubtedly modified by the fact of the gross negligence or misconduct of the railway company in thrusting detached cars over the crossing without warning, after the passage of the main portion of the train has tempted the traveler into the belief that the danger is over. While, as already seen, a traveler, on approaching a railway crossing, is bound to keep a sharp lookout for approaching engines or trains, yet he is not bound to anticipate that the railway company will commit an act of negligence so gross as to make a 'flying switch' across a public highway; and, in general, it is not negligence not to anticipate that another party will be negligent." *Thomp. Neg.* § 1697.

It is urged here, however, that, as the plaintiff has admitted that he knew it was the practice of the employes of the defendant company to make these flying switches at that point on the coming in of the train, he was bound to take notice of it, and that the passing of the engine was enough to suggest to him that this performance was then in process of execution. So the ques-

tion is: Was it contributory negligence on the part of the plaintiff not to have remembered, and guarded against, the known negligent practice of the defendant company? As to the legal effect to be given to this knowledge on the part of the plaintiff, no authority has been cited on either side bearing directly upon the point. A somewhat similar case is *Woodard v. Railroad Co.*, 106 N. Y. 369, 13 N. E. 424, in which the person killed by a car running loose on a side track, as these cars were running, had worked in a coal yard near the side track, and knew that cars were usually "kicked" onto it, and it was held that, as he could have seen the approaching car before he stepped on the track, and knew that the track was so used, he undertook to cross in front of the car after having seen it, or did not look when it was his duty to do so, and was therefore chargeable with contributory negligence, and that it was error to submit the question to the jury. Three of the seven judges, however, including the chief justice, dissented. But the case was unlike this in the fact that the injury occurred in the middle of a bright, clear day, while here it occurred in the nighttime. Both the plaintiff and his father, who was with him, and just a step or two behind him when he went upon the track, and who gave the alarm which caused him to wheel around in an effort to escape, say they looked down the track to see if there were any cars coming, and did not see any, before the plaintiff went upon the track. As already stated, the moon was not shining, and the testimony is conflicting as to the degree of darkness. In order to hold, as matter of law, that the plaintiff was guilty of contributory negligence, the court would be bound to say, as in the New York case, that the plaintiff either did see the cars coming, and took upon himself the risk of danger in attempting to cross in front of them, or that he could have seen or heard them coming if he had looked and listened. Whether he could have either seen or heard them coming depends upon the extent of the darkness of the night and the amount of noise made by the engine. These are purely questions of fact, and as to them a reasonable inference may be drawn either way from the evidence. Under such conditions it cannot be held that there was contributory negligence on the part of the plaintiff. To this it may be objected that, as the plaintiff knew of the negligent practice of the defendant railroad company, he was bound to wait a reasonable time for the passage of loose cars which he might reasonably have supposed were following the engine. That is not tenable, for the reason that it does not appear that he had knowledge of the further negligence of the railroad company in making these flying switches in the nighttime without any light on the front of the loose cars, or without a brakeman or other person standing on the front end of the car to give warning to pedestrians of their

danger. It is true the coach on the rear of the box cars was lighted, but there is nothing to show that the plaintiff could have seen the lights on the coach. Whether he did see them, or ought to have seen them, is also a question for the jury. As there is room for a reasonable inference either way, the demurrant has given plaintiff the benefit of the doubt.

By demurring to the evidence, the demurrant admits, in favor of the demurree, all inferences of fact that may be fairly deduced from the evidence. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839; *Talbott v. Railroad Co.*, 42 W. Va. 561, 26 S. E. 311; *Garrett v. Ramsey*, 28 W. Va. 345. "The evidence upon a demurrer to the evidence should be interpreted most benignly in favor of the demurree, so that he may have all the benefit which might have resulted from the decision of the case by a jury, the proper forum from which the decision has been withdrawn by the demurrant." *Garrett v. Ramsey* (Syl., point 3), approved in *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

The judgment being clearly right, it must be affirmed.

(53 W. Va. 276)

# KIRKPATRICK v. BOARD OF CANVASSERS OF FAYETTE COUNTY.

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

## ELECTIONS — BALLOTS — INDORSEMENT BY POLL CLERK—MANDATORY PROVISION—EFFECT OF VIOLATION—CONSTITUTIONAL LAW.

1. The clause in section 36 of chapter 3 of the Code of 1899, requiring each poll clerk to "write his name" on the back of each election ballot sheet, before it is delivered to the voter, and the clause in section 66 of said chapter, declaring that "any ballot which is not indorsed with the names of the poll clerks, as provided in this chapter, shall be void and shall not be counted," are mandatory, and ballots not so indorsed must be rejected in ascertaining the result.

2. The purpose of said clauses is to secure identification of the ballots voted, so as to distinguish them from all unvoted official ballots, as well as from all spurious ballots, in the interest of the purity of elections and the preservation of the secrecy of the ballot. Hence the words, "shall write his name," mean that the name of each poll clerk shall be placed on the back of each ballot voted, in his own handwriting, and ballots on which the names of both poll clerks are written by one of them, or by some other person, are void, and cannot be counted.

3. Such requirements, when mandatory, are basic and fundamental in their nature, and the declared consequences of violations of them must follow, whether such violations result from mere ignorance or inadvertence, or actual fraud.

4. The rule that departures from, or violations of, merely directory statutes, regulating elections, by election officers, will not invalidate votes or elections, in the absence of such actual fraud as clearly vitiates the votes or the election, does not apply in the case of violations of statutory provisions requiring specific things to be done, and declaring that noncom-

pliance with the requirements shall make the ballot void.

5. The clauses of sections 36 and 66 of chapter 3 of the Code of 1899, requiring identification of the ballots cast, by the signatures of the poll clerks, being reasonable regulations, designed to prevent fraud, are constitutional and valid, although they necessitate the rejection of a very limited number of ballots honestly voted.

McWhorter, P., and Brannon, J., dissenting.  
(Syllabus by the Court.)

Petition by H. L. Kirkpatrick for writ of mandamus to the board of canvassers of Fayette county. Writ granted.

Mollohan, McClintic & Mathews, for petitioner. C. W. Dillon, for respondents.

POFFENBARGER, J. H. L. Kirkpatrick applies for a peremptory writ of mandamus compelling the board of canvassers of Fayette county to reject certain ballots cast at certain precincts of said county in the election held in November, 1902. He and W. E. Deegans were competitors in said election for the office of commissioner of the county court of said county, and on the face of the returns Deegans had 3,370 votes and Kirkpatrick 3,332. A recount was had upon the demand of Kirkpatrick, which resulted in giving him 3,292 votes and Deegans 3,352 votes, a majority of 60 for Deegans. At Precinct No. 7 of Fayetteville district, known as "Paint Creek Precinct," 123 ballots were deposited, on which there were found to be 95 votes for Deegans and 17 for Kirkpatrick. At Precinct No. 6 in Quinimont district, known as "Quinimont Precinct," 131 ballots were deposited, on which there were found 57 for Deegans and 72 for Kirkpatrick. The objection to the ballots deposited at Paint Creek precinct is that each of the poll clerks did not write his name on the back of each of the ballots, as the law required him to do. One of the clerks, James Humphreys, placed his own name and that of J. R. Ford, the other poll clerk, on 90 of the ballots, and Ford wrote his own name and that of Humphreys on the remaining 33 ballots. At Quinimont precinct, one of the election commissioners wrote the names of both clerks on 68 of the ballots cast there, and there is some doubt as to who signed the names on 12 more of those ballots. Kirkpatrick contends that all the ballots cast at Paint Creek precinct, and those improperly signed at Quinimont precinct, are illegal, and must be rejected.

Before filing the return to the mandamus nisi, objection was made by the respondents that the plaintiff was precluded by rule 13 of this court from making his application here, because he did not show that it had been first made to the circuit court and the writ refused by that court; wherefore they moved to dismiss. That rule requires application to be first made to the circuit court, "unless there are special reasons" for making the application to this court without having first applied to the circuit court. Nothing stands in the

\* 5. See Elections, vol. 13, Cent. Dig. § 149.

way of this application except a mere rule of practice which this court, in the exercise of its discretion, has made, and that rule contains an express saving of the right to make the application to this court in the first instance when there are special reasons for so doing. What is a sufficient reason under this rule is left to the determination of this court. The speedy ascertainment and declaration of the result of elections has been declared by the Legislature to be a part of our state policy. Section 89 of chapter 3 of the Code says: "A mandamus shall lie from the Supreme Court of Appeals or any one of the judges thereof in vacation, returnable before said court to compel any officer herein to do and perform legally any duty herein required of him." This statute is clearly intended to hasten the ascertainment and declaration of the results of elections, as well as the performance of other duties by election officers. It has been so construed and applied. *Morris v. Board of Canvassers of City of Charleston*, 49 W. Va. 251, 38 S. E. 500; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. See, also, *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, and *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296. The Legislature has clearly manifested an intention to put mandamus against election officers upon a ground exceptional and higher than that upon which it stands in any other case. That is a sufficient reason for allowing the application to be made in this court in the first instance, notwithstanding the general rule against such applications. As a further objection to the same end, it is shown in the return that this application was first made to the circuit court and not refused, but that the plaintiff dismissed the same in that court without prejudice, and then made a new application in this court. As he had the right to come to the court of last resort in the first instance, he is not deemed to have lost that right by having first applied to the circuit court, unless the dismissal entered in the circuit court operates as a bar to any further proceedings. The application was dismissed over the objection of the respondents, and it was expressly done without prejudice to the right of petitioner to ask that or any other court "for another writ of mandamus, or to institute any other proceeding in relation to the relief sought for therein" as the plaintiff might be advised. In *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806, a dismissal of an action before a justice of the peace, after a hearing upon the evidence and argument of counsel, was held to be a final adjudication of the rights of the parties in respect to the cause of action, notwithstanding the entry made by the justice that it was "without prejudice to a new suit." Said case is not relied upon here, nor is it insisted that the order of dismissal is a bar to this proceeding. However, it is well to ascertain whether it does so operate. "A termination of the suit without a consideration of the merits does not affect the cause of action sued upon, nor the

legal rights of the parties, except to raise a liability for costs. \* \* \* The judgment or decree of dismissal is not *res adjudicata*, and constitutes no bar to a new proceeding for the same cause of action between the same parties." 6 Enc. Pl. & Pr. 986, 987. A dismissal upon the merits operates as a bar, unless the decree expressly states that it is without prejudice. *Id.* 991, 994. "It is likewise the right of a plaintiff in actions at law to take or suffer a voluntary nonsuit where the application is seasonably made, or discontinue his cause, at his option, either at law or in equity, where a discontinuance is appropriate." *Id.* 834. When a plaintiff acts seasonably, he is entitled to control the disposition of his cause upon payment of costs (*Id.* 833), subject to the qualification that he must have leave of the court to dismiss (*Id.* 868). Leave may be withheld or granted, in the sound discretion of the court. *Id.* 870. Under these general principles, the dismissal in this instance cannot be a bar. It is expressly made without prejudice, with leave of the court, before a hearing or submission upon the merits, and before a return to the mandamus nisi had been filed.

The two provisions of the statute to be construed in passing upon the validity of the ballots in question are sections 36 and 66 of chapter 3 of the Code. Section 36 is found under the subheading, "Preparation and Distribution of Ballots," and the part thereof involved here reads as follows: "On the back of each sheet of paper on which the ballots are printed as aforesaid, and as near the center thereof as may be, shall be printed the words, 'Poll Clerks,' and under them, each poll clerk shall write his name before the ballot is delivered to the voter." Section 66 is found under the subheading, "Ascertaining the Result at the Several Election Precincts," and contains the following clause: "Any ballot which is not endorsed with the names of the poll clerks, as provided in this chapter, shall be void and shall not be counted."

It is admitted by the respondents that these provisions of the statute are mandatory. Although in *Snodgrass v. County Court*, 44 W. Va. 56, 29 S. E. 1035, this court equally divided upon the question whether ballots not signed by each of the poll clerks in his own handwriting are valid, both of the opinions filed assert that the statute is mandatory. Moreover, the two opinions agree that the signatures of both clerks must appear upon the ballot. But in what may be called the affirming opinion it was held that, although the name of one of the clerks was written by the other on the ballot, so that both names were in the same handwriting, the name of the one who did not actually write his own name was nevertheless his signature within the meaning of the statute, and amounted to a substantial compliance with the statute, although it is mandatory. This is the contention of the respondents in this case.

The obvious purpose of the Legislature in

requiring the signatures of the clerks is the identification of the ballot as an official ballot sheet, as a safeguard against the substitution of fraudulent ballots. Such substitution might be made in either of two ways. Ballots might be prepared outside of the election room, ready for deposit in the ballot box, and exactly in the form of the official ballots used on the inside, and, if it were understood between the clerks that one of them should sign the names of both, such substitution of ballots, prepared and signed before election day, could be easily made. Another way would be to substitute for the ballots actually voted, after the voting is all done and the result at the precinct ascertained, but before the recount provided for by the statute, fraudulent ballots, in exactly the same form, and bearing exactly the same names in the same handwriting, but prepared at some time and place other than on election day and in the election room. All the provisions of the statute relating to the preparation and distribution of ballots, the manner of conducting the election, and the mode of voting, have for one of their objects the absolute destruction and obliteration of that part of the old election system which permitted ballots to be prepared, for deposit, at any place other than in the election room. The act of 1891 provides for an official ballot, prescribing the kind of paper on which it shall be printed, its form, method of preparation, the persons by whom it shall be prepared, its custody and distribution, and all the necessary steps to be taken by both the voter and the officers of the election for its deposit in the ballot box. Among other things, it is provided that such of these ballots as go into the box shall be distinguished from all other ballots, whether official, unvoted ballots or not, by means of the signatures of the two clerks; and upon all officers charged with the execution of these provisions, and all other persons violating them in material respects, the law denounces heavy penalties, making a great many of the forbidden acts felonies, punishable by confinement in the penitentiary. All these elaborate provisions, minutely prescribing the duties of election officers and citizens, have for their object the suppression of corruption, fraud, and intimidation in elections. It is well known that at the time the act was passed these evils were general, not only in this state, but throughout the country, and similar laws were passed in a great many of the states. Of another provision of the statute, relating to the preparation of the ballot, Brannon, J., said, in *Morris v. Canvassers*, 49 W. Va. 255, 38 S. E. 502: "It was intended as, and it is, a valuable reform made to cure ills revealed by time in the most important matter connected with government."

It is no answer to the supposed methods of substitution to say that the two clerks, by corrupt agreement, may accomplish, or

promote the accomplishment of, the same thing in the same way. The Legislature intended that these two clerks, representing different political parties, should by their signatures identify every ballot deposited, and it thereby provided as effectually as possible against such substitution. It did not provide against a corrupt agreement between the clerks, further than to prescribe a mode of selecting them, their qualifications, and their method of transacting the business, and by denouncing upon them the penalties prescribed for bribery and corruption in officers generally, if such an agreement falls within that class of crimes. Justifiably or not, the Legislature proceeded upon the assumption that these are sufficient safeguards against such corrupt agreement. The fraud at which this provision is aimed is possible without such agreement and collusion, if one clerk may sign the names of both. If that may be done in one case, it may be done in all. Upon one pretext or another, a designing and corrupt clerk may obtain the privilege of writing the names of both clerks on all or a part of the ballots, through the ignorance or inadvertence of the other clerk, and without any wrongful purpose or design on his part, and so the fraud may be accomplished as effectually as if there had been fraud and collusion on the part of both clerks. Then there is another reason for requiring the signatures of both clerks in their own handwriting. Any attempted forgery of these signatures in making a substitution of ballots would necessarily be more difficult. The risk of detection in the forgery of two names is manifestly greater than in one. Still another reason exists. If an election clerk is permitted to delegate the writing of his name on the ballot to the other clerk, there is no reason why he should not be permitted to allow any other person to write it for him. In case of his delegating it to a number of persons on the same day at his precinct, the ballots lose the means of identification almost as completely as if no signatures were required upon them at all. It would become necessary to call in possibly a dozen men from that precinct to ascertain whether the ballots produced on a recount or in a contest are genuine, and even then identification might be impossible. In this case there is a doubt, or at least an alleged doubt, as to whether one of the clerks signed his own name on 12 of the ballots, or whether one of the commissioners signed his name on them. Suppose at some precinct that the signatures appeared on the ballots in a dozen different handwritings. Would it not be next to impossible to detect substituted ballots among them? There would be the uncertainty as to how many people put on signatures, and as to the identity of the persons who did put them on. There is still another reason. These differences of handwriting could be made the means of destroy-



ing the secrecy of the ballot. The statute, as well as the Constitution, holds the secrecy of the ballot sacred. Shall clerks be permitted, by varying the signatures on the backs of the ballots, to ascertain, or make it possible to ascertain, how people vote? The allowance of the omission here complained of would make it possible to do so. It would be impossible to say just how many abuses and forms of fraud might grow out of this practice. The Legislature must have regarded it as a most vital provision, else they would not have made it mandatory, and declared that its violation should make the ballot void.

In the affirming opinion in *Snodgrass v. County Court*, 44 W. Va. 56, 29 S. E. 1035, this question is dealt with upon the assumption that the signature required on the back of an election ballot stands upon the same footing as the signature to a deed, contract, or other writing, where the interests of individuals only are affected, and fails to distinctly and positively recognize that it is an instance in which the signature only affects the public primarily, and not the individual, and in which that signature is intended to identify and make certain the genuineness of the paper upon which it is written. In the cases of private contracts, it is undoubtedly true that a person may have his name written by another in his presence and thereby bind himself. In those cases, however, the act of the party, evidenced by his signature, is the material and important thing, and the signature is intended only as a memorial of the act. Here the great office of the signature is identification of the paper. A signature is said to consist of two parts, the act of writing the name, and the intention of thereby finally authenticating the instrument. 2 Greenl. Ev. 674. This, however, relates to the signature of an individual to papers of a private nature, and, when its sufficiency is put to the test, he is estopped from denying that it is his signature by proof of the fact that he directed it to be written for him, and that it was done in his presence. From this proof the act and intent on his part are sufficiently made out. Signatures are required on the backs of ballots, not for the purpose of binding in any way the individual who is required to sign his name on it, but for the sole purpose of distinguishing the ballots which have been voted from all other ballots of the same kind which have not been voted, to the end that, by this simple and reasonable regulation of the exercise of the elective franchise, the door may be partially or completely closed against fraud and intimidation. It is in the interest of the public and the purity of elections that these ballots are required to be so identified, and not for the purpose of subserving individual ends. It must be manifest to every reasonable mind that, if the handwriting of the clerk be eliminated from this requirement, the barrier against fraud

which the Legislature has set up in this statute is, in every practical sense, thrown down, and that there is far less certainty in the means of identification so provided.

There can be no doubt about the legislative purpose in prescribing this requirement. In Minnesota the statute requires the initials of two of the judges of election to be placed on the backs of the ballots. In *State v. Gay*, 59 Minn. 6, 19, 60 N. W. 676, 50 Am. St. Rep. 389, Collins, J., said of it: "We readily agree with counsel in the assertion that it was the purpose of the Legislature, when enacting this law, to purge our methods of conducting elections of some of the evils connected therewith, and to promote the purity of the ballot." The Indiana statute requires the election clerks to indorse their initials on the back of the ballot. Speaking of it, in *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 80 Am. St. Rep. 254, Coffey, J., said: "The immediate purpose of the provisions of section 34 is to prevent the counting of fraudulent votes by requiring the poll clerks to indorse their initials upon the official ballots, to the end that they may be identified when taken from the ballot box." As has been shown, the necessity for identification is by no means limited to the time when the ballot is taken from the ballot box. The opportunity for fraudulent substitution is far greater in that period intervening between the count of the vote at the election precinct and the recount which it is possible to have several days afterwards, during which the ballots are lying, in many instances, in insecure county court clerks' offices, and within the easy reach of the evil-minded. Hence the view taken by the Indiana judge stops far short of the full purpose of the statute, although he clearly states the principle upon which it is based. "In jurisdictions where the law requires the use of official ballots, the statutes often provide that on the back of such ballots shall be printed or stamped certain words indicative of their official character; and, to prevent the counting of fraudulent votes, such statutes sometimes require certain election officials to indorse their names or initials upon the official ballot." 10 Am. & Eng. Ency. Law (2d Ed.) 714.

It is clear that, in requiring the names of the clerks to be written on the backs of the ballots in their own handwriting, the Legislature has adopted a better safeguard against the substitution of ballots than would have been made had the requirement been merely that their names appear on the ballots. That this is what was intended by the Legislature is equally clear, for the statute says that "each poll clerk shall write his name" on the back of the ballots. Then it says that "any ballot which is not endorsed with the names of the poll clerks, as provided in this chapter, shall be void and shall not be counted." How could the Legislature have made its purpose more manifest,



or put this requirement in more certain terms? It might have said the names of the poll clerks shall be written on the backs of the ballots in their own handwriting, but do not the words, "shall write his name," mean exactly the same thing? If the language were, "the names of the poll clerks shall be indorsed or shall be placed on the back of the ballot," the construction contended for by the respondents might be accepted, but how can it be reasonably said that this statute does not mean what it actually says, namely, that each poll clerk shall write his name on the back of the ballot? In construing this language, it is necessary to keep in mind the purpose which the Legislature had in inserting that clause in the statute. *Daniel v. Simms*, 49 W. Va. 554, 560, 39 S. E. 690, point 5 of the syllabus. The purpose being so absolutely beyond question, it would be unwarranted by any rule of construction to so construe this language as to defeat, in whole or in part, the very object intended to be accomplished by it. Keeping in mind this object, it is equally apparent that the signing of both names by one of the clerks is not a substantial compliance with the requirement.

But it is insisted that the ballot will not be rendered invalid by a mistake or failure of duty on the part of the election officer when the voter has done all that is required of him. It is true that, where there is any room for a construction that will sustain the legality of a vote, the court will apply it, especially when the objection is not based upon a failure of duty on the part of the voter. But the authorities do not bear out the assertion that the court will sustain an election or uphold the legality of votes when mandatory provisions of the statute have been violated. In this connection *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557, is relied upon. In that case the requirement that poll clerks be of opposite politics was ignored, and the election commissioners, without authority, appointed two additional clerks. These were irregularities, departures from the statutory provisions, but the statute did not declare that in case of such irregularity the election should be void, or that the ballots cast under such conditions should be void, or should not be counted. There was room there for construction in the effort of the court to uphold an honest vote, where there was no suspicion of actual fraud on the part of the election officers. The same principle has been applied in many other similar cases. Here, however, we have a statute mandatorily requiring a certain thing to be done, and declaring that if the requirement is not complied with the ballot shall be "void and shall not be counted." No case has been found, nor is it believed that any exist, in which the court has held that disobedience to such a requirement does not invalidate the ballot, when the statute itself is held to be constitutional. Speaking of

statutes prescribing the form and size of ballots and the kind of paper upon which they are to be printed, etc., 10 Am. & Eng. Ency. Law. (2d Ed.) at page 726, says: "These statutes, being designed to preserve the secrecy of the ballot and to prevent fraud, intimidation, and bribery, will generally be considered mandatory; and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted." In *State v. Sadler*, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 123, 83 Am. St. Rep. 573, ballots were rejected for the reason that, although official, two kinds had been printed and used at the precinct, under a misconception of the law on the question of whether or not a candidate had resigned. There the fault was that of the public officers, and not of the voters. There were about 55 of such ballots. In reference to these ballots the court said: "Not only is uniformity in paper required, but uniformity in printing is regarded as essential to secure the secrecy of the ballot, through which fraud and corruption are to be prevented." *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585, holds that "statutes requiring that ballots, on account of want of conformity to any particular of the law, shall not be counted, are mandatory." It further holds: "If a ballot is numbered and recorded on the election pollbook without any name being written opposite thereto to designate the person who voted the ballot, parol evidence is not admissible to identify, nor to supply the name of, the voter." The omission of the name was an act of the clerk, with which the voter had nothing whatever to do, and the Supreme Court held that the vote had been improperly counted. In *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491, it was held that: "When the election law itself declares a specified irregularity in an election to be fatal, courts will follow that command, irrespective of their views of the importance of the requirement; but, in the absence of such mandatory provision, an irregularity not so vital as to prevent a free and full expression of the popular will, will be considered as immaterial, and will not vitiate the whole return." In *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495, ballots were rejected because only one judge of the election had signed his name on the back of them, when the statute required the signatures of two of the judges, and provided that unless they were so signed they should not be counted. The same was held in *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313.

Further authority to the same effect is found in *McCrary on Elections* (4th Ed.). At section 225, he admits that mere irregularity on the part of election officers, or their omission to observe some merely directory provisions of the law, will not vitiate the poll, but in section 226 he says, after referring to a case (*West v. Ross*) in 53 Mo., at page 350,

in which the statute requiring the ballots to be numbered according to the numbers on the pollbooks was held to be mandatory: "Although this doctrine may sometimes result in very great hardship and injustice, by depriving the voters of their rights by reason of the negligence or misconduct of the officers of election, it is nevertheless difficult to see how any different construction could have been placed upon such a statute. Statutes which simply direct the judges of election to number the ballots, without declaring what consequences shall follow if this be not done, may well be held directory only; but, where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction. Such statutes are intended to prevent fraudulent voting, and, if the Legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail." *Major v. Barker* (Ky.) 35 S. W. 543; *Slaymaker v. Phillips* (Wyo.) 42 Pac. 1049, 47 L. R. A. 842; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. 232.

In section 227, he quotes the following from *Gilleland v. Schuyler*, 9 Kan. 569: "Questions affecting the purity of elections are in this country of vital importance. Upon them hangs the experiment of self-government. The problem is to secure, first, to the voter a free, untrammelled vote; and, secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. But these rules are only means. The end is the freedom and purity of the election. To hold these rules all mandatory and essential to a valid election is to subordinate substance to form, the end to the means. Yet, on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years have found conducive to the purity of the ballot box. Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials, should not be permitted to disfranchise a district. Yet rules and uniformity of procedure are as essential to procure truth and exactness in elections as in anything else. Irregularities invite and conceal fraud." This is the language of *Brewer, J.*, now an associate justice of the Supreme Court of the United States. The alleged grounds of invalidity in that case were mere

departures from statutes held to be directory, and not violations of mandatory statutes.

Much stress is laid upon the fact that the evidence shows that no fraud was either perpetrated or intended at the precincts at which this statutory requirement was omitted. This argument would be sufficient if the omissions could be classed as mere irregularities. Where such irregularities are accompanied by fraud, which establishes the impurity of the election at the precinct, it is generally held that the election is void. But where mere irregularities, not violations of mandatory statutes, are the result of a mistake or ignorance, they do not vitiate the election. The question here is not affected by the presence or absence of actual fraud. The ballots are, by express declaration of the law, void, without reference to the presence or absence of fraud. No case has been brought to the attention of the court in which it has been held that where a mandatory statute has been violated it must be further shown that such violation was accompanied by actual fraud, in order to make the ballots invalid, and it is not believed that any such case exists. The Missouri statute, requiring the number opposite the voter's name on the pollbook to be placed on the back of the ballot voted by him, is designed to prevent only the casting of illegal votes. It is intended to secure identification of the man who casts the vote, to the end that fraud may be suppressed, and not to identify the ballot, which is a far more important matter. The fraudulent voter can do mischief only on election day, in open daylight, and in the presence of assembled voters, while the man who substitutes a fraudulent for a genuine ballot goes at the midnight hour, when honest men are asleep, and executes his dastardly purpose, and for its execution he has several nights between the election day and the time of the recount. That is the evil against which the provisions of our statute now under consideration are aimed. It was not the intention of the Legislature that the enforcement of this statute should be limited to particular cases, and made to depend upon the proof of a thing which is generally very difficult to prove. Fraud is always concealed, covert, and hidden. The absence of fraud, or any intention to commit fraud, was urged upon this court in the case of *Daniel v. Simms*, but it was unavailing. The violations of the statute in that case were violations of a mandatory provision, similar to the one now under consideration, but not so manifestly intended for the prevention of postelection fraud.

The constitutionality of these provisions is not questioned. Under the construction contended for by the respondents, there is no necessity for calling in question the validity of the statute. But, as the constitutionality of the statute is germane, it is not out of place to say something on that subject. Cool-

ey, Const. Lim. 757, says: "All such reasonable regulations of the constitutional right which seem to the Legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the Legislature, but are commendable, and at least some of them absolutely essential." Several decisions have been referred to in which similar statutes, operating just as harshly upon the voter, and far less meritorious and essential to the purity of the ballot, have been enforced, and it is not to be supposed that all these courts have passed over the question of their validity. It was not ignored in *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495, which has been cited. On the contrary, the constitutionality of the statute requiring the signatures of two judges on the back of the ballot was expressly decided. There is perhaps no better test of the reasonableness of a regulation than the manner of its operation. The record accompanying the petition in this case shows that in Fayette county there are 74 election precincts, and there is no intimation that this statute was violated in more than two of them. The statute was passed 12 years ago, and this is the second case turning upon the violation of this provision that has come to this court. The other was that of *Snodgrass v. County Court*, in which the validity of the ballots of but one precinct was denied upon that ground. This indicates that out of the thousands of precinct elections held in this state since the passage of the act, a great many of the ballots used in which have passed through the hands of canvassing boards, there have been very few in which this provision has been violated, notwithstanding the fact that the vast army of commissioners and election clerks have been, for the most part, men without legal training or knowledge of the law. They have followed a plain, simple, reasonable statutory provision, and the evil resulting from holding the ballots in this case, and any other cases that may come to this court on that ground, invalid, is very insignificant, as compared with the great purpose for the accomplishment of which the statute is intended. In one state of the Union, namely, Washington, a statute prohibiting the counting of ballots not indorsed with the initials of election officers has been held unconstitutional. *Moyer v. Van De Vanter*, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 870, 50 Am. St. Rep. 900. But for that decision no precedent is cited, and the opinion shows that the reasoning of the court in reaching that conclusion strikes at the very root of all that system of ballot reform law, which, by reasonable and just regulation of the exercise of the elective franchise, has so commended itself to the good sense of the people that it has been adopted in nearly all the states of the Union, and by practically all English-speaking municipalities. Of

course, a supposed case might be put in which the three commissioners and the two clerks at an election precinct would willfully and deliberately violate this provision for the express purpose of invalidating the vote at that precinct. But would such a supposition be a reasonable one? Is not a majority always represented in the officers of the election? Is it fair to presume that the majority so represented will corruptly and deliberately invalidate the vote at the precinct, or permit it to be done? In upholding the validity of its own vote, by complying with these provisions, the majority sustains the vote of the minority. Under the statute, moreover, the voters themselves, representing each party, have a large measure of control over the precinct election officers. Each party may select its own clerk, and, if they do so, the commissioners of election are bound to appoint him. Thus they have the power at all times to place an honest representative at this important post, and thereby prevent the consummation of any corrupt agreement into which all the commissioners might enter for the purpose of opening this door to postelection fraud. The provision is not an unreasonable one. It operates no abridgment of the right of the voter to such an extent as ought to render it unconstitutional, in view of the salutary purpose for which it was passed, and the authorities, generally, clearly sustain its constitutionality.

For these reasons, the peremptory writ of mandamus prayed for should be awarded.

DENT, J. (concurring). I concur in the opinion and conclusion reached in this case, for the reason that the statute expressly provides that on the ballots "each poll clerk shall write his name before the ballot is delivered to the voter," and "any ballot which is not endorsed with the names of the poll clerks as provided in this chapter shall be void and shall not be counted."

This was my opinion in the case of *Snodgrass v. The County Court*, 44 W. Va. 56, 29 S. E. 1035, and, had that case been decided in harmony with the statute, this case would not have been here. It has been well said "that a question is never settled until settled rightly"; then it stays settled. If this court had failed in this case to settle this question rightly, it would not have remained settled, but it would have continually returned in some form to trouble the court. It will now remain settled. It is hard thus to defeat the popular will, and I would not agree to do so did not the imperative and mandatory language of the act require it. In the cases of *Morris v. Board of Canvassers of City of Charleston*, 49 W. Va. 251, 38 S. E. 500, and *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690, there was no such positive enactment involved, and I dissented, and refused to be a party to the overthrow of the will of the people, in the absence of such enactment. It is strange, however, that the

construction of the statute should uniformly result in ousting a Democrat from office and putting in a Republican, almost invariably contrary to the expressed will of the people as shown on the face of the ballots. *Morris v. Board of Canvassers of City of Charleston*, 49 W. Va. 251, 38 S. E. 500; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250; *Curry v. Means* (no opinion filed); *Hebb v. Co. Court*, 49 W. Va. 733, 37 S. E. 676; *Snodgrass v. Co. Court*, 44 W. Va. 56, 29 S. E. 1035. Such is the irony of fate, and it more firmly anchors my belief in foreordination, predestination, and election, except by the people. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, may be said to be an exception. That case, which is overruled at least in part by the later cases of *Morris v. Board of Canvassers of City of Charleston* and *Daniel v. Simms*, owes its salvation to the laudable impartiality of an incorruptible and upright circuit judge, whose perfect freedom from partisan bias led him to obey the manifest will of the people. Election officers have no duties they can transmit to successors or intrust to agents, but their duties are all personal. Whenever the Legislature makes the failure to perform such duties, in the manner provided, a sufficient cause to avoid the ballots affected thereby, the courts cannot do otherwise than submit to its behests, even though the will of the people be defeated; otherwise the will of the people should prevail. This is and has been my position in all these election cases, and I have no disposition to vary therefrom in the present case. Hence my concurrence.

**BRANNON, J.** (dissenting). There is no suggestion whatever that the ballots in question are not the true ballots—no hint that they do not show the true, honest result of the election. Seeing no reason to change the views I gave in *Snodgrass v. Wetzel County Court*, 44 W. Va. 56, 29 S. E. 1035, I dissent from the judgment in this case.

**McWHORTER, P.**, for the same reasons expressed in the foregoing note of Judge **BRANNON**, also dissents from the opinion of the majority of the court.

(68 W. Va. 1)

#### FINDLEY v. CUNNINGHAM et al.

(Supreme Court of Appeals of West Virginia.  
March 28, 1903.)

#### EXECUTORS AND ADMINISTRATORS—LIMITATIONS—DEBTS OF DECEDENT—NEW PROMISE—COPARCENERS.

1. An executor or administrator cannot make a new promise to pay a debt of his decedent either before or after the debt has been barred by the statute of limitations.

2. The answer of an administrator pleading the statute of limitations to a demand against

the estate of his decedent goes to the defense of both the personal and real assets.

3. The answer of one coparcener to a bill to set up a demand against the estate of the father of the coparcener, and charging that in making a new promise he acted as agent for his coparceners, which answer denies such agency, operates as a denial of the charge of agency by the other parceners, though they have not appeared.

**McWhorter, P.**, and **Dent, J.**, dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Berkeley County; **E. Boyd Faulkner, Judge.**

Bill by **James Findley** against **W. L. Cunningham** and others. Decree for plaintiff, and defendants appeal. Reversed.

**Faulkner, Walker & Wood, M. T. Ingles, and A. C. Nadenbusch**, for appellants. **Flick, Westenhaver & Noll**, for appellee.

**BRANNON, J.** The administrator of **S. S. Cunningham** brought a chancery suit against the estate of **James L. Cunningham** to convene the latter's creditors, and satisfy his debts out of his real and personal assets. The bill alleged that **James L. Cunningham** had made to **S. S. Cunningham** a note for \$2,314.40 and one for \$100, and sought to enforce their payments out of said assets. The two administrators of **James L. Cunningham** and his heirs were parties. An amended bill was filed, substantially the same as the original. One of the administrators answered those bills, denying the existence of the debts of **S. S. Cunningham**, and pleaded the statute of limitations against them. The case was referred to a commissioner to ascertain the debts against **James L. Cunningham's** estate, and he reported the bond of \$2,314.40 as barred. Then the heirs filed their answer, denying indebtedness under said notes and pleading the statute. Then the plaintiff filed a second amended bill, filing certain letters written by **William L. Cunningham**, who was one of the administrators of **James L. Cunningham**, and one of his children, to **S. S. Cunningham**, and claiming that they operated as new promises by the administrator, binding the estate for the full new period of the statute after their dates, and that they also bound the said **William L. Cunningham** and other children as heirs to the continued liability of the real estate for those debts. This second amended bill also charged that in writing those letters **William L. Cunningham** acted as agent for the other administrator and for his coheirs, and thus bound them by a new promise, and charged the real assets for the debts. These letters were written before the bond was barred. This amended bill was sworn to. **William L. Cunningham**, as administrator and as heir, answered, denying its allegation that he acted as agent of the other administrator and the other heirs, but those heirs did not answer said second amended bill, and it was taken for confessed against them. A decree was entered, charging the personal and real

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 750, 1754; *Limitation of Actions*, vol. 23, Cent. Dig. § 552.

assets with both of the bonds in favor of S. S. Cunningham's estate, and both the administrators and heirs appeal.

As to the question whether an executor or administrator can, before a debt against the estate has been barred by the statute of limitation, by a written promise debar the estate from the benefit of the statute. Section 8, c. 104, Code 1899, reads: "No acknowledgment or promise by any personal representative of a decedent or by one of two or more joint contractors, shall charge the estate of such decedent, or charge any other of such contractors in any case, in which, but for such acknowledgment or promise, the decedent's estate or another contractor could have been protected under the sixth section of this charter." This is literally the same as section 8, c. 149, Code Va. 1849. How was the law before 1849? The great current of authority said that an administrator could not revive a debt already barred. Wood, Lim. § 180; note 12 Am. Dec. 659; Angell on Lim. § 265. I assert what the opinion in *Seig v. Acord's Ex'r*, 21 Grat. 371, 8 Am. Rep. 605, asserts and shows—that such was always law in Virginia. But the law in Virginia, as elsewhere generally, was that an executor could, by a promise to pay, give a new term to a debt not barred. *Bishop v. Harrison's Adm'r*, 2 Leigh, 532. To restrain this power to a limited extent—that is, as to realty of a decedent—in 1841 (Acts 1841-42, p. 55, c. 98, § 2) the Virginia Legislature passed an act containing the provision, "No debt shall be protected against the operation of the statute of limitations by this act, nor by any assumpsit of the executor or administrator, so as to charge the real estate in the possession of the heirs or devisees with the payment thereof." Here we have the broad enactment that no promise by an executor or administrator shall give the debt a prolonged force against realty. There is no hint that his promise should be void as to a barred debt, but good as to one not barred. The act makes no such distinction. Can we suppose that it was the purpose of section 8, c. 149, Code Va. 1849, to narrow the law of 1841, and to charge real estate by the promise of an executor, whereas it would not by the act of 1841? It would be a violent assumption to say so. That it was not so intended is clearly shown by the note of the revisers who reported the Code of 1849 to the Legislature for its action. That note says that section 8 would "accomplish the object of the latter part of the act of 1841-42;" that is, attain the object—afford the same protection to realty as did the act of 1841. Revisers' Report, 744. No other section was inserted to retain the act of 1841 as there was no need of another section. Now, the Code of 1849 for the first time made real estate of a decedent assets for payment of general debts the same as personalty, and we cannot suppose that it was intended to make an executor's promise charge the personalty, and

not the realty. Of course, that idea cannot be for a moment entertained. It was the design in 1849 to protect both against an executor's promise in the only case in which they needed protection—that is, where the promise was to pay a debt not yet barred. The law already protected both personalty and realty against an executor's promise to pay a barred debt. The act of 1841 went a step farther, and protected realty against a debt not yet barred, and when, in 1849, both personalty and realty were made alike liable to all debts, the same protection was meant for both. There was no longer reason to make the difference between personalty and realty made by the act of 1841. The law already denied effect to an executor's promise to pay a barred debt, and we must say that the Code of 1849 meant some change, and that was to protect both alike, to deny any power in an executor or administrator to add to the burden of the estate, to make it liable where without his act it would be exempt. In construing a statute we look at the evil to be remedied, and that was the power of an executor to promise payment of a live debt, not his power to revive a dead one, as he had no such power. The probability arising from the state of the law up to 1849, and the making of both personalty and realty assets for debts and the adoption of section 8, seems likely and strong; but that probability does not rest on those influences alone, but it becomes a certainty when we look at the report of the revisers. It adverts to English cases holding that a new promise by an executor must be express, and must be by both where there are two, and then says: "We think it wise not only to follow it so far as it has gone, but to go a step farther, and in accordance with the opinions of the Supreme Court of the United States in *Thompson v. Peter*, 12 Wheat. 565 [6 L. Ed. 730], and of the Supreme Court of Pennsylvania in *Fritz v. Thomas*, 1 Wheat. 66 [29 Am. Dec. 39], establish that in an action against a personal representative no proof of acknowledgment or promise by him will take the case out of the statute of limitations. The section will accomplish this purpose, and at the same time attain the object of the latter part of the second section of the act of 1841 (Acts 1841-42, p. 55, c. 98), which provides that no debt shall be protected against the statute of limitations by any assumpsit of the executor or administrator, so as to change the real estate in the possession of the heir or devisee with the payment thereof." The Legislature passed section 8 with that explanation of its aim and legal effect before it, and may we not therefore say that it intended to utterly deny in all cases power in an executor or administrator to make any promise having any effect to prevent the bar of the statute? And why should this power not be denied? The man is dead; the administrator takes the estate as he finds it simply to gather in assets, pay debts, and dis-

tribute. Chief Justices Marshall and Gibson, in the cases just mentioned, strongly condemned the policy of allowing a dead man's representatives to bind the estate, as he does not possess requisite information touching the debt to do so, and for other reasons.

Take the words of section 9. How comprehensive! "No acknowledgment or promise" shall charge the estate "in any case \* \* \* in which the decedent's estate \* \* \* could have been protected under the sixth section of this chapter." It frees the estate in any case where it would be free but for such promise; it eliminates the promise. There is a shadow of question arising from the words "could have been protected." The words are in the past tense of the potential mood. The section does not say "would be protected." From this it may be said that the words refer to the date of the promise, and that, in the case of a debt then still alive, it could not have been protected by the statute, and the promise makes it no worse, whereas, as to a dead debt, the law would protect it but for the promise. I shall not be so dogmatic as to say that this argument has not force, but I will say that it is only one of several considerations entering into the question, and not conclusive or outweighing others. It is only misuse of a tense. It does not—ought not to—frustrate what, considering everything pertinent, was manifestly the aim of the lawmakers.

Another argument is that section 8, c. 104, of our Code of 1899 contains the broad provision that any one may make a new written promise, and thus lose the benefit of limitation; and section 9 comes in directly following, making an exception to the capacity to make such new promise, disabling personal representatives and joint contractors from so doing. It was designed to make a clean-cut exception of them from section 8—take them clear out of it. The provision as to joint contractors in section 9, c. 104, throws light on this question. At common law a new promise by one of two joint contractors deprived the other of the plea of limitation. In 1838 (Acts 1838, p. 73, c. 95, § 1) an act was passed reading: "And where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactment, or either of them, so as to be chargeable in any respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them."

The revisers and the Legislature, in adopting the Virginia section 8, must have considered that all the provisions of this act as to contractors would be attained by section 8. They left out the words of the act of 1838, "executors or administrators of any contractor." They were not necessary. Suppose a promise by his administrator. It was deemed unnecessary to retain those words, as the words "executor or administrator" in the act

would apply to both the executor of a single and joint contractor. Do you suppose that, if one joint contractor should make a new promise to pay either a dead debt or one alive, it would have any effect? I think not. Why does not the section including both operate alike as to both joint contractor and decedent? Before this act, as it assumes, an executor of a joint contractor could bind the surviving contractor by a promise before the debt was barred, and also after, some say. This act plainly takes this power entirely away in both cases, if he had that power in both cases. The act of 1838 was not re-enacted in the Code of 1849, unless section 8 provides for it. If it does not include an executor of a joint contractor, then what? He has to-day the power, as at common law, to make such promise; but I cannot think it was so intended. You may, however, answer that the word "representative" in section 8 includes the executor of a joint contractor, and that, as in the case of a single contractor, the executor can only promise when the debt is not barred. Even if so, then it follows that there is no law to prevent such promise where the debt is yet in life, according to the view opposite my view. Who believes that the Legislature meant thus to recant the act of 1838, and allow an executor to prolong a debt yet unbarred? It did not so intend. It thought that section 8 would cover this case, and, if it did not design to let the executor of a joint contractor promise so as to bind the survivor, why let an executor of a single debtor do so? My opinion is that by section 8, c. 149, Code Va. 1849, and section 9, c. 104, of our Code of 1899, the "executor of a several or joint contractor" is meant. His powers are in both cases taken away, in the same cases and to the same extent. This was the mission of that section. It did not intend to repeal the act of 1838, but intended to make the executor of both a single and joint contractor powerless to promise. If not, then the act of 1838 is repealed.

I cannot, on the whole, think that the Legislature intended to allow the act of a decedent's representative to delay for years the closing of the estate and the distribution of the assets, or add to the burden of its liability. It designed that he should take the estate just as the dead man left it, and wind it up. It is not contended by counsel that any case in either of the Virginias decides this question, but that in three cases opinions have been expressed that an executor can give extended life to a demand by a written promise. These opinions are obiter. In *Braxton v. Harrison's Ex'rs*, 11 Grat. 30, and *Switzer v. Noffsinger*, 82 Va. 524, are such obiters. The first case arose before the Virginia Code of 1849. Judge Moncure, in saying that it was well settled that an executor could make an effectual promise to pay a debt not barred, likely had in mind the law as it was before the Code of 1849. The expression was mere-

ly a passing expression in the other case, not considered well. So, in *Smith v. Pattie*, 81 Va. 662. And further, if the promise of an administrator could, as it cannot, give prolonged life to a debt as to the personalty, it could not as to the realty, with which he has no connection. Even where the administrator may new-promise, he cannot thereby charge realty. *Steele v. Steele's Adm'r*, 64 Ala. 438, 38 Am. Rep. 15; *Bevens v. Park*, 88 N. C. 456. As no promise of an administrator can avail, this remark is useless; but the decree charged the realty in this case.

As the heirs pleaded the statute of limitations in their answer to the original and first amended bill, that was sufficient, though they did not answer the second amended bill. If this were not so, there can be no doubt but that the answer of the administrator to that bill would serve the heirs as to the defense of the statute. When he defends the personalty, he defends the realty. If a debt does not bind personalty, neither does it bind the realty of a decedent; its defeat as to one is defeat as to the other. This plea certainly defends the interest of the children as to their share in the personalty, and it would be dry technicality for the court to exempt the personalty on the plea of the statute by the administrator, and then hold the realty liable because the heirs have not pleaded it. Is it possible that, in a chancery suit to charge both personalty and realty of a decedent with debts, the plea of limitation by the administrator is not enough, but the heirs must also plead it?

But it is contended that the second amended bill, setting up the letters written by one administrator as new promises, and charging that in writing them he acted as agent for the other heirs, stands without answer by them, and is taken for confessed as to them, and proves such agency without other proof, and binds the land by the new promises. The answer says it is "the separate answer of William L. Cunningham, one of the administrators." Is it that of William L. Cunningham as an individual heir, the word "administrator" being mere description of the person? We must look at the pleading entire. It contains matter proper for the party to put in for the defense of the estate, denying the bond and pleading limitation; and proper for his own defense, that same matter, and that he did not write the letters binding his interest in the estate; and it denied the agency. Thus, we ought to treat it as the answer of the administrator and in his own right as an individual heir. I hold that as an answer of the administrator and of one coparcener, since the interest of the heirs are joint, and the liability of all grows alone from the bond of the ancestor, as the heirs are sharers in both personalty and realty, that answer serves to defend both estates and all the heirs. Why not? It denies the same facts which their answers would deny. The fact it denies, if true, operates to defeat

the whole demand, as well for one heir as another. It is the same defense common to all. It would be unreasonable to say that there is no debt as to the personalty, yet a binding one as to realty; or no debt because defeated as to one heir, yet a debt as to the others. High authority sustains this position. In *Clason v. Morris*, 10 Johns. 524, 538, Spencer, J., said: "I believe not a case can be found in which it is insinuated that where there are two defendants having a joint interest, and one appears and answers, and disproves the plaintiff's case, the plaintiff can have a decree against the other who had made default, and against whom the bill was taken pro confesso. It would be unreasonable to hold that, because one of the defendants had made default, the plaintiff should have a decree against him, when the court is satisfied from proofs offered by the other that in fact the plaintiff is not entitled to a decree. Though I have not met with a case in equity to the point, yet, pursuing the analogy between proceedings at law and in equity, we are not without very clear authority; for it is a well-settled principle that, in actions upon contracts, the plea of one defendant inures to the benefit of all, for, the contract being entire, the plaintiff must succeed upon it against all or none, and therefore, if the plaintiff fails at the trial upon the plea of one defendant, he cannot have judgment against those who let judgment go by default. It would require the most binding authority to induce me to yield assent to such a proposition set up by respondent's counsel; and, indeed, the result would be extraordinary, for if one defendant entitled himself to a decree, where the interest is joint and inseparable, a decree must be made in his favor as to a moiety of the matter in issue, and against the other in default for the other moiety—that is, the plaintiff would get half a decree, and the other defendant the other half." This principle is sustained by *Ashby v. Bell's Adm'r*, 80 Va. 811, where one defendant to a joint obligation pleaded limitation, and the bill was taken for confessed as to another, the plea was held good as to both, and it was announced as law that where the cause of action is joint, and one defendant disproves the plaintiff's case, unless it be on some defense purely personal to himself, no decree can go against the others. This is where the defense is common to all. *Cartigne v. Raymond*, 4 Leigh, 579, holds the same. In a suit to charge land as fraudulently conveyed to a party, her administrator answered, denying the fraud and asserting that the grantee paid value for the conveyance. It was held that this answer went to the defense of the heirs, who did not answer. The administrator had no connection with the land, and the personalty was not involved; but there was the answer opposing the defense. *Terry v. Fontaine's Adm'r*, 83 Va. 451, 2 S. E. 743. But how as to the agency? Principles above apply. William

L. Cunningham denied it. Could it be decreed to exist alone on the bill because the other heirs did not answer in the face of that denial? In *Johnston v. Zane's Trustees*, 11 Grat. 568, the court said: "It is said that though Mrs. Zane has not answered, and the allegations of the bill are as to her to be taken for confessed, and that therefore, the pre-existence of the debt being admitted, the appellant is entitled to relief to the extent of any interest she may have in the subject. I have, however, already shown that there is no such allegation in the bill; and, if there had been, the answer of Shriver, the trustee, would serve to put it in issue for her benefit, and that of all others claiming under the deeds. For this purpose, he may properly be regarded as representing the cestuis que trustent, and his answer will inure alike to the benefit of all."

A trustee sold land under a trust deed. The purchaser alleged that the creditor agreed to make a general warranty, and he was unwilling to accept a trustee's deed. The trustee denied this contract in his answer, and it was held that this answer went to the benefit of the heirs of the creditor to deny that contract, though they did not appear. The fact set up by the trustee defeated the claim, because it showed there could be no decree on its basis. *Payne v. Graves*, 5 Leigh, 561, 579.

On these principles I think that answer denying the agency operated as a denial of it for all the heirs. These letters do not purport to have been written as agent. They bear no mark of being acts of an agent or in behalf of any principal, which they must do to bind by their force. *Mechem, Agency*, §§ 432, 445; 1 Am. & Eng. Ency. L. 1035. There is nothing else appealed to to show such agency except that William L. Cunningham managed the land and was trying to sell. This he would do for himself. And what if in that he was acting for them? No general agency is proven, and, if he was agent in managing or trying to sell the land, that does not prove that he was special agent to make a new promise. His special power for that act must be shown, and it is not. William L. Cunningham never declared that he was special agent to make such promise for the other heirs. His acts cannot make him such, though they expressly purported to be done as agent, as "neither the declarations nor acts of a man can be given in evidence to prove that he is the agent of another." *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222. One dealing with a special agent must look out for his authority. *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339. Those letters do not prove agency—could not if they spoke agency; but they do not so speak.

Do those letters bind the interest of William L. Cunningham in the assets? They do not otherwise bind him; but that is not involved, as such is not the purpose of the suit. (1) He wrote only as administrator.

He had no intent to bind himself personally or his interest in the land. (2) I cannot see that an heir can give a paper operating merely as a new promise of a debt of his father, because a new promise is by him who owes the debt, and, unless the heir gives a deed of trust on his share, I do not see that he can otherwise bind it. (3) The letters are not sufficient to be new promises. In *Quarrier's Adm'r v. Quarrier's Heirs*, 36 W. Va. 810, 15 S. E. 154, it is held: "A new promise must not be uncertain. It must acknowledge a fixed sum, or a balance which admits of ready and certain ascertainment." The promise must be express to pay, or, if a mere acknowledgment, it must be unqualified, without condition, importing intent to pay without reference to a future settlement; it must be determinate and unequivocal, so as to be tantamount to an express promise to pay. *Abrahams v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692; *Stansbury v. Stansbury's Adm'rs*, 20 W. Va. 23. Try the letters by these rules. One asks for amount of "your note," and says: "I have no doubt his estate will hold out." That will not do. Another says: "I want to come over to your place, and talk to you about your debt against the estate of my father." This will not do. In another he speaks of selling the farm, and says: "I now ask you, if we cannot get that price publicly, will you take it at that? You have a big pile in it—would not feel the buying of it very much." What that "pile" is—its amount—is not given; simply that some indebtedness existed. Now, an acknowledgment must be equivalent to a promise to pay. This is not. Of course, the letter simply sending \$125 on indebtedness will not do, as partial payment does not serve as a new promise. And there were two notes. To which does it apply? In another letter he speaks of the general indebtedness, saying how he expected to arrange it, without any reference to any particular debt, saying that none of the creditors need feel uneasy, as the debts only amounted to \$8,500, and the land would bring more, and the heirs would sell, if they could, rather than carry the load and worry. Of course, this does not acknowledge any particular debt or any amount. In one of the letters, referring to a partial payment, he said: "I hope to send you more soon." In another he speaks of his desire to sell, and of dividing the property among all creditors, and asks if S. S. Cunningham could put them on the track to borrow \$5,000 at 5 per cent. He said: "I would like to see you and talk about it." About what? That particular debt? Or what arrangement to make as to all? Or as to getting a loan? Or as to best means of selling or dividing the farm among creditors? The letter does not say. The expression of hope to pay soon. Pay what amount? The letter does not say. A promise to settle, or pay an amount there-



after to be agreed, will not do. Quarrier's Adm'r v. Quarrier's Heirs, 36 W. Va. 310, 15 S. E. 154; Bell v. Crawford, 8 Grat. 110. So, these letters are not new promises to charge even their writer's share in the estate. They are not mortgages on it.

Therefore, we reverse the decree, reject the bond of \$2,314.40 given by James L. Cunningham to S. S. Cunningham as a debt against the estate of James L. Cunningham, and remand the case to the circuit court for further proceedings.

McWHORTER, P. (dissenting). The executor of S. S. Cunningham, Casper Shunk, filed his bill in the circuit court of Berkeley county at the October rules, 1895, on behalf of himself and all other creditors of James L. Cunningham, deceased, who would come in and contribute to the costs, against William L. Cunningham and J. N. Cunningham, in their own right and as administrators of said James L. Cunningham, deceased, John K. Cunningham and Annie E. Cunningham, his wife, Mattie A. Cunningham, Mary Cunningham, widow of A. P. Cunningham, E. B. Faulkner, trustee, A. C. Nadenbouch, trustee, E. B. Faulkner and C. J. Faulkner, administrators with will annexed of C. J. Faulkner, deceased, and the National Bank of Martinsburg, a corporation, setting up two notes made by said James L. Cunningham in his lifetime to S. S. Cunningham, one dated June 10, 1881, for \$2,314.40, at one day (alleged in bill to be at one year), and the other dated September 28, 1885, for \$100, at one day after date; that both of said notes remained wholly unpaid, except certain payments mentioned in the bill, viz.: June 27, 1885, \$100; March 14, 1889, \$125; May 3, 1893, \$277.72, paid by W. L. and J. N. Cunningham, administrators of James L. Cunningham, deceased; March 31, 1893, \$500 paid by W. L. Cunningham, one of said administrators; and May 7, 1894, \$100 paid by W. L. Cunningham—all of which payments were applied to the larger note. He alleged that on the 25th day of August, 1886, said James L. Cunningham in his lifetime wrote a letter and signed by himself, and delivered same to S. S. Cunningham, acknowledging said note for \$2,314.40 to be due and unpaid, and promised to pay the same, but no part of it had ever been paid, except said payments mentioned; that said James L. Cunningham departed this life intestate August 25, 1887, and defendant administrators were duly appointed and qualified as such; that in 1895 S. S. Cunningham died, leaving a will in which plaintiff was appointed executor, and who was duly qualified as such executor; that said James L. Cunningham left a widow, who died in February, 1895, and left as his heirs at law the following children: John K. Cunningham, whose wife's name is Annie E. Cunningham; William L. Cunningham, a single man; J. N. Cunningham, a single man; Mat-

tie A. Cunningham, a single woman; and A. P. Cunningham, who some time in the spring of 1895 died intestate without children, leaving a widow, Mary Cunningham, and his brothers and sisters, as his heirs at law; that said James L. Cunningham left a large and valuable personal estate, which passed into the hands of the administrators, amounting, as shown by their sale list, to \$4,536.49; that said administrators had made no settlement of their administration accounts; that in addition to the personal estate said decedent left two valuable tracts of land in Berkeley county, one containing 219 acres, 1 rood, and 29 perches, the other 489 acres, 1 rood, specifically described in the exhibits filed with the bill; that on September 12, 1887, the widow and heirs of said James L. Cunningham conveyed all of said real estate to A. C. Nadenbouch, trustee, to secure the payment to E. B. Faulkner and C. J. Faulkner, administrators with the will annexed of C. J. Faulkner, deceased, an indebtedness of \$3,500, evidenced by three certain bonds of said heirs bearing even date with said deed of trust, which deed was filed as an exhibit. He alleged the payment of said bonds, although the deed of trust was not released upon the records; that on December 3, 1889, said A. P. Cunningham conveyed to E. B. Faulkner, trustee, all of his interest in said tracts of land in trust to secure William L. Cunningham and J. N. Cunningham as indorsers on a note for \$500 made by said A. P. Cunningham, payable 90 days after date, and discounted at the National Bank of Martinsburg, and exhibited said deed of trust; and that same had been paid off, though not released on record; that besides his own he knew of no other indebtedness against the estate of said James L. Cunningham—and prayed for convention of the creditors, and order of reference to ascertain debts, priorities, etc., and settlement of accounts of administrators of said decedent.

At March rules, 1896, by permission of the court, James Findley, who had been appointed administrator *de bonis non cum testamento annexo* of S. S. Cunningham, deceased (the executor, Shunk, having died), filed his amended bill against the same parties named as defendants in the original bill and L. O. Gerling, sheriff, administrator of A. P. Cunningham, deceased, which amended bill corrects the dates of some of the payments on said larger note as stated in the first bill, and prays for settlement of administration accounts of said administrators and distribution of the personal assets among the parties entitled thereto, and that, should the personal estate prove insufficient to pay all the plaintiff's debt, the real assets left by said James L. Cunningham, and which descended to his heirs who are made parties to the suit, might be subjected to the payment of said indebtedness and for general relief.

On the 21st of January, 1897, the answer of William L. Cunningham, one of the administrators, was filed, and general replication thereto, and the cause was referred to Commissioner in Chancery W. B. Colston, with instructions to state and settle the accounts of said administrators of James L. Cunningham, and to ascertain and report the real estate of said decedent, James L. Cunningham, with its fee simple value, and the debts against the estate of said decedent, together with their respective amounts and priorities. The answer of said Cunningham admitted the execution of the deeds of trust as alleged in the amended bill, did not admit the making of the notes of \$2,314.40 and \$100 as alleged, but controverted the making thereof by his intestate, and denied the writing of the letter of August 25, 1886, by his testator, as alleged, acknowledging said note of \$2,314.40, and promising to pay it, and averred that no promise in writing or acknowledgment of said notes had been made by his said decedent, or by his administrators, or either of them, within the period of 10 years next before the commencement of this suit, which would bind James L. Cunningham's administrators or executors or his heirs for the payment of said sums of money, and expressly set up the statute of limitations as a bar against the collection of the said notes, or either of them, by plaintiff. On the 13th of July, 1897, William L. Cunningham and J. N. Cunningham, in their own right, and John K. Cunningham, Mattie A. Cunningham, and Mary E. Cunningham, filed their answer to the original and amended bills, to which plaintiff replied generally. The answer avers that said S. S. Cunningham was at the time of his death, and for more than 20 years previous thereto had been, a resident of the town of Williamsport, in Maryland, just on the opposite side of the river from Berkeley county, in West Virginia, and owned quite a considerable quantity of property in said Berkeley county, and for a long period of years had been president of a bank in Williamsport and director thereof, which did a large amount of business with the citizens of Berkeley county, such as is generally transacted between banks and their customers and patrons, including loaning money, discounting notes, etc., and that during such time S. S. Cunningham's acquaintance with business people and transactions in Berkeley county was quite extensive, making loans to, and taking notes and bonds from, many of them, either on his own account or on account of his said bank; that although respondents did not admit the making of the note or bond by James L. Cunningham for \$2,314.40 to said S. S. Cunningham, and denied the same, they averred that the said administrators of James L. Cunningham, or one of them, did send to said S. S. Cunningham on the 31st of March, 1893, the sum of \$500, and on the 7th of May, 1894, the further sum of \$100, which remittances were made by

said administrators, or one of them, on the claim and representation to them by said S. S. Cunningham that the estate of James L. Cunningham was legally liable to him for the payment of the said sums of money, he (said S. S. Cunningham) carefully concealing the fact that, if there had been any such note or bond as the one for \$2,314.40 in the bill mentioned and described, it had long before that time been barred by the statute of limitations, a fact unknown to said administrators until after the commencement of this suit. Respondents charged that the application by the said S. S. Cunningham of the sums of \$500 and \$100 to an alleged bond or note held by him at that time, and which was then barred by the statute of limitations, unknown, however, by said administrators, was illegal and fraudulent; that so much of said money should have been applied by him as a payment on the \$100 note or bond as would be sufficient to satisfy it, and the remainder of said remittances by said administrators, or one of them, should have been returned to them as having been made in ignorance and by mistake of fact, to be administered by them according to law; and respondents claimed the benefit of the statute of limitations as a defense against any indebtedness by said alleged note of \$2,314.40, and asked for a decree in favor of the administrators of James L. Cunningham against said James Findley, administrator, for the excess of the aggregate of the said two sums over the indebtedness evidenced by the \$100 note or bond, with interest, etc. To which answer plaintiff demurred, and filed a special replication, wherein he admits that S. S. Cunningham lived, as alleged in the answer, at Williamsport, Md., and owned a considerable quantity of property in Berkeley county, and was president and director of a bank, but denies that said bank did a large amount of business with the citizens of Berkeley county, such as is usually transacted between banks and their customers or patrons, including the lending of money and the discounting of notes, etc., or that his acquaintance with the business people and transactions in Berkeley county was extensive, or that he frequently made loans to them, and took notes and bonds from them, either on his own account or on account of said bank; alleges that it is true, as stated, that the administrators of James L. Cunningham paid the sums of \$500 and \$100, that they were paid on account of the indebtedness mentioned and described in plaintiff's original and amended bills, without any specific directions as to how the same should be applied, and that said S. S. Cunningham, in the absence of any such direction by the party making the payments, applied same on the note then due and owing to him from said James L. Cunningham, deceased, for \$2,314.40, bearing date June 10, 1881, but denies that the payments were made by the administrators under any mistake of fact in connection with

the debts on which same were being paid; denies that said S. S. Cunningham concealed from said administrators of James L. Cunningham, deceased, any fact in connection with said notes, either as to the date of the same, the time when due, or the amounts owing thereon, but, on the contrary, furnished the said administrators full information in all these respects by sundry statements and calculations of the amounts due, thereby giving them full information in all these respects as to the nature of said indebtedness; denies there was any mistake of fact under which they made said payments, but the mistake, if any, on their part, was a mistake of law. Therefore he says the defendants ought not to take anything by their answer, so far as the same is in the nature of a cross-bill, and prays that he may be dismissed, etc.

At the November rules, 1897, plaintiff filed his second amended bill, to which defendant William L. Cunningham demurred on the 1st day of February, 1898, of which demurrer the court took time to consider, and on April 29, 1898, the court overruled the demurrer, and granted demurrant leave to answer within 30 days. The said bill adopts the averments and allegations of the original and amended bills, and refers to the answer of William L. Cunningham, one of the administrators of James L. Cunningham, to the original and amended bill, in which he pleaded and relied upon the statute of limitations to prevent the recovery of plaintiff's debts; and plaintiff alleges that the debts set up in said bills and in this second amended bill are not barred, and that he should not be prevented from recovering the same, either against personal or real assets of the estate of James L. Cunningham, by reason of the facts set out in his said second amended bill, and proceeds to exhibit various letters, statements, and correspondence between said William L. Cunningham, who plaintiff alleges was not only the acting and active administrator of the estate of James L. Cunningham, deceased, but the agent of his co-administrator, J. N. Cunningham, and also in his own right and as agent of the other heirs and distributees of James L. Cunningham and S. S. Cunningham, whereby it is alleged that said W. L. Cunningham acknowledged in writing, and signed by himself, the existence of the indebtedness due plaintiff's decedent on said two notes or bonds of \$2,314.40 and \$100, and in his said capacities expressly promised to pay the same, with the full knowledge at the time of making such acknowledgment and promise of the character and nature of such indebtedness of his father's estate; alleges that shortly after the death of plaintiff's decedent, and both before and after the institution of this suit, he had made and caused to be made careful search among all the papers of S. S. Cunningham, deceased, for letters, correspondence, and other memoranda relating to the indebtedness of James L.

Cunningham to the estate of plaintiff's decedent, and these papers, except Exhibit No. 5, were not found, although due diligence was used in the search, until about three weeks prior to the writing of the second amended bill, when the same were discovered by accident, as plaintiff was informed and believed, by one Mrs. ——— Jefferson, in the back drawer of an old desk used by plaintiff's decedent; that with the paper writings filed with the bill signed by William L. Cunningham were found the annexed copies of what were evidently replies thereto in the handwriting of plaintiff's decedent, the originals of which plaintiff believed and charged were sent and mailed to and received by said defendant William L. Cunningham, and called upon said William L. Cunningham to discover and produce the original of the paper writings, copies of which were filed with said second amended bill as exhibits; alleges that said administrators, William L. and J. N. Cunningham, as he was informed, claim to have paid and taken up a number of debts against the estate of their decedent, on account of which there is owing to them as administrators a large sum of money from the estate; that such debts to which they are entitled by subrogation are not barred by the statute of limitations, but are valid and subsisting debts against the real estate of their decedent; and if, therefore, it should appear that the debts due to plaintiff's decedent are not barred as to the personal assets, but are barred as to the real assets of the said James L. Cunningham, then plaintiff asks that the assets may be marshaled, so that the creditors whose debts are not barred as to the real assets may be required to seek satisfaction from that source, leaving the personal estate of the said James L. Cunningham for the satisfaction of the plaintiff's several debts. Which second amended bill was verified.

On the 26th of September, 1898, by leave of the court, the defendant William L. Cunningham filed his separate answer, in which he adopts the allegations of his answer to the original and first amended bill—that he has no knowledge of his decedent having made the note for \$2,314.40, does not admit the making thereof, but, on the contrary, controverts it; neither does he know of his own knowledge of James L. Cunningham having made the \$100 note or bond of September 23, 1885, nor admit the making of it, but, on the contrary, controverts it—and says, if such notes or bonds were made, the same, or a considerable part thereof, have been paid, and, if not paid, have been barred by the statute of limitations which he is required by law to set up in defense thereto; denies having made any acknowledgment of the indebtedness evidenced by said notes, or any promise to pay the same, which would either prevent the statute of limitations from barring said debts, or which would remove the bar of the statute thereto; admits that he, as one of the said administrators, made general pay-

ments of money on indebtedness claimed by said S. S. Cunningham to be owing to him by the estate of said James L. Cunningham, to wit, the sum of \$500 March 31, 1893, and \$100 May 7, 1894, both of which were made through the mail, and whatever knowledge respondent then had was obtained by him from the said S. S. Cunningham, who was fully trusted by him in that respect, and respondent was at that time wholly ignorant that more than 10 years had elapsed from the time the alleged note of \$2,314.40 had become payable, said S. S. Cunningham having carefully concealed from respondent the time when this alleged note or bond was payable; denies that S. S. Cunningham wrote and mailed to respondent the statement, copy of which is filed with the bill, and says that S. S. Cunningham had no right to apply the payments so made, but, if such note as the \$100 really existed, he should have applied sufficient to pay that off, and returned the residue to respondent, as having been paid by him by mistake of fact. Respondent says he kept no copies of letters written by him to S. S. Cunningham, and is unable to say positively whether Exhibits Nos. 3, 5, 6, 8, 11, 12, and 13 are copies of letters written by him, does not know that he wrote such letters, does not admit that he did, but controverts the statement in plaintiff's bill charging him with writing the letters of which said exhibits are copies; avers that all the correspondence he had with said S. S. Cunningham touching the alleged indebtedness to him of the estate of James L. Cunningham was as one of the administrators of said James L. Cunningham, and in no other way or capacity, and that he never was agent for the other administrator of James L. Cunningham, nor was he agent for any of the heirs or distributees of said James L. Cunningham, nor did he ever represent himself to said S. S. Cunningham as the agent of his co-administrator, or as agent of any of the heirs or distributees of said James L. Cunningham; neither admits, as alleged, that he acknowledged the existence of the indebtedness claimed by plaintiff in his bill, nor expressly or otherwise promised to pay it, nor that he had full knowledge of the nature of plaintiff's claim, but the only information he had respecting it was what he obtained from S. S. Cunningham until within less than one year of the time this suit was brought. Which answer was also verified.

The commissioner returned his report, which was excepted to by the administrators of James L. Cunningham because he applied the payments of \$500, March 31, 1893, and \$100, May 7, 1894, on the note of \$2,314.40, which was barred by the statute of limitations, whereas he should from the sum of the two payments have paid the note of \$100, which was not barred, and the residue of the sum of the two payments he should have reported in favor of the administrators of James L. Cunningham as a debt owing to

them by the estate of S. S. Cunningham, as for money paid by mistake of fact; they not knowing that the \$2,314.40 note was barred by the statute of limitations. Plaintiff excepted to said report because it reports as barred by the statute of limitations, and refuses to audit as a debt against James L. Cunningham's estate, the note of \$2,314.40, dated September 28, 1881, and filed 18 other exceptions thereto. On the 25th day of January, 1899, plaintiff moved the court to hear the cause, to which motion defendant William L. Cunningham objected, and moved the court to continue the cause so as to allow him to take depositions, and the court overruled plaintiff's motion and continued the cause; and on the 3d day of May, 1899, the cause was heard and submitted, when the court took time to consider, and on the 14th day of June, 1899, the court decreed that the plaintiff recover of and from William L. Cunningham and James N. Cunningham, administrators of James L. Cunningham, deceased, the sum of \$3,895.16, with interest from the date of decree, being the amount due, with interest, to that date, on the said two notes, to be levied of the goods and chattels in their hands to be administered, and further ascertained and decreed that the same was a valid and subsisting debt, binding the real assets of the estate of said James L. Cunningham in the hands of his heirs at law; and the court overruled the said exception of the defendants, the administrators of James L. Cunningham, to the report of Commissioner W. B. Colston, and sustained the first exception of plaintiff thereto, and, without passing upon the plaintiff's other 18 exceptions to said report, recommitted the cause to said commissioner. The defendants William L. Cunningham and J. N. Cunningham, in their own right and as administrators of J. L. Cunningham, John K. Cunningham, Mattie A. Cunningham, and Mary E. Cunningham, appealed to this court, and say they are aggrieved: "First. Because the court determined upon the record before it that the administrators of James L. Cunningham, deceased, were indebted as fiduciaries to the complainant in the sum of \$3,895.19, with interest from the date of the decree. To have reached this conclusion under the pleadings and facts as shown by the record the court must have held: (1) That the promise of one of the two administrators is sufficient in law to prevent the operation of the statute of limitations; (2) that William L. Cunningham, one of the administrators representing the estate of James L. Cunningham, deceased, had not only acknowledged the justice of the debt of the plaintiff's intestate against said estate, but had expressly promised to pay the same; (3) that William L. Cunningham, as administrator and in his official capacity, acknowledged the indebtedness as due and expressly promised to pay the same; (4) that the letters produced in evidence, signed by William L. Cunningham, individually and not as ad-

ministrator, marked Exhibit No. 3, Exhibit No. 15, Exhibit No. 5, Exhibit No. 20, and Exhibit No. 6, constituted in law an acknowledgment by the fiduciary of the justice of the indebtedness, that it was due, and an express promise that he would pay; (5) that there being two debts claimed by the plaintiff as due, that the acknowledgments and promises claimed to be contained in said letters were definite and certain as applying, not to one or either, but to both, of the bonds set up in said bill."

What the effect under sections 8 and 9, c. 104, Code 1899, of a promise in writing or acknowledgment in writing from which a promise of payment may be implied, made by a personal representative before the debt is barred, or before the decedent's estate could have been protected, seems not to have been decided in this state, but in the case of *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26 (Syl., point 3), it is held: "In this state the administrator, by his verbal promise, can no more prolong the vitality of a debt of his decedent, not yet barred, beyond the limit of the statutory bar, than he can revive a debt already barred; neither has he any option about protecting the estate by interposing the statute of limitations, when applicable." This is a clear ruling on the statute as to a verbal promise or acknowledgment, but we can only have an inference from it as to a promise or acknowledgment in writing; but it seems to have been well settled in Virginia. In *Bishop v. Harrison's Adm'r*, 2 Leigh, 532, in an action of assumpsit against the administrator de bonis non to recover a debt due from the testator, the question was whether it was competent to plaintiff to join counts on promises by the executor, as executor, with counts on promises by the testator, in order to save the statute of limitations. Judge Cabell, in the opinion of the court, says: "Upon the whole, I am decidedly of opinion that, if the two counts founded on the promises of the displaced executor in this case had been properly framed, the demurrer to them ought to have been overruled." He further says: "It is clearly competent to an executor, by his promise to pay a debt of the testator, to exempt the case from the operation of the statute of limitations, and it is no devastavit in him to do so." And Judge Carr in the same case gives the following reasons for such power in the personal representative: "The executor or administrator represents the testator or intestate completely; he has the legal estate; and it is necessary that he should have it, both for its management and for the safety of those who deal with him. When he has made a contract as to any of the property, which he had a perfect right to make, and another has thereby gained an interest in that property, his subsequent death or removal cannot affect that interest. In truth, the question does not seem to me to be one of privity, but of power. Here was a debt

claimed of the testator. To whom was the creditor to look? To the representative. He applies to the executor while the debt is yet untouched by the statute of limitations, and tells him, 'Here is a debt due me by your testator, and here is the proof of it. It is a debt due by simple contract, and I must sue at once.' The executor replies, 'I see the debt is just, and I tell you before this witness that I will pay it. Therefore you need not bring suit, but give me time till money of the estate comes to my hands.' The creditor waits; the executor dies; and administrator de bonis non is appointed. Shall he say to the creditor, 'The promise of the executor does not bind me, nor take your debt out of the statute'? Surely, no. The promise does bind him, or rather the estate, at least so far as to remove the bar of the statute; for the executor was clothed with full power to do what he did." In *Braxton v. Harrison's Ex'rs*, 11 Grat. 80, it is held "that although it is generally true that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations out of the assets of the estate, upon which a suit may be maintained." See, also, *Smith v. Pattie*, 81 Va. 662; *Switzer v. Noffsinger*, 82 Va. 524, and cases there cited.

These decisions seem to settle clearly this question contrary to the views taken by counsel for appellants in their very able and plausible analysis of section 9, c. 104, Code 1899, which is substantially the same as that contained in Va. Code of 1849. They refer to the report of the revisers of January, 1849, in support of their theory; but it seems to me that a careful inspection of that report and the authorities there cited have reference to the acknowledgment and promise of a personal representative removing the bar of the statute after it has run and the claim barred. The revisers, after citing *Tullock v. Dunn*, 21 Eng. Com. Law Rep. 478, that, "as against an executor, an acknowledgment merely is not sufficient to take the case out of the statute; there must be an express promise"; that "the promise by one is not enough to entitle the plaintiff to recover; there ought to be a promise by both"—which *Parke, B.*, in *Scholy v. Walter*, 12 M. & W. 514, says "is founded in justice and good sense, and ought to be followed"—say: "We think it wise not only to follow it so far as it has gone, but to go a step farther, and in accordance with the opinion of the Supreme Court of the United States in *Thompson v. Peter*, 12 Wheat. 565, 6 L. Ed. 730, and the Supreme Court of Pennsylvania in *Fritz v. Thomas*, 1 Whart. 68, 29 Am. Dec. 39, establish that in an action against a personal representative in his official character no proof of an acknowledgment or promise by him will take the case out of the statute of limitations." The section to which this note is appended (being

substantially our section 9, c. 104, Code 1899) will accomplish this purpose, and at the same time attain the object of the latter part of section 2, Acts 1841-42, p. 55, c. 98, which provides that no debt shall be protected against the operation of the statute of limitations by any assumption of the executor or administrator, so as to charge the real estate in possession of the heirs or devisees with the payment thereof. The cases cited by the revisers in 12 Wheat. 565, 6 L. Ed. 730, and 1 Whart. 66, 29 Am. Dec. 39, are both attempts to prosecute actions on acknowledgments or promises of personal representatives on claims already barred when the promise was made, and had no reference to promise on debt alive at time of promise. Appellants refer to a late case decided by this court—*Stiles v. Laurel Fork* (W. Va.) 85 S. E. 986—and say that "it seems to decide conclusively the questions involved in this case." It is there held (Syl., point 1): "An administrator cannot, by the acknowledgment in pleading of a debt against his decedent which is barred by the statute of limitations, or in any other way, remove the bar of that statute;" that is, when the bar has taken place, he can in no way whatever remove that bar. As provided in section 9; "No acknowledgment or promise by any personal representative of a decedent \* \* \* shall charge the estate of such decedent \* \* \* in any case in which, but for such acknowledgment or promise, the decedent's estate \* \* \* could have been protected under the sixth section of this chapter." "Could have been protected" when? Why, clearly, at the time the promise or acknowledgment was made. If the statute had already taken effect, the administrator could not revive the debt by any act or promise, and there is nothing in the case cited intimating that a new promise might not be made in writing by a personal representative to pay a debt not yet barred by the statute, which would make a new starting point from which the statute must run as against the personal assets of the decedent.

As to the first proposition, whether in case of joint administration the promise of one administrator is sufficient in law to prevent the operation of the statute of limitations, appellants seem to rely with great confidence on the case of *Tullock v. Dunn*, supra, in an action against several executors, wherein Lord Chief Justice Abbott says: "The promise by one only is not enough to entitle the plaintiff to recover. There ought to be a promise by both." This question seems never to have been decided either in Virginia or West Virginia, but in the case of *Taze-well's Ex'r v. Whittle's Adm'r*, 13 Grat. 329, which was a suit to enforce the collection of a debt on a new promise or acknowledgment by one of two personal representatives of the deceased debtor, the debt having been barred at the time of the testator's

death, while the case of *Tullock v. Dunn* is referred to both by counsel in the argument and by Judge Moncure in his opinion in the case, the question of the acknowledgment or new promise being insufficient because not made by both the personal representatives is not mentioned. The fifth syllabus in the case is: "To take a debt out of the statute, the acknowledgment of an executor must be express. And quære if there must not be an express promise to pay." In the case of *Shreve v. Joyce*, 36 N. J. Law, 44, 13 Am. Rep. 417, the question is fully discussed and many authorities cited, and it is there held: "A promise by one of two or more executors is sufficient to take a debt of the testator out of the statute of limitations." In this case Judge Bedle says: "The only direct adjudication upon the subject in the English courts is the case of *Tullock v. Dunn*, and that has only the force of a *nisil prius* decision." So, in *Briggs v. Starke*, 12 Am. Dec. 659, 2 Mill. Const. 111, where a motion was made to set aside the verdict in the case on the ground "that the promise of one executor is not sufficient to take a demand out of the statute of limitations, nor to prevent it from running against it," the court held that "new promises made by one of the several executors take the case out of the statute." As stated in the New Jersey case cited, "the question is one of first impression, and we are at liberty to declare the law as we think most in accordance with the principle." The statute (section 9, c. 104, Code 1899) clearly recognizes a difference in the application of the principle as between personal representatives and joint contractors, as it provides that "no acknowledgment or promise by any personal representative of a decedent, or by one of two or more joint contractors shall charge the estate of such decedent, or charge any other of such contractors in any case, in which but for such acknowledgment or promise, the decedent's estate or another contractor could have been protected under the sixth section of this chapter." In the case of joint personal representatives the action of the one affects only the estate of which he has control, and casts no personal liability on his co-representative, while in the case of joint contractors the action of one, but for the statute, might involve the personal liability of his co-contractor. In *Wheeler v. Wheeler*, 9 Cow. 34, it is held that: "Executors are esteemed but one person in law; and acts done by one of several, relating to the delivery, sale, or release of the testator's goods, are all the acts of all. Thus, one of two executors may assign a note belonging to the estate of their testator. So, he may pledge such note or assign it as collateral security for a judgment obtained against the estate of the testator." *Stribling v. Coal Co.*, 31 W. Va. 82, 5 S. E. 321; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3.

The second, third, and fourth propositions of appellants as to the conclusions arrived

at by the circuit court under the pleadings and the facts shown by the record will be considered together. After the suit was matured on the bill and amended bill, and William L. Cunningham had filed his answer relying upon the statute of limitations to protect the estate he represented, the cause was referred to a commissioner, and the larger debt of plaintiff reported as barred, and exceptions to report filed, the heirs at law of James L. Cunningham then filed their answer in which they relied upon the statute of limitations, neither said bills nor answers being sworn to, and, before any action was taken on these matters, plaintiff discovered writings and correspondence between the defendant William L. Cunningham and plaintiff's decedent touching the indebtedness of, said James L. Cunningham's estate to plaintiff's intestate, upon which plaintiff based his second amended bill, which was sworn to. These writings are relied upon to prove a new acknowledgment of the debt by the administrator William L. Cunningham, and a new promise to pay the same. The writings consist of letters written by said administrator to S. S. Cunningham, plaintiff's testator, and the replies thereto, and are exhibited with the said second amended bill. The bill sufficiently accounts for the delay in their production, having then been recently discovered for the first time. None of the heirs answered the said second amended bill. Their answer formerly filed, not being under oath, could not be taken as such answer unless sworn to and refled and relied on by them. The only answer to this bill is that of William L. Cunningham as administrator of James L. Cunningham. The bill is taken for confessed as to all the heirs, and surely the allegations of the bill affect their interests directly, as it alleges that said William L. Cunningham, in conducting said correspondence, in writing the letters, and receiving the replies and statements, was acting not only as the active administrator of the estate of his and their father, but as agent for his coadministrator and for all the heirs at law of James L. Cunningham.

The first letter shown by the record, written by William L. Cunningham to S. S. Cunningham, bears date August 18, 1887, and starts out by saying: "Having qualified as one of the administrators of my father's estate, I write to you to please send me the amount of your note, with interest on same up to the 1st day of September, 1887, against this estate; contrary to all expectations he left no will. I have no doubt but what his estate will hold out, and there will be a good large margin to go on," etc. In response to this it is alleged that on August 22d, same month, S. S. Cunningham wrote and mailed to him a statement in writing showing the dates of the notes—one for \$2,314.40; the other for \$100—and the interest up to September 1, 1887, as requested, and also the application of a payment of \$100 entered as a

credit on account of interest June 27, 1885, and exhibits said statement and letter of S. S. Cunningham transmitting it. Defendant, in his answer, does not say that he never received or had such statement. He does say: "It is not true, as alleged in plaintiff's second amended bill, that he, the said S. S. Cunningham, wrote and mailed to this respondent the paper writing, a copy of which is filed with plaintiff's second amended bill as Exhibit No. 4." Respondent in his answer says, further, that "he does not know that he wrote such letters, and does not admit that he did, but controverts the statement in plaintiff's bill charging him with writing the letters of which such exhibits are copies." Yet it was well proved by the depositions of witnesses who were well acquainted with his handwriting that he did write them, and, although the cause was continued on his motion to allow him to take depositions, he neither went upon the witness stand himself nor took depositions of others. On the back of the letter of August 18th requesting a statement of plaintiff's intestate's debt, written by William L. Cunningham, is a pencil indorsement proved to be in the handwriting of S. S. Cunningham, in the following words: "Statement sent with interest to September 1st, 1887, shows balance to that date \$2,912.21"—which statement so fixing the amount gives the dates and amounts of the notes, and the letter accompanying the same, dated August 22d, acknowledges the receipt of the letter of 18th of August, and says: "According to your request, hand you a statement of your father's indebtedness to me with interest to September 1st, 1887. I have given you the dates and amounts, and hope you will find the interest correctly calculated. I am very much pleased to hear satisfactory statement you give of his affairs." On the 29th day of September, William L. Cunningham wrote to S. S. Cunningham, inclosing statement of the latter's taxes for 1887 which he had obtained from the deputy sheriff, and said, in closing his letter: "I want to come over to your place and talk to you about your debt against the estate of my father as soon as I am a little footloose." When he wrote this letter he must have received the statement of the debt, or been in possession of facts in relation to the debt, that he wanted to see him about it—presumably to make some arrangement for its payment. On the 24th of December, 1888, he wrote another letter to S. S. Cunningham, saying that he had advertised the Falling Waters farm very extensively. "We must sell it if not this time, it must go soon for whatever it will bring. With the incumbrance on the land we cannot make it pay the interest and taxes, consequently we must sell. \$35 per A. is the minimum price we will let it go at this time. At that price it will let us out. I consider it is well worth that—at the present price of products I think it can be made neat 4 per cent at that figure.



We raised this year on it about 925 bu. wheat, about that much corn, clover seed enough to sow, enough clover hay to feed the tenants' stock, fencing in reasonable good repair. I now ask you if we cannot get that price publicly, will you take it at that. We will pay the taxes for 1888. You would be entitled to % of the growing wheat crop, and if you would desire to rent it and wish it I will attend to that for five years, should you and I live that long, free of charge. We have a good tenant on the farm. You have a big pile in it—would not feel the buying of it very much. On the other hand it certainly would be a great relief to us all, and more especially to mother and Mat. Please consider the matter and let me hear from you soon regarding it." Here we have an express acknowledgment of the debt after he must have had full and complete knowledge of the evidence of such indebtedness; not only this admission of the debt, but a direct offer to pay the debt with real estate of which his father died seised, calling his attention to the producing capacity of the farm offered, telling him what proportion of the growing wheat crop he would be entitled to from the tenant, and, among other inducements to buy it, saying, "We will pay the taxes for 1888" (here he must have been speaking of the heirs, he being one of them), and also calling his attention to the fact that he had a "big pile in it"—that is, had a large debt against it which would apply on the price of it—hence he "would not feel the buying of it very much," adding, "On the other hand, it certainly would be a great relief to us all, and more especially to mother and Mat" (the writer surely was representing some parties besides himself; persons who were considering themselves or their property liable and bound for the indebtedness which they could pay off in case they could induce their kinsman to buy it on account thereof), and closing his letter by asking him to consider the proposition and let him hear from him. It is clearly indicated by that letter that he was representing the heirs. On the 14th day of March, 1889, William L. Cunningham wrote S. S. Cunningham, saying: "I received your note some time ago; proceed to answer. As we have a little funds left in our hands from the estate after paying the most urgent demands, I will enclose you check this time for the amount of \$125 as you will see. Please return the enclosed receipt after signing. I certainly wish we could sell, but that seems impossible to do, even at a great sacrifice. I am tired of worry with it and the debts thereon. \* \* \* Sometimes I think if we could make arrangements with the creditors to divide the property and the debts it would be better. \* \* \* I would like to see you and talk about it. After the personalty of the estate is settled up, there will still exist about \$8,500 indebtedness. There is as off-sets to that 600 acres of land in addition to two notes of J. R. Cunningham aggregating

about \$2,400, for which the farm is bound for." This is a part payment on the debt evidenced by a writing signed by the acting administrator.

In *Foster v. Starkey*, 12 Cush. (Mass.) 324, Shaw, C. J., says: "It was laid down, amongst other rules well settled, that a part payment of principal or interest is unequivocal evidence of a new and continuing promise, to avoid the statute of limitations, and forms a new point from which the statute begins to run"—and cites *Sigourney v. Drury*, 14 Pick. 387. If part payment is a continuing promise, and such payment be made in writing signed by the party making it, it would seem that it would be a new promise in writing. *Walt, Actions & Def.* 297; 13 Am. & En. E. L. 748.

Our statute was intended, we may concede, to render ineffective all oral evidence of a new promise or acknowledgment, and that, in consequence, it destroyed the effect of parol proof of a partial payment. To this extent only can the contention of the appellants in their petition be considered sound, when they assert that our statute destroys the effect of a part payment. The true rule, as shown by the foregoing authorities, is that our statute has changed the mode of proof; the new promise or the acknowledgment of a subsisting debt, which is made by statute the equivalent of an express promise, must now be evidenced by a writing signed by the debtor or by his agent. Our statute has no other effect. As a part payment was, before the passage of the statute, not only the best form of an acknowledgment of a subsisting debt, but in the language of Chief Justice Shaw, already quoted, "unequivocal evidence of a new and continuing promise," so it remains since our statute; and if the evidence of it is in writing, signed by the debtor or his agent, it is a new promise in writing, and may be proved. It has been so held in a multitude of cases arising under the English statute, which was construed by the courts as making ineffective parol evidence of part payments. See the review of them in *Williams v. Gridley*, 9 Metc. 482.

On the 26th day of March, 1889, said William L. Cunningham wrote and signed another letter to S. S. Cunningham, which evidently refers to the receipt returned to him by S. S. Cunningham, as he requested, for the payment of the said \$125, in which he says: "Yours was received a few days ago, with thanks for the remittance; it was not as much as I expected to send you but as we must keep a little surplus on hand it was all we could spare at this time, but hope to send you more soon. We have but one note in bank; and that we have been making every effort to pay by installments, and have gotten it considerably reduced. We expect to close the estate soon so far as we as administrators are concerned, and think we will run it on the responsibility of the heirs of James L. Cunningham, dec'd, at that time if



necessary, we will confess judgment on all the paper by taking up the old and giving our paper for it as heirs. I do not think that any of the creditors need be uneasy as the debts are \$8500 or near about that figure, when there is between 1000 and 1100 acres of land bound for them, would sell and pay it if we could do so, rather than carry the load and worry." We have here a reference to the payment made before mentioned, and an explanation why it could not be a larger payment at the time, with the expression of hope to send more soon. The amount paid at that time was more than sufficient to pay off the \$100 note and interest, at that time. If it had been so applied, and yet there was no question raised as to any part of the debt, but the whole tenor of the letter is to the effect that they want and expect to pay the debt, and the letter admits that the lands of the decedent and father, James L. Cunningham, are bound for these debts. In *Abrahams v. Swann*, 18 W. Va. 274, it is held (Syl., point 5): "If such acknowledgment or promise is contained in a letter of the defendant to the plaintiff, it is not necessary that the amount of the debt, or that its date, should be specified in the letter, but the particular debt to which the letter refers may be identified by extrinsic evidence, written or parol; and if so identified clearly, and the promise is unequivocal, or the acknowledgment is of a subsisting debt, for which the defendant is liable and willing to pay, the bar of the statute of limitations is thereby removed." The construction of such letters is fully discussed by Judge Green in that case, beginning at page 282, 18 W. Va., 41 Am. Rep. 692.

It is impossible for an unbiased mind, from the record, to come to other conclusion than that William L. Cunningham received from S. S. Cunningham the statement of the debt marked "Exhibit No. 4," in reply to his request for it of August 18, 1887, which statement gave the dates and amount of the two notes, with calculation of interest to September 1, 1887. In all the letters written by William L. Cunningham there is not a word of protest or question about the justice of it. He seems to have known of the existence of the notes from the time of his qualification as administrator. There was no other debt due from his father's estate to S. S. Cunningham, and all the correspondence was concerning that particular debt. There is no question about the identification of the debt, and no equivocation on his part about paying it if in his power to do so. Appellants insist that the court erred in the decree of June 14, 1899, in decreeing that the amount of said debt is a valid and subsisting debt binding the real assets of the estate of James L. Cunningham in the hands of his heirs at law, because of the provision of the statute—the latter part of section 2, c. 98, Acts 1841-42, p. 55. It is true the promise of an administrator made wholly in his representa-

tive capacity, and without authority from the heirs at law, would not stop the running of the statute as to the real assets and as against the heirs, any more than a judgment against the administrator would, as held in *Saddler v. Kennedy's Adm'r*, 26 W. Va. 636.

But the second amended bill alleges that, in writing the letters in which the promises were made, William L. Cunningham was not only acting in the capacity of administrator, but was acting for and on behalf of his co-administrator and of the heirs at law, and by their authority. The bill is taken for confessed as to all of them, whereby they admit that William L. Cunningham was so acting for them as their agent, and so corresponded and dealt with plaintiff's decedent, S. S. Cunningham. The second amended bill virtually made a new case for the same purpose as the letters and documents discovered and exhibited with the new bill, which contained allegations that the other bills did not contain. Under section 38, c. 125, Code 1899, the said bill, being verified by the oath of the plaintiff, could only be answered under oath, so that the answer filed by the heirs at law to the original and amended bills could not be treated as their answer to the second amended bill. On the 3d day of May, 1899, the cause was heard on the papers and proceedings theretofore read and had therein, on the plaintiff's second amended bill, and exhibits filed in open court, process duly served on all the defendants to said bill and on said bill taken for confessed, on the answer of William L. Cunningham, administrator, theretofore filed, and general replication thereto, also on depositions, etc. In *Wilson v. Preston*, 15 Iowa, 246, it is held that: "It was competent for the court to permit the party to attach the verification after respondent had answered. After it was attached, it was as much the duty of respondent to verify his answer as if the petition had been sworn to in the first instance. The answer as filed was no response to the petition as amended." *Radford v. Fowkes*, 85 Va. 821, 8 S. E. 817; 1 Am. & Eng. Enc. Pl. & Pr. 625. The second amended bill is wholly unanswered except by William L. Cunningham in his capacity as administrator, and is taken for confessed as to all the heirs at law and the co-administrator. This is an admission of all its allegations, that William L. Cunningham was, in writing the letters, the sole acting administrator (and this fact is not denied by said William L. Cunningham) and the agent of his said co-administrator, and that in making and delivering such letters and writings he was acting with the full knowledge of and as the agent for the other distributees and heirs at law of said James L. Cunningham. Section 38, c. 125, Code 1899, provides that "every material allegation of the bill not controverted by answer \* \* \* shall for the purpose of the suit be taken as true, and no proof thereof shall be required." In *Cann v. Cann's Heirs*, 45 W. Va. 563, 31 S. E. 923,

it is said by Judge Dent: "The fact that the adult defendants failed to answer, denying the plaintiff's right of recovery, weighs heavily in favor of the justice of plaintiff's demand. They were his sisters, and should have been acquainted with the circumstances; and a legal admission by them [referring to the bill being taken for confessed] is almost equivalent to positive proof or affirmation. As to themselves, it certainly is so regarded by the law of pleading." *Cann v. Cann*, 40 W. Va. 133, 20 S. E. 910; *Bank v. Shirley*, 26 W. Va. 563.

With the second amended bill are filed as exhibits several other letters written after the expiration of 10 years from the date the larger note fell due—one from S. S. Cunningham to William L. Cunningham, dated January 13, 1893, inclosing a statement of the two notes, showing the interest due to January 1, 1893, to be \$1,145.42, requesting its payment by the 1st of the following April; another by William L., dated January 21, 1893, acknowledging receipt of the statement, and saying: "We will do the very ——— for you that we possibly can by the 1st of April. We are certainly very much obliged to you for leniency thus long;" and after speaking of some persons being behind with them on their interest to them on the farm in Frederick county, Va., about \$900, says: "If we can in any way collect that we will be in no trouble to raise the full amount of your interest." In January, 1894, S. S. Cunningham sends him another statement of the whole amount due him, \$3,240.89, April 1, 1894, and asks him, if he can, to pay the back interest, \$826.49, and the principal of the small note, \$100, in all, \$926.49, by the 1st of April next. On the 8th of March, 1894, William L. wrote S. S. Cunningham that he had received the statement some time ago, and refers to the interest and smaller note of \$100, making, in all, \$926.49, and refers to his wanting it by the 1st of April, 1894, and goes on to tell him why they cannot pay it by that time, speaks of selling land, and asks him if he could not make some terms and buy one of the farms. "It would be a great relief to us, and I hope no encumbrance to you. I close by repeating that I will do the best I can for you." April 2, 1894, William L. again wrote to S. S. Cunningham: "In regard to the payment of you some money, I will say that I have been disappointed in getting some for you on the 1st of the month, as requested, but I will state that if there will be no further disappointment, I expect to get some during the month some time. If I am not disappointed I will bring it over to you." On May 7, 1894, William sent to S. S. Cunningham check for \$100, which he says was all he could raise for him at that time, and saying that he could do no better. These last-mentioned letters are no proof of promise by the administrator which could prevent the running of the statute of limitations, being written after the statute had run, but under the

pleadings, and facts alleged in the second amended bill and confessed by the coadministrator and all the heirs at law of James L. Cunningham, they amount to a promise on their part to pay the debt, and which is sufficient to charge the real assets therewith. They show clearly that it was always the purpose of the administrators and heirs to pay the debt, and it was only when suit was brought that they seemed first to conceive the idea of pleading the statute of limitations, and being the beneficiaries of the real assets of their father's estate is sufficient consideration for the promise. *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. 56.

There being no reversible error in the decree, the same should, in my opinion, be affirmed.

DENT, J. (dissenting). The section of the law construed is as follows: "No acknowledgment or promise of any personal representative of a decedent, or by one of two or more joint contractors, shall charge the estate of such decedent, or charge any other of such contractors in any case, in which, but for such acknowledgment or promise, the decedent's estate or another contractor could have been protected under the sixth section of this chapter." The first point of the syllabus construing this section is as follows: "An executor or administrator cannot make a new promise to pay a debt of his decedent either before or after the debt has been barred by the statute of limitations." This construction renders wholly meaningless the following words or clause, "in which, but for such acknowledgment or promise, the decedent's estate \* \* \* could have been protected under the sixth section of this chapter," and amends the section so as to make it read, "No acknowledgment of any personal representative of a decedent shall charge the estate of such decedent in any case." The power of construction is certainly great when at one fell swoop it can eliminate a complete qualifying clause from an enactment of the Legislature. That this has been done in this case there can be no question. The effect of so doing is simply to deprive the personal representative of a power heretofore vested in him, both by common and statute law for the protection of the decedent's estate, to prevent unnecessary suits against it, and its devastation by the costs of useless litigation. This power was of no benefit to the creditor whose debt was in danger, for the courts are open to him, and by suit against both heir and personal representative he can easily prevent the bar of the statute, though by so doing he mulct the estate with costs, which by proper arrangement with the representative heretofore could have been avoided. But now no creditor dare wait or hesitate if his debt is threatened by the bar of the statute. He must bring his suits—one

at law against the personal representative, and the other in equity against the heir—for the promises of the personal representative, though full handed with assets, are worthless either as against himself or the estate. Being bound to plead the statute to save the estate, he would not be liable individually for the reason that his promise would be without consideration, as the estate would not be liable for the debt if paid by him after its bar, and the law as promulgated by the court makes his promise wholly void—that is, neither binding on himself nor the estate, it matters not what may be the condition of the assets. Neither can a testator clothe his executors with power to make arrangement with his creditors for the benefit of his estate if the statute of limitations is involved. Creditors must sue to save themselves, and the executor is powerless to protect the estate intrusted to his care from unnecessary costs. The holding of the court makes suits against the personal representative, heirs, or devisees absolutely necessary to prevent the running of the statute. No such thing was contemplated by the lawmakers, and in using the language, now rendered meaningless, "in which but for such acknowledgment or promise the decedent's estate could have been protected under the sixth section of this chapter," they did so advisedly, with the plain import that, if the personal representative could not otherwise protect the estate from a just charge, his promise to pay, by which suit was delayed and the estate protected, would operate to prevent the running of the statute.

And why should not such promise do so? The estate is subject to no greater liability by reason thereof, but unnecessary costs and expenses are saved to it. But it is said it may delay the settlement of the estate. Not necessarily so, unless those interested therein desire such delay for their own and the estate's benefit. The creditor is in no wise benefited by the delay. He extends the credit for the estate's benefit, not his own. Take even in the present case, if the creditor had sued promptly, would the estate have been any better off? And because in some instances the power may have been abused, that is no reason why it should be denied to all personal representatives, when it is so necessary for the proper and judicious administration of estates. The section under consideration was enacted for the purpose of rendering the preceding section 8, c. 104, Code 1899, harmonious with section 5, c. 87, Id., wherein it provides that if any personal representative shall pay any debt, the recovery of which could be prevented by reason of illegality of consideration, lapse of time, or by any other fact within his knowledge, no credit shall be given him therefor, and to destroy any inference therefrom that although he could not pay, yet, being the legal representative of his decedent, he might exercise the right of such decedent to

renew a debt already barred by the statute by a promise in writing. It is strange that this section should have been several times re-enacted, carried through various editions of the Code, and construed by the Supreme Court of the state of Virginia with its grammatical construction unchanged, and yet the discovery was never made that the lawmakers, including the revisers of 1849, had used the wrong tense to express their meaning until the present term of this court, although, if a mistake, it changes the entire meaning of the section, as is perfectly apparent to any school child. Grammar is not such a new study that such a mistake so vital to its meaning could be introduced into a statute of importance, and carried through so many editions of the Acts and Code for more than half a century, without being noticed by some legal light, although the grammarians of the past may not compare with those of the present. It is not a mistake. The language was used advisedly. Why construe its plain meaning away? It is said it is necessary to remedy the evil the Legislature had in view. What evil? The right of a personal representative to protect and preserve the estate. Such evils exist only in dreams. The personal representative has the power to stop the running of the statute as to the personal property by confession of judgment and as to the real estate by instituting a suit in equity. But these legal proceedings will entail costs on the estate. Why, then, should he not have the power to do the same thing by a proper promise in writing? Why should not such power extend to the real assets as well as personal? Why should he or the creditors be forced into legal proceedings when they could be so easily avoided without detriment and to the benefit of the estate? The only answer is that it might enable him to unduly postpone the settlement of the estate. Those interested under the numerous statutory safeguards could easily prevent such a result, but if for the benefit of the estate, and necessary to prevent sacrifice thereof, they ought not to want to prevent it. Such an argument would never have been advanced had not a creditor been duped by false promises into waiting until his debt had been barred by the statute; and now it is not made for the protection of estates generally, but simply for the justification of bad faith in the present instance. Because one estate is enabled to escape a just debt, many estates are made to suffer thereby, and all personal representatives are shorn of the power they heretofore possessed for the proper discharge of their administrative duties.

Read the statute again: "No acknowledgment or promise of any personal representative of a decedent shall charge the estate of such decedent in any case, in which, but for the acknowledgment or promise, the decedent's estate could have been protected un-

der the sixth section of this chapter." Protected by whom? By the administrator. If he can protect it without a new promise, it is his duty to do so. But if he cannot protect it without a new promise, it is his duty to make the promise. The limiting clause rejected by the majority of the court necessarily implies that there are acknowledgments and promises of personal representatives that will charge the estate; otherwise it would have been omitted just as the court now expunges it. What are these acknowledgments and promises of the personal representative that will bind? Such as are made by them when they cannot otherwise protect the estate from sacrifice or loss. Why does such acknowledgment or promise bind the estate? Because the estate gets the benefit thereof, and is protected thereby. The creditor refrains from suit, and extends the time, to save cost, expense to, and sacrifice of the estate. This section was intended merely as a qualification upon the preceding section, and includes no other subject except the bar of the statute of limitations. There are but two kinds of promises within its purview, both of which are provided for directly or by plain implication. One is where the debt is barred by limitation at the time of the promise, and the other is where it is not so barred. In the one instance the personal representative can and is bound to protect the estate, and a promise made by him contrary thereto is void. In the other, he cannot protect the estate without such promise, and it is recognized as valid and binding because of indulgence extended to the estate. Otherwise, one creditor being forced to bring suit to avoid the statute might bring the estate into disrepute, and precipitate an avalanche of suits against it, involving much needless cost and expense. It was plainly the intention of the revisers of 1849, and of each succeeding Legislature down to the present time, to preserve to the personal representative the power to protect the whole estate, both real and personal assets, by such binding promise in writing as was necessary for this purpose, until such assets could be made legally and properly available for the payment of debts. The protection of the real estate referred to by the revisers was not the real assets, but such portion of the real estate as had passed into the hands of an innocent purchaser for value, without notice, under section 5, c. 86, Code 1899. All other assets were to be subject to the protecting power of the personal representative. Without being guilty of redundancy, they expressed this intention in the section under consideration as plainly as it is possible for language to express it. It is true they might have added the further clause, "But in any case in which such estate cannot be protected without such promise in writing, the same shall be a valid charge thereon." This would be unnecessary repetition, for the same meaning already exists by necessary implication; and it might

be held that the word "protected" referred to the time of the plea, and not to the time the promise was made, and if, at the time of the plea, the debt was not barred, the writing would not be invalid; or it might be held that the clause was surplusage, and did not change the meaning as now construed. No legislation can be armored against the ruthless club of judicial construction, wielded by willing hands. My conclusion is that as to a debt not barred by the statute of limitations the promise of a personal representative, made for the purpose of protecting the estate against unnecessary and premature suits, will prevent the running of the statute, and make such debt a proper charge against the assets, both real and personal, except such portion of the real estate as may have been conveyed by an heir or devisee to an innocent purchaser for value without notice, as provided in section 5, c. 86, Code 1899. In so far as Judge McWHORTER'S opinion is consistent with this conclusion, I concur with him, and in so far as Judge BRANNON'S opinion conflicts therewith I dissent.

(53 W. Va. 227)

WARD et al. v. BROWN et al.

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

PROBATE OF WILL—APPEAL BY EXECUTOR—  
VALIDITY OF BEQUEST—DIRECTING ISSUE—  
ATTESTING WITNESSES—INSTRUCTIONS—  
TESTAMENTARY CAPACITY—EXPERT EVIDENCE—  
WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESS—APPEAL—REVIEW.

1. An executor of a will may propound it for admission to probate, and prosecute an appeal from a decree, declaring it void, in a suit brought to impeach it.

2. Whether a bequest actually made is valid cannot be inquired into upon a bill filed to test the validity of a will. That question is properly raised upon a bill to construe and expound the will.

3. It is not error to direct an issue devisavit vel non without proof of the interest of the plaintiffs, unless objection has been made that they would have no interest in the estate if the will were set aside, or unless such want of interest appears from the record itself.

4. Attesting witnesses of a will who are introduced to impeach the will on the grounds of want of proper execution, unsoundness of mind, or undue influence, will not be excluded; but their evidence will be viewed with much suspicion, and it is proper to so instruct the jury.

5. When part of the attesting witnesses testify against the will, it is error to instruct the jury that the evidence of the witnesses present at the execution of the will is entitled to peculiar weight.

6. When a proper instruction is asked and given, it is error to give another improper instruction which modifies it and nullifies its effect or obscures its meaning.

7. Evidence of physicians as to testamentary capacity is entitled to greater weight than that of nonprofessional persons, provided they have had personal observation and knowledge of the person whose mental capacity is in question; otherwise, it is not. Rule on this subject announced in Jarrett v. Jarrett, 11 W. Va. 584, Kerr v. Lunsford, 8 S. E. 493, 31 W. Va. 659, 2 L. R. A. 608, and Nicholas v. Kershner, 20 W. Va. 255, examined and explained.

8. Expert testimony, except under special circumstances, is entitled to only such weight as the jury may deem it entitled to when viewed in connection with all the evidence and circumstances; and it is error to instruct the jury that the evidence of physicians testifying as experts only, on the trial of an issue *devisavit vel non*, is entitled to great weight.

9. It is error to classify witnesses in respect to the weight and value of their evidence by an instruction to the jury, unless the classification is based upon a well-defined distinction as to the opportunities and powers of the witnesses to know the truth.

10. Evidence of the acts and conduct of the testator tending to show soundness of mind at or near the time of the execution of the will is entitled to more weight than the opinions of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak.

11. When there is a doubt as to the competency of the testator to make a will, the fact that he has given his property to persons other than those related to him in a reasonable degree by blood is proper to be considered by the jury.

12. When evidence is introduced to show interest on the part of a witness for the purpose of discrediting him, it is improper to refuse to admit evidence to show the extent of such interest or to disprove its existence; and any person who is conversant with the facts may testify as to them, although the alleged contract is between the witness and a municipal corporation.

13. An instruction which tells the jury that if they believe any witness has testified falsely in the case as to material matters they may disregard such false testimony, or give to it and all the evidence of such witness such weight as they believe it entitled to, is improper in failing to inform the jury that they may disregard all the evidence of such witness.

14. If an instruction is proper in other respects, it is not vitiated by merely naming the witness to whose testimony it is applicable.

15. The court is not bound to repeat its instructions.

16. Point 20 of the syllabus in *McMeehan v. McMeehan*, 17 W. Va. 683, 41 Am. Rep. 682, approved.

17. Where a will has been prepared by, and executed in the presence and under the direction of, a lawyer of ability and good standing, professionally and as a citizen, and two of the attesting witnesses attempt to impeach the will on the grounds of nonexecution, insanity, and undue influence, and the person under whose supervision it was executed is dead, and an effort was made, when too late, to take his testimony, it is proper to admit evidence of his character and capacity.

18. When an erroneous instruction has been given by the court to the jury, the presumption is that the exceptor was prejudiced thereby, and the verdict will be set aside on account thereof, unless it clearly appears from the record that he could not have been prejudiced thereby.

19. When a correct instruction is refused, the verdict will be set aside, unless the appellate court can see from the record that, even under the instruction, a different verdict could not rightly have been found.

20. The giving of erroneous instructions bearing upon the weight and value of certain testimony, when the evidence is contradictory, is cause for reversal.

Brannon, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County; E. S. Doolittle, Judge.

Bill by John Ward and others, B. Ward's heirs, against J. F. Brown and others. De-

cree for plaintiffs. Defendants appeal. Reversed.

Brown, Jackson & Knight, Flournoy, Price & Smith, and Mollohan, McClintic & Mathews, for appellants. E. W. Wilson and A. B. Littlepage, for appellees.

POFFENBARGER, J. Brigham Ward, a resident of the city of Charleston, and an eccentric old man, died on the 7th day of April, 1896, leaving a will which he had executed two days before his death. Many of his peculiarities and eccentricities are attributed to the fact that from his birth he had been afflicted with what is called a "cleft palate," which interfered with his speech. He was originally from New Hampshire, and came to this state in 1859. After serving in the federal army for some time, he came to Charleston near the close of the Civil War, and continued to reside there. He never married, nor had he any relatives living near him. For many years he had been in the grocery business, and at the time of his death he owned considerable property. By his will, after directing payment of his debts and the erection of a monument to cost not more than \$600, he bequeathed \$10,000 of his estate to the trustees of the Kanawha Presbyterian Church, to be used by them in paying off the debt contracted by them in enlarging the church edifice, and the residue of his estate he gave to the city of Charleston, to be invested, and to be known as "The Brigham Ward Hospital Fund," the income to be used in supporting and maintaining free beds in the hospital of said city then in process of erection. The will was prepared by Edward B. Knight, a very able lawyer and an upright man, and he and James F. Brown were appointed executors of the will. Mr. Brown qualified, but Mr. Knight did not.

After the will had been probated in the county court of Kanawha county, John Ward and others, nephews and nieces and grand nephews and nieces of the testator, instituted a suit in chancery, alleging in their bill that they were the only heirs and distributees of said Brigham Ward; that the writing which had been probated was not his will; that at the time it was executed he was of unsound mind, and that undue influence was exerted over him to induce him to make the will; and praying for an issue *devisavit vel non*. Answers were filed by the executor, the trustees of the church, and the city of Charleston, the issue directed and tried on the law side of the court, and a verdict was rendered in favor of the contestants. Numerous exceptions were taken to the rulings of the law court, and, among others, to its action in overruling a motion to set aside the verdict. After the proceedings in the law court were certified and returned to the chancery court, another motion was made to set aside the verdict, and it was overruled, and a decree entered declar-

ing that said paper writing was not the will of said Brigham Ward. From this decree an appeal was taken by the executor of the will and the trustees of the Kanawha Presbyterian Church. The city of Charleston did not join in the petition for the appeal, but, before the case was argued and submitted, it appeared by counsel and united in the appeal, praying that the decree might be reversed, the verdict of the jury set aside and a new trial awarded, and that the brief filed for the appellants be read in its behalf.

It is insisted by counsel for the appellees that the bequest to the Kanawha Presbyterian Church is void, that the executor has no interest in the matter in controversy, that the city of Charleston is not properly before this court, and that therefore the appeal should be dismissed. The first reply to this is that the bill does not allege invalidity of the bequest to the church trustees. Upon that question the court below took no action whatever, nor could it have done so in the absence of pleading. If the bill had contained such an allegation it would have been improper, since that question is one of construction, to be disposed of in a subsequent suit brought for the purpose of having the will construed in case it should stand. This proceeding is little, if anything, more than one of probate, since it can only be entertained by a court of equity under a special statute, and does not belong to the general chancery jurisdiction of the court. Many authorities hold that the only question that can be decided is whether the alleged will, or any part thereof, is the will of the testator; in other words, whether in fact and in law the paper was executed as and for the will of the testator. After that function is performed, the court can go no further. *Coalter's Executor v. Bryan*, 1 Grat. 18; *Dower v. Church*, 21 W. Va. 23; *Lamberts v. Cooper's Executor*, 29 Grat. 66; *Connolly v. Connolly*, 32 Grat. 657; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65. In *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346, *Johnson, J.*, said: "Upon a bill filed to test the validity of a will which has been regularly admitted to probate, the function of the suit is exhausted when that question is decided. It would be strange, in a suit brought to set aside a will, that the will should be expounded." In *Malone's Adm'r v. Hobbs*, 1 Rob. 388, 39 Am. Dec. 263, *Baldwin, J.*, said of the Virginia statute, which is similar to ours: "That statute provides a supplemental tribunal to revise the decision of the court of probate, if in favor of the will; and that tribunal is a jury, to be impaneled for trial of the issue of devisavit vel non, to be directed by a court of chancery. The jurisdiction, such as it is, so conferred on the chancery courts, is not part of the original jurisdiction of the courts of equity, which will not (in the language of the books), in an adversary way, take jurisdiction to de-

termine the validity of a will. It is a probate jurisdiction, to be exercised, not by the chancellor, but by the jury; and its only power is to convene the proper parties, and to cause the prescribed issue to be made up and tried, with the incidental power to grant a new trial, and to remove impediments and furnish facilities to a full and fair trial of the merits before the jury." An examination of the authorities cited clearly shows that this doctrine, announced by the Virginia Court of Appeals many years ago, has been adhered to until this time.

It is claimed that *Jelev. Lemberger*, 163 Ill. 338, 45 N. E. 279, asserts a different doctrine. *Lemberger* brought a suit to set aside the will of his deceased uncle, devising to certain other persons real estate in which he would have taken an interest as an heir but for the will and his alienage, disclosing on the face of his bill the fact that he was an alien, by saying in the first sentence of the bill: "Your orator, Joseph Lemberger, of the empire of Germany," etc. On an issue the jury found for the will, and, he appealing from the decree adjudicating its validity, the Supreme Court reversed the decree, on the ground that it appeared that the plaintiff, being an alien, not qualified to hold real estate in Illinois, was not a person interested within the meaning of the statute conferring equity jurisdiction to entertain bills to impeach wills. Whether the Illinois court correctly construes the words "any person interested," found in the statute, when it holds that the interest must be pecuniary (*McDonald v. White*, 130 Ill. 493, 22 N. E. 599), need not be determined here. But it can be reasonably asserted, and with perfect consistency with the Virginia and West Virginia decisions, that a claimant under a clause of a will, questionable as to its validity, has an interest thereunder which entitles him to a judicial construction of that clause before what he receives under it can be taken from him, and that a bill to impeach and construe a will in one and the same suit cannot be maintained. Here the will gives \$10,000 to trustees for the payment of debts incurred in enlarging a church, secured upon church property, and debts hereafter to be created in a similar manner, provides for the payment of testator's debts and funeral expenses and the erection of a monument, and then gives the residue of the estate to the city of Charleston. Suppose the bequest to the trustees is void, and the will is valid; who could then contest the validity of the clause except the city of Charleston? What would be the result if it declined to do so? Can the city of Charleston remain silent, and fail or refuse to contest it, and thus allow the payment of the debts as provided by the will? Can it be said then that the church trustees have no interest in the clause? Will the court, in a proceeding of this kind, anticipate and forestall these possibilities, by holding that the trustees have no interest? Under these peculiar circumstances it cannot be consistently done. Nor will it be

asserted that, when a will containing an alleged invalid clause has been probated and is sought to be impeached, the claimant under such clause has not such an interest as entitles him to appeal from a decree declaring the paper in question not the will of the decedent. This case and that of *Jele v. Lemberger* do not stand on the same ground. Here the right to appeal by a person in whose favor the will contains a clause is involved, and the appeal has been granted, bringing into this court, for review, the proceedings in the cause in the court below. In the other case the question was whether the appellant had such interest as entitled him to institute a suit to impeach the will. The distinction is very marked and material. All the legatees were interested in the question tried in the circuit court—the validity of the will. As to it, they stood on an equal footing in this: that, according to its determination, all should win or lose. When the rights of the parties are thus dependent upon a single issue, an appeal by one of them brings that question up for all. Points 7 and 8 of the syllabus in *Walker's Ex'r v. Page*, 21 Grat. 636, are as follows: "Where the parties in a cause stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other. Where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the Court of Appeals will consider the whole case, and settle the rights of the parties not appealing, as well as those who bring their case up by appeal." To the same effect are the following cases: *Tate v. Liggit*, 2 Leigh, 84, 107; *Lewis v. Thornton*, 6 Munf. 87, 97; *Lenow v. Lenow*, 8 Grat. 349; *Purcell v. McCleary*, 10 Grat. 246; *Newman v. Mollohan*, 10 W. Va. 488. It is claimed, upon the authority of *Adamson v. Pearce*, 9 W. Va. 249, that the city of Charleston was not affected by the appeal taken by the other parties. The case of *Newman v. Mollohan*, 10 W. Va. 488, holds the contrary of this, and it is not believed, either that the two cases are in conflict, or that *Adamson v. Pearce* supports the contention of appellees. It holds that a party jointly interested on the same side with another party who has taken a writ of error to the judgment may, under the statute, sue out another writ himself, in order to protect himself against a dismissal by his complainant in error, thereby admitting that a reversal upon his complainant's writ would avail him, or an affirmance or dismissal preclude him. There may be a severance of joint parties, but, until there is, the judgment or decree is an entirety, binding all. *Newman v. Mollohan*, 10 W. Va. 488. A case covering entirely and specifically the objection raised here is *Bowlby v. De Witt*, 47 W. Va. 323, 34 S. E. 919, holding that when the rights of co-parties are not only

involved in the same question, but equally affected by the decree or judgment, the appeal of the one will call for an adjudication of the rights of the other not appealing. See, also, *Vance Shoe Co. v. Haught*, 41 W. Va. 282, 23 S. E. 553; *Weekly v. Hardesty*, 48 W. Va. 39, 35 S. E. 890.

Upon the same principle, the appeal of the executor brings up the decree as to all who claim under the will, and that he has an interest which entitles him to maintain an appeal is beyond question. In character, this proceeding is one of probate, and the propounding of the will for probate has always been one of his duties. "Under early procedure, it was often said that the executor was the proper person to propound the will for admission to probate." Page on Wills, § 817; *Baskett's Estate*, 78 L. T. Rep. 843; *Redmond v. Collins*, 15 N. O. 430, 27 Am. Dec. 208; *Ford v. Ford*, 7 Humph. 92; *Foster v. Tyler*, 7 Paige, 48, 51. "In the English ecclesiastical courts, which had jurisdiction only of wills of personality, a will could be propounded by none but the executor named in it, either voluntarily or upon the citation of others interested in the subject. If the executor refused or renounced, it could then be propounded by any other person interested. In a few of the United States the primary right to offer the will for probate belongs to the executor, if one is named, and a party interested may act only where none is named, or the executor is dead, nonresident, or refuses to act." 16 Ency. Pl. & Pr. 907. Anciently, only wills of personal property were probated. In the Virginias, wills of both personal property and real estate have been probated by virtue of the statute for a great many years. After this change was made, the statute was construed in the great case of *Wills v. Spragins*, 3 Grat. 555, where the first defect in the Virginia statute was developed, and *Baldwin, J.*, after reviewing the entire history of probate law, and considering the statute in connection therewith, said: "It follows from these considerations, and as a matter of necessity, that under our statute a sentence against the propounder of the instrument is a sentence against all claiming under it. He is the champion of the common cause, and charged to keep the lists against all antagonists, and not the less that some of his associates may be disabled by infancy, coverture, or other impediments. \* \* \* It follows that any will may be propounded, not only by the nominated executor, but by any legatee or devisee therein who has an interest in establishing it, without regard to the nature of the property upon which it acts; and that such propounder, in common with others of a like interest who may choose at any time to associate themselves with him as parties, becomes the representative of the will for the purpose of its probate, and the representative of all others of a like interest, though not formal parties."



Some authorities have been cited here, on the subject of the character and extent of an executor's interest, from which it is argued that he has no interest which would entitle him to appeal, but no case has been presented which says he has not such interest, or that he has not the power to do so, or that for the purpose of probate he does not represent the will and all persons claiming under it. Mere strained argument and inference from his want of power to do other things is no answer to the universal declaration of the courts that he may propound the will, and that in so doing he acts for everybody who claims under it. To show the utter inapplicability of the cases cited, the following are here noted: *Estate of Sanborn*, 98 Cal. 103, 32 Pac. 865, holding that a public administrator cannot contest a will; *Reid v. Vanderheyden*, 5 Cow. 719, holding that a person who has no interest under a will, or who had an interest which has ceased, cannot be a party to a proceeding for the probate of the will; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441, holding that a person named in the will as an executor has no such interest as will disqualify him as a witness to the will; *In re Hickman's Estate*, 101 Cal. 609, 36 Pac. 118, holding that a public administrator is not entitled to letters of administration as against an executor of a will which merely appoints an executor, without disposing of any property, and that the executor is so entitled; *Garnett v. Childers*, 2 Munf. 277, *Bogges' Heirs v. Robinson's Heirs*, 5 W. Va. 402, and *Jones v. Cunningham*, 7 W. Va. 707, all holding that a reversal cannot be had for mere error as to costs; and *In re Stewart's Estate*, 107 Iowa, 117, 77 N. W. 574, holding that an executor cannot contest the probate of a codicil revoking his authority. The bare statement of the purport of these cases so clearly shows their insufficiency to sustain the contention of counsel for appellees that further comment on them would be a waste of time and labor. In addition to the authorities already cited, the following cases expressly decide that an executor may prosecute an appeal: *Shirley v. Healds*, 34 N. H. 407; *Smith v. Sherman*, 4 Cush. (Mass.) 411; *Bellows' Estate*, 60 Vt. 224, 14 Atl. 697; *Fairfax v. Fairfax's Ex'r*, 7 Grat. 36. This will makes such disposition of the testator's estate as makes a sale of the real estate necessary, and expressly authorizes it, thereby vesting in the executor power over it, and charging upon him duties respecting it, so that, although he has no personal interest in it, he has a more immediate and higher interest in it than any other person in his representative capacity, just as in the case of a will of personal property, where he takes the legal title. He must act for all who take under the will. All they can receive from the state comes to them, not immediately, but mediately, through the executor. He must sell the real

estate, and apply the proceeds as directed by the will. The will operates a conversion of the real into personal property. *Brown v. Miller's Ex'rs*, 45 W. Va. 211, 31 S. E. 956; *Doaney v. Mercantile Trust Co.*, 160 N. Y. 497, 55 N. E. 296; *Everitt v. Everitt*, 29 N. Y. 39; *Hatch v. Bassett*, 52 N. Y. 359; *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585.

On the trial of the issue, the proponents of the will introduced Dr. F. S. Thomas, a physician of 21 years' experience as a practitioner, and one of the attesting witnesses to the will, who testified that he had known the testator for 20 or 25 years; that he had attended him as his physician for 4 or 5 years prior to his death, and during his last illness; that he was called in said illness on the 30th or 31st day of March, and went to see him every day from that time, three or four times a day, until he died, on the 7th day of April; that he was a sufferer from asthma, and had taken cold which had developed into capillary bronchitis and fever, which exhausted him; that some days before the will was made the testator talked to him about making the will, and asked him what he thought of Mr. Knight in that connection; that he told him he could not get a better man; that the next day the same conversation took place; that, on Sunday before the death of the testator, witness asked him if he had made his will, to which he replied "No," but that Mr. Knight was drawing it, and it would be fixed up the next day; that witness told him he thought he had better make the will then if he intended to do so, and Mr. Knight was sent for, and the will was executed on Sunday; that when Mr. Knight came he opened the will and read it to the testator, who said it was just what he wanted, so far as it went, but it did not then contain the residuary clause in favor of the city, and, after some discussion about what was to be done with the surplus, Mr. Knight suggested that it be left to the hospital, to which the testator immediately assented, and asked witness what he thought of it; that he replied, "All right, sir. You are making your will; I am not;" that after it was prepared witness got testator out of his bed and into a chair at a table, and he was unable to sign his name, and asked witness to sign it for him, and he did so, and testator made his mark; that he helped him back to his bed, and the witnesses signed the attestation; that he and Mattie Jenkins, two witnesses, signed it in the presence of each other and in the presence of the testator; that the testator signed the will in the presence of all three of the witnesses; that Jacob Debolt, the other witness, went out of the room after the testator had signed, and had to be called, but witness thinks he was not in the room when the other witnesses affixed their signatures; that the testator, at the time, said the will was just the way he



wanted it; that afterwards on that and on the next day he said the will was all right; asked the witness what he thought of the manner in which he had disposed of his property; that he was then about 80 years old, and died of acute pneumonia; that his mental condition was good; that he was "just as bright as he ever was, mentally"; that he was a very bright man; that on the next day he was as "clear as a crystal"; that he was perfectly intelligent during his sickness, and up until the time of his death; and that on Tuesday evening, when he died, he had become exhausted. On cross-examination a number of questions were propounded to the witness in reference to the symptoms of insanity, and what constitutes insanity, and also as to his interest in the hospital, that institution having been leased to him by the city. He admitted having taken some interest in the movement to induce the county court of Kanawha county and the city of Charleston to build the hospital, but denied that he had any connection whatever with the bequest made, and also that he in any way influenced the testator in reference to the matter.

Dr. T. L. Barber, another witness for the defendants, testified that he had known the testator; that he joined the Kanawha Presbyterian Church about two years before his death, and attended regularly, when able; that in the fall of 1895 the testator told witness he did not expect to live but a short time, and that he expected the church to have what property he had; that he had had a number of conversations with the testator in the last few months of his life, and that he was sane, sensible as witness, he thought, or any other man; that he saw no evidence of aberration of mind, or insanity; that he went to see him the night before he died, having been sent for; that he found two or three persons in the room with the testator, among whom was Debolt; the testator asked him to sing for him, saying he had found pleasure in the singing at church; that he did sing for him, and they talked about a number of things; that testator was then a very sick man, and they talked about his sickness; that he volunteered the information that he had made the bequest to the church; that at that time the testator was perfectly clear, mentally, and witness saw no evidence of insanity; that, when they talked in the fall of 1895, testator told witness he had no relatives to whom he intended to give any of his estate, and he expected to give all that he had to some good purpose and to the church; that he further said some of his relatives had made an effort to get some of his property, and he spoke particularly of a sister who had come to Charleston once, and to whom he had given a ticket to get home, saying that was all she got, and seemed pleased over having thrust them off; that the testator was unable, on account of his deformity, to articulate plainly, and it

was difficult to understand him, and that he had given that as a reason why he had left his people, they having commented on his infirmity, to his annoyance; that the testator gave to the church liberally, \$72 to \$75 a year, besides making special contributions; witness saw testator again on Tuesday morning, but that he was sleeping a good deal at that time, and does not think he aroused him or had any conversation with him.

E. W. Knight, the son of E. B. Knight who wrote the will, and a lawyer, testifying for the defendants, said he had known the testator for probably 20 years; that on Friday preceding his death, upon returning to his office, he was informed that a telephone message had been received in his absence, saying that Mr. Ward wanted Mr. Knight to come down and see him; that he went down, and told the testator he had been telephoned for; that testator said he did not want to see him, but did want to see his father, and wanted him to draw his will; that he further said witness' father knew all about it, or that he (Ward) had told him all about it; that witness, saying he would send his father down, went to his father's house that day to take dinner, and told him that Mr. Ward wanted him to draw the will, and that his father went down to see him that afternoon; that when he was in testator's room no person was there except himself and the testator; that testator was then apparently in perfect possession of his faculties; that he was apparently sick, quite pale, possibly suffering some pain, but had his clothes on, and was sitting up in a chair about the middle of the room; that he thought, when informed of the message, that his father was wanted, but he went down to find out what Mr. Ward wanted, so he could tell his father; that at that time witness' father had retired from practice; that he thought his father was Mr. Ward's lawyer.

Jacob Debolt, one of the subscribing witnesses, but hostile to the will, testified as follows: He had known testator from 1877 or 1878; worked for him a great deal; furnished him meals from 1893 to January 1, 1896; ceased furnishing them then, because he had no boy to carry them to him; witness' wife did his washing, mending, sewing, and buying of his clothes; testator told witness that he and his wife were to have his property, subject to the payment of his debts and the erection of a \$600 monument; Ward told him never to give a cent of his money to a hospital; at Hot Sulphur Springs, Ark., he had been mistreated in the hospital; he had often heard Ward talk to himself and holloa, "B. Ward. Here is B. Ward," and other similar expressions; witness was with him from 1884 to 1890, and during that time he noticed this peculiarity; afterwards he got worse in that respect; in conversation, being reminded that he had said certain things, he would deny what he had said in the same conversation; on Thursday, April 2d, having

heard that Ward was sick, witness went to his room about 11 o'clock a. m., and found Ward lying on his bed; Ward had Mattie Jenkins write a receipt for some rent, and sent him to collect it; testator ordinarily wore No. 6 shoes, but his feet were so swollen then that he had to have a large pair of slippers, and witness went and found a pair of No. 11 slippers, and purchased them for him; witness stayed with him nearly all the time, except Sunday night, until he died; on that Thursday, Ward paid Dr. Rogers \$10 room rent, taking his receipt; Ward took his bed that day, and was delirious at times; witness was there all day Friday, and did not see E. W. Knight there, but did see E. B. Knight there at half past 1 or 2 o'clock; Knight and Ward had a conversation which witness could not hear, but he did hear Ward say "No," and Mr. Knight say, "Will I come back to-morrow?" to which Ward said "No," and that he did not want him to come on Monday; while Mr. Knight was there, Ward was raging, tearing his clothes, and required witness and Mattie Jenkins to keep him in bed; on Friday night testator had no use of his left arm and left leg; on Saturday his condition was about the same as on Friday; Dr. Barber was there Monday night; on Sunday morning, before the will was made and before Mr. Knight came, Ward was very restless, and made witness and Miss Jenkins get him up in the chair, and implored witness to knock him in the head with something; having exhausted himself, they put him back to bed; immediately afterwards Dr. Thomas and Mr. Knight came in; on Saturday Dr. Thomas had directed witness to go on Sunday morning and tell Mr. Knight to come down at 10 o'clock and write the will; witness did so; after they came in and spoke to Ward, Mr. Knight sat down and wrote something, while Dr. Thomas seated himself in another part of the room; while the writing was going on, Ward called witness to the bed two or three times; when Mr. Knight had finished he asked Ward if he had made up his mind as to how he wanted his will made, to which Ward replied, "No, I haven't," as loud as he could speak; then Mr. Knight suggested that he provide for the payment of his debts, the erection of a monument, and leave \$10,000 to the church, and the balance of his estate to the hospital, to which Ward replied, "Well, yes—No;" Ward was then weak and tearing himself; Dr. Thomas took the will to the bed and asked him to sign it; Ward replying that he could not write, Dr. Thomas took hold of his hands; after that, Thomas helped him out of the bed into a chair, and placed the will before him on the table, and he was then unable to sign it, but made some scratches or marks on the paper, and then Dr. Thomas took hold of his hand, but he does not think any signature or mark was made; witness felt hurt at the way they had treated Ward, and went out on the street and was sent for; when he returned, Miss

Jenkins was signing her name; he then signed at the direction of Dr. Thomas; on the next morning Ward was a little better, and witness mentioned the will to him, and he said he made no will, and, being informed that he had, said he was not satisfied with it; as witness went away that morning he met Dr. Thomas on the street, and they had an altercation about the condition of Ward's mind when the will was made, which was concluded by witness saying, "Doctor, you have got the will, but you haven't got the property. Mr. Ward has got some relatives, and they will be hunted up;" testator was in fair condition until 11 or 12 o'clock Monday, when he then became delirious, and continued so until 1 o'clock that night, when some medicine left by Dr. Barber to quiet him was given him, after which he became quiet, and remained so until he died; in 1893, when Ward went to Red Sulphur Springs, he told witness he was going to leave his property to him and his wife; afterwards he spoke of the death of a sister, and said there were probably some other relatives; while away at the springs he left witness in charge of his business; closed out his business in 1895, after returning; in the early part of the week before testator died, witness met him, and he was complaining; later, witness saw him at his room, and he was flighty; when witness went to his room on Thursday he was undressed and in bed; Miss Jenkins was sent for to nurse him; at one time witness' wife presented a bill for \$13 or \$14 for services, which testator refused to pay, saying it was to bear double interest until his death, and then she would get it all at once; admitted that he was mistaken in saying that Miss Jenkins had to be sent for on Thursday; admitted that rent was paid Dr. Rogers on Friday evening; testator was in no condition to make a will on Friday nor Saturday nor Sunday; testator had given witness his gold watch in 1893, but had not delivered it to him; on Friday evening he kept motioning toward the desk; Miss Jenkins took out several articles and held them up, but he indicated that they were not what he wanted; witness suggested that it might be the watch; she took it out of the desk, and testator nodded his head; then she said, "I guess you are the one to have it," and handed it to witness, and he took it, and still has it; admitted that Dr. Barber was there on Monday night and sang a hymn; on Tuesday afternoon testator could not see, but would say, "I can't see, and know your voice, and that is all;" on Monday night testator called witness to the bed, and said, "Jake, they robbed me, did you get it?" to which witness replied "No," and he said, "They robbed me of all I have got."

Mattie Jenkins, another principal witness for plaintiffs, testified as follows: She had been employed by Ward for about four years in cleaning his rooms and washing for him; since October she had cooked for him and

carried his meals to him; he was cleanly and decent in his habits; he had talked of his mother and sister; he took to his bed not more than three days before his death, and was up and down then; does not remember when Dr. Thomas first came; on Friday testator sent her after him, and told her to stop and tell Mr. Knight to come down; they came and talked a while with testator, and Dr. Thomas asked him if he had made his will, and told him it was time he was fixing up his business, and testator said he had not; they suggested what he should do, and he said he did not feel like talking, and told them to come back Saturday; instead they came Sunday and talked with him, but he did not know anything at the time, being in great misery; one of them wrote the will and told her to sign it, and she did so; she read none of it, they did not tell her what it was, and it was folded; the signature, "B. Ward," was not on it when she signed, nor were the words, "his mark," nor the mark itself; there were some large B's on it; they took testator out of the bed, put him in a chair by the table, put a pen in his hand which he could not hold, and Dr. Thomas took hold of his hand and tried to help him, and the B's were there when she was called; she did not hear testator ask Dr. Thomas to sign his name; he did not ask him; Dr. Thomas asked testator if he did not think he could give the hospital \$10,000, and the reply was that he did not feel like talking, and that they should come back to-morrow; something was suggested about the church, too; testator had had a bad night Saturday night, and could not walk alone Sunday; Monday morning Mr. Knight came in, and testator told him the will was not right, and he did not want it, and Mr. Knight said he was crazy, and did not know what he was talking about; after Mr. Knight went away Dr. Thomas came in and asked for a pen and ink, and after obtaining it went to the bed with a paper and asked testator to write his name, and he replied that he could not; Dr. Thomas then went back to the desk and wrote his name, and went to the bed and said, "Mr. Ward, see this," to which he replied, "I can't see," and Thomas said, "Oh, yes! you can, it is B. Ward," and testator repeated after him, "B. Ward"; the paper looked like a will; on Sunday morning testator wanted Debolt to shoot him, and imagined he was in a hospital, and wanted to be taken out; called for his mother, saying he was hungry. On cross-examination she admitted having testified on the probating of the will in the county court; she did not remember what questions were asked; did not remember whether she testified there that Ward was of sound mind when he made the will; denying that he signed the will, she supposes she told the court so if the question was asked; does not remember whether she said Ward executed the will in her presence,

and she attested it in his presence, and that he was then in sound mind; she did not understand the proceeding, but knew it related to the will; she had no recollection of what occurred in the county court; whatever she did say there was true; on Friday testator would lie down and get up, and sit in the chair and lean back; she and another person helped him up Monday morning; she was there nearly all day Thursday; Mr. Shawver came over and paid rent Thursday, and Mr. Ward was sitting up at his desk and wrote the receipt; witness never wrote any receipt for rent, as stated by Debolt; witness went to the office of Mr. Knight in the Kanawha Valley Bank Building on Friday for him; she found him there and delivered the message; that was near 4 o'clock in the afternoon; when Dr. Thomas and Mr. Knight came on Friday evening testator was dressed and sitting in his chair near the stove, and there had the conversation with them; she has no recollection of seeing Debolt there on Thursday nor on Friday, until after Dr. Thomas and Mr. Knight went away; he was there Saturday morning, and in the afternoon of Saturday; testator was delirious Friday night—made her get him up out of bed; Debolt came in and pacified him; witness saw nobody go to the desk Friday night; testator had the keys; she did not open the desk then nor afterwards during testator's life; she put the watch in it Friday evening and gave him the keys, and she never afterwards opened it; she never got the watch out for him, and never handled it again; she did not know before testator's death that Debolt had the watch, and did not think he did have it; Friday night Debolt asked her about the watch, and he told her that testator had given it to him, but she never opened the desk for him nor gave him the watch; she thinks he had the watch on Saturday; he told her testator had given it to him and he had it, but she did not see it; she did not remember what she had told Mr. Brown about the watch; she did not think testator knew what he was doing when they had him at the table Sunday morning; he had been wanting some one to kill him at 6 or 7 o'clock that morning; he was sitting up; he was saying something, but she could not understand very well, and he got worse while he was talking; on Monday morning, when Dr. Thomas had him repeat "B. Ward," he remarked, "His mind is as clear as a crystal;" testator had promised to provide for her in his will; said he would give her a piece of land lying on the outskirts of the city, but she had no idea of getting it; she had employed an attorney to make out her claim against the estate; she had presented a claim for \$500, which had been compromised at something over \$200; testator had paid her for her cooking, house cleaning, and other services, except the nursing, and her claim was for that.

Mrs. C. S. Debolt testified as follows: Testator began boarding at her house in June, 1893, and continued for about a year, after which she sent his meals to him, but he came to the house occasionally; she had noticed a great change in his mind in the last year of his life; he slept there several nights; would cry out in his sleep, "Come quick, they have robbed me; they have got all I have got;" he talked to himself a great deal, and would call out, "B. Ward;" she mended his clothes, and once, in 1887, he complained of a vest not fitting, and she had him take off his coat, and found he had it on upside down; just before he went to Red Sulphur Springs he agreed with her and her husband that if anything should happen his property would be left to him and her; soon after that he told her his house on Quarrier street would be hers after his death; she had often seen him when on the street stop suddenly and shake his cane at some imaginary object, and talk to it as if he were crazy, but she could not understand what he was saying; she spoke to him of the death of his sister in 1895, and of a nephew whom he called "John," just a short time before he died; he had told her and her husband he would never give a cent to a hospital, and that there were too many churches, and he did not believe in giving all he was worth to the churches; that was in 1893.

B. D. Davies, witness for the plaintiffs, testified as follows: From August, 1895, until April, 1896, he had a photograph gallery in rooms on the floor above those occupied by the testator; during all that time he had often heard testator hollering and swearing at himself, saying, "Ward, God damn your old soul," and using other similar language; he often came to a washstand in the hall of the building with only an undershirt, pants, and shoes on to wash, to the annoyance of witness and his customers; witness thought testator was not of sound mind; he thinks testator drank, had heard that he did, but never saw him drinking, but had seen him go into saloons; witness had heard him swear about the hospital several times along about the time they were talking of building the hospital, declaring it to be an outrage on the taxpayers.

Maggie M. Pollard, witness for plaintiffs, testified as follows: She worked for testator at intervals from 1885 or 1886 until about two years before his death, cleaning his rooms and writing for him; she stayed with him one whole winter while he roomed over Rogers' drug store and while he was sick, and she thinks it was in 1891; he would talk to himself about money, saying he must raise so much money for the next day, and then he would turn around and say, "No, I have got money; I have got more money than any person; I have got plenty of money;" this would occur as he started out of the room, and sometimes he would see witness sitting in the room, and

would say, "Maggie, I guess you wonder who I am talking to," and upon her assenting he would say, "I was talking to a gentleman; I was talking to B. Ward;" called himself in loud tones, and would holla; the year he went out of business he told witness he was going out of business on account of his mind failing him; he was decent in his habits, but she had seen him go to the window early in the morning before putting on his clothes, and was a little careless in that way; he was in the habit of gathering up old dirty clothes, and wanted her to clean up a shirt that was completely mildewed, and she told him it caused disease and microbes, and he directed her to burn it, and the next day he told her he could feel microbes crawling in his blood, and every time he would get sick after that he would attribute it to microbes; being dissatisfied about a \$50 contribution he had made to a hospital, he told her he would give nothing more to charity; he paid her very little, and told her he would some time give her more money, enough to fix herself, at least; her face being disfigured by the bite of a dog, he told her he would give her money enough to have her face fixed when she was ready for it; he had said he had money in all the banks in Charleston; she had voluntarily gone to the attorneys and told them what she knew, upon the pretext of being interested in the trial out of mere curiosity, and wanted to know when it would take place; testator had told her his mind was entirely wrong; one morning he said, "Shut the door quick. See that pretty girl there? I want to keep her in here. Ain't she pretty? Keep her in here," but witness saw nobody; that was two or three years before testator died; he was not entirely sane.

James H. Rogers, witness for plaintiffs, testified as follows: He owned the building in which testator roomed and the drug store under his rooms; he had known testator for many years; he was always peculiar, but more so for a few months before his death; he brought back from the mountains a lot of rough canes and tried to sell them to his friends for a half dollar apiece; he often heard him hammer, holla, and curse himself up in his room; witness went to his room a short time before his death and found some worn-out brooms, and was told by testator he had them there as weapons, and indicated how he would jab them in the eyes of any one attacking him and then beat him to death; he often came to witness for whiskey, and, being in a nervous condition, witness put some drug in it to quiet him, cautioning him against taking anything elsewhere; he had cursed the hospital; witness did not consider him sane months before he died; years before that he regarded him as a very sensible man, but he was very odd and peculiar; witness remembers when testator's sister came to see him, but he would only say she was one of his relatives and

wanted money, but it would be time enough to get it after he was gone.

George W. Gates became acquainted with testator in 1863 or 1864; he then had the habit of talking to himself, but always talked rationally in common conversation; in 1863, being sick and alone, he gave witness a belt to keep for him which he said contained \$1,800, and about a week afterwards witness returned it to him, and some time after that he came for it, and witness and his brother went with him to his room, where they found it in his trunk, and after that incident they were not so intimate any more; testator expressed great surprise, and apologized; during that spell of sickness he wanted somebody to stay with him, and was afraid he would jump out of the window.

Lillian Flagg says: She had worked for the Debolts, and had heard testator say he was going to give his Quarrier street property to Mrs. Debolt; she had heard him muttering to himself, and seen him shaking his cane violently, the last time in February before he died; his mind was not so good in the last three or four months of his life as it had been; he had mentioned his nephew John; he had expressed his hostility to hospitals; other than the muttering and the shaking of the stick, he seemed to be a man of good common sense.

Mrs. Lena Fadelay had known testator for about eight years; had worked for him at intervals for about five years, washing and mending; had often heard him talk to himself, and say somebody wanted to rob him or had taken his money; once he had asked her to hunt his shoes, and she found he had them on; had often heard him say he would never give a cent to the church, or a hospital, and that they did not treat him right in the hospital, and there was no use of so many churches; he had said he closed out business because his mind was not good, and he could not remember as he ought to.

Daniel Davies worked in the photograph gallery over testator's room; had heard him cursing himself; had seen him come out to wash, only partially dressed; knew he had kept the stump broom as a weapon, as stated by Rogers; he seemed to be in fear all the time; witness thinks he was insane.

Lillie Wehrle had known testator eight years; worked and ran errands for him about six years; had heard him talk to himself and holloa, "Hello there! B. Ward;" once, when Dr. Butts' sister came for a bucket of coal, testator had given her a bucket of water, which she took away, and when his attention was called to it he said he was crazy; she thought he was insane; she was a daughter of Mrs. Fadelay; testator had slapped her once because her little brother had thrown some nails down in the hall.

Alvin Goshorn had known him ever since the war; had seen him twice within ten days or two weeks of his death; testator knew him the first time, but did not know him the

second time he went; he was oblivious to everything around him; had heard him calling his name and cursing himself from the street; at the time he visited him last he was unfit to do any business; thinks he drank a good deal of whisky; he was very bolsterous about his establishment when he was drinking; up until the time he quit business he was a sane man, but very cranky; thinks he became insane by excitement; he was afraid of him, but had never heard of his hurting anybody; he had never regarded him as being entirely right.

John D. White had taken him into his hotel when he first came to Charleston; he was very peculiar, and talked and walked in his sleep, and had cramps in his arm, which caused him to cry out with pain; having put him in a room to sleep with another man, he was compelled to change him; he was a successful business man, and accumulated considerable property.

George A. Baker had known him since 1859, and had done some work for him not long before he died; part of the work had been done by witness' son, whom testator paid; but he sent for witness two or three times to pay him, forgetting that he had paid him, and that he had been so informed; that was not long before his death—probably a year or more.

Joseph A. Jones said he had known the testator for a great many years; had occupied the same rooms that the Davies Bros. used, and for the same purpose, prior to their taking them, and during part of the time testator occupied the rooms below them; that he heard peculiar noises from the room occupied by Ward, and had been informed by him that he had rheumatism; sometimes he could be understood, and at other times he could not; on one or two occasions he had heard him swear; not having known of such conduct on the part of Ward when he was well, witness had thought he was not exactly at himself, but was not able to say whether he was insane.

J. W. Malcolm had known testator since about 1884; in 1887 or 1888, while passing by his store in company with another man, his attention was attracted, and on going in he found Ward with a hatchet in his hand making a vicious attack upon one Clark, whom he had backed up against a lot of merchandise, and who was defending himself with a poker; Ward was wild with anger, and did not act like a sane man on that occasion.

After this evidence was introduced by the plaintiffs, the defendants called John S. McDonald, who, at the time the will was probated, was president of the county court, and he testified that the usual questions were propounded to Mattie Jenkins, and she had answered them in the affirmative, and seemed to understand perfectly the nature of the proceeding and the questions propounded to her. On the subject of the soundness of

mind of the testator, she qualified her testimony only to the extent of saying he had been a little flighty at times, but she believed that he was of sound mind at the time he executed the will. It was also shown that she had testified on that occasion that the will was signed at the time it purported to have been signed, but not as to the manner in which it was done.

E. A. Woodall, who was also a member of the court and present on that occasion, and J. F. Brown, the executor of the will, both testified to the same effect. It was further shown that Dr. Thomas and Mr. E. B. Knight also testified in the probate proceeding to the same effect. Mr. Brown further testified that the attorney of Mattie Jenkins had presented to him, as executor, a claim for \$3,000, which was afterwards compromised and settled at \$235.50, she having claimed 156 days of service, which he settled at \$1.50 per day. He had no knowledge of her coming to the office for Mr. Knight, and never saw her to know her until after Mr. Ward's death. He had received the telephone message requesting Mr. Knight to come to Ward's room, on Thursday evening, to the best of his recollection, and the voice was that of a woman. He delivered the message that evening or the next morning to E. W. Knight. E. B. Knight was not then a member of the firm, he having retired, but was sometimes in his son's room at the offices. Witness had been a member of the city council, and on the board of hospital trustees, and on the committee concerning the hospital, and knew that Dr. Thomas had no special interest in the hospital at the time the will was made. Witness had found among the papers of his testator receipts from saloons, amounting, in the aggregate, to \$100.40, bearing dates running from December 31, 1894, to March 2, 1896. In addition to that the executor paid another saloon bill of \$5.40, the items of which were dated March 6th, 10th, 14th, and 17th. The executor found twenty-four dollars and some cents in one of the banks, and nothing in any of the others. Maggie Pollard had come to him and claimed a considerable demand against the estate, saying she was a witness on behalf of the plaintiffs, and that the testator had promised to provide the expense of an operation on account of the deformity of her face. Witness had known testator very well since his boyhood, and regarded him as a perfectly sane man and of good mind, not educated, but of shrewd business and common sense.

W. F. Shawver, who occupied the testator's business house at the time of his death, went to the testator's room on the 2d or 3d day of April, 1896, between 10 and 11 o'clock a. m., to hand him a check for the rent, and found him, as he always found him, in his sitting room; when witness rapped he came and opened the door, and witness thinks he sat in a chair by the table; he had his clothes on, and took the check and handed witness a re-

ceipt; witness, seeing he was sick, did not stay long; testator was sane, and had the same business sagacity he always had; wanted to increase the rent in accordance with the notice he had given him; afterwards on the same day he saw Ward on the street, going toward the bank on which the check was drawn, but looked rather frail.

C. W. Young, cashier of the bank, testified that the check which had been given by Shawver had been paid April 2d, Thursday, to Mr. Ward at the bank.

Mrs. Florence Minsker knew the testator well; he had often visited at her house; she saw him at his room the last time on Monday, April 6, 1896; having heard that he was sick, she and another lady went to see him after 5 o'clock in the evening; he knew her, and called her by name, as he always did; called her Florence, and asked her to come back that night; his mental condition was as it had always been; she saw no evidence of insanity in him; he was not raving nor tearing at himself, but was lying down, and every few minutes wanted to get up; after supper she and her husband went back to see him again, and he knew both of them; she knew the date, because she kept a diary and had noted it; on this last visit he seemed to suffer more, complain more, and was breathing hard. George Minsker, her husband, had known the testator about 20 years, and thought he was sane; when he visited him that evening he called his name, and he was not raving nor tearing his clothes; witness saw nothing wrong with his mental condition; he had always been regarded as an odd and eccentric man.

A number of the most prominent and substantial business and professional men in the city testified to their long acquaintance with the testator, and, while admitting his peculiarities, they all regarded him as a man of shrewdness, and a man of good sense and stability of character. An effort having been made, when too late, to obtain the deposition of Mr. E. B. Knight, and much testimony having been introduced tending to impeach the alleged execution of the will which had been made under his provision and direction, the defendants were allowed to prove his high standing as a citizen and professional man.

This very extensive summary of the evidence, as given by the witnesses, is necessary to a perfect understanding of the questions raised on the instructions given and refused upon which the assignments of error are based.

It is objected that the court erred in directing the issue before the establishment by proof that the plaintiffs are heirs of the testator. In the absence of any objection on the part of the defendants, the court will not make any inquiry as to the bona fides of the claim of the plaintiffs. If objection that they had no such interest as entitled them to demand a test of the validity of the will had been made below, the court, upon a rule to show cause why the

bill should not have been dismissed for that reason, would have made such inquiry. *Dower v. Church*, 21 W. Va. 23, 48. Here the objection was not made in the court below, and it cannot be made in this court for the first time. The answers only disclaim any knowledge of the heirship of the plaintiffs, and aver that they all reside in distant states. They do not call for proof of the bona fides of the claim of heirship, and clearly do not constitute such an objection as ought to have moved the court below to make the inquiry. When the want of interest affirmatively appears in the bill, some courts hold that the objection may be made for the first time in the appellate court. 16 Ency. Pl. & Pr. 1015. It does not so appear here.

At the instance of the defendants this instruction was given: "The court instructs the jury that a person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator, and, if he afterwards attempts to impeach the validity of the will, his testimony invalidating the will ought to be viewed with suspicion." At the instance of the plaintiffs the court gave the following instruction: "The court instructs the jury that, unless discredited by the facts and circumstances appearing by the evidence in this case, the evidence of witnesses present at the execution of the paper writing purporting to be the last will and testament of said Brigham Ward is entitled to peculiar weight." It is urged that these two instructions are inconsistent, and therefore, tend to mislead the jury. In one of them the jury are told that the testimony of witnesses who must be included in the class to which the other relates must be viewed with suspicion, while in said other instruction they are told that their evidence is entitled to peculiar weight. This is clearly irreconcilable, and amounts to inconsistency, unless the clause in the one given for plaintiffs, saying the evidence of these witnesses is entitled to peculiar weight, "unless discredited by the facts and circumstances appearing by the evidence in the case," so limits it as to cut out the inconsistency. The attestation of the will by Jacob Debolt and Mattie Jenkins undoubtedly went to their discredit as witnesses for the plaintiff, for their testimony in this case was in direct contradiction of their act of attestation, which is held to be testimony to the sanity of the testator, as well as to the fact of his having executed the will. *Lamberts v. Cooper's Ex'r*, 29 Grat. 68. None of the witnesses were present except the attesting witnesses. By their act of attestation they deprived their testimony of the weight to which it would otherwise be entitled when testifying against the will. Plaintiffs' instruction relates to none of their testimony, except that concerning the execution of the will. As the defendants were entitled to their instruction, the giving of plaintiffs' instruction amounts to a modification of it, which has a tendency to mystify its meaning and nullify its effect. The clause, "unless

discredited by the facts and circumstances appearing by the evidence of this case," does not eliminate the inconsistency, nor make the instructions reconcilable. These instructions are not general, but relate to the evidence concerning the facts of the actual signing and attesting of the will. Two of these witnesses having repudiated, and testified against, their solemn acts of attestation, the defendants were entitled to have the court tell the jury in plain and unmistakable terms that they should view the evidence of these two witnesses with suspicion. *Webb v. Dye*, 18 W. Va. 376. "The attesting witnesses of a will, who are introduced to prove the will was not properly executed, or the incapacity of testator, will not be excluded; but their evidence will be received with much suspicion." *Lamberts v. Cooper's Ex'r*, 29 Grat. 61. Judge Staples, in the opinion of the court, said: "A person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator. If he should afterwards attempt to impeach the will upon the ground of the want of sufficient capacity, his evidence will not be positively rejected, but it is received with the utmost caution." This is asserted as a proposition of law. It was the duty of the court to give it to the jury in this case when requested. It could not at the same time tell the jury, directly or indirectly, that the testimony of such witnesses was entitled to peculiar weight, without introducing the grossest inconsistency, and withholding from the defendants the benefit of an instruction to which they were entitled. It is true, the instruction given for plaintiffs has been approved in *Jarrett v. Jarrett*, 11 W. Va. 584, and *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; but in those cases the witnesses present did not contradict their former solemn testimony. In *Jarrett v. Jarrett* the matter in controversy was the validity of a deed as to which no attestation was required. In the other case the attesting witnesses testified in favor of the will. Hence the authorities cited in favor of the instruction do not support it. The propriety of an instruction always depends upon the facts and circumstances of the case.

Unless the rule of law casting suspicion upon the testimony of subscribing witnesses who, after subscribing, testify against the sanity of the testator, is to be thrown aside as never having been the law, contestants of a will, relying upon the testimony of subscribing witnesses to impeach the will for insanity of the testator or nonexecution of the will, are not entitled to an instruction saying, in so many words, or in effect, that the testimony of such witnesses is entitled to peculiar weight, because such an instruction is in direct and irreconcilable conflict with the law. The contestant has no right to submit to the jury the question whether such testimony shall be viewed with suspicion, under the uncertain and general phrase, "unless discredited by the facts and circum-

stances appearing by the evidence." The law says they shall so view it, and the contestees have the right to have the court tell them so in plain terms. When such instruction is properly drawn and requested, the court must give it, without modification, either by an interpolation in that instruction, or by giving another, at the request of the contestants, having the effect of such modification. The rule of law relied upon by contestees is announced not only in Virginia, but in this state also. *Webb v. Dye*, 18 W. Va. 376. Subscribing witnesses may testify against the will, and their testimony may be believed and acted upon by the jury as true, and it may be that, under peculiar circumstances and all the facts in the case, they could not render a good verdict in favor of the will, as in the case of *Tucker v. Sandridge*, 85 Va. 546, 8 S. E. 650; but this does not argue that, in a case where there are numerous witnesses on both sides, and a wide field of investigation is covered, and the evidence is directly and strongly conflicting, the contestants may have the jury instructed that the evidence of subscribing witnesses testifying against the will, in the face of much evidence offered to show improper motives on their part, shall be entitled to peculiar weight, unless discredited by facts and circumstances. It is discredited to the extent that it must be viewed with suspicion, and that is not to be submitted to the jury as a question. Its submission tends to mislead and confuse.

Plaintiffs' instruction No. 14 was given, and reads as follows: "The court instructs the jury that, unless discredited by the facts and circumstances appearing by the evidence in this case, the evidence of physicians testifying in this case is of great weight." In support of this, *Jarrett v. Jarrett*, cited, *Kerr v. Lunsford*, cited, and *Nicholas v. Kershner*, 20 W. Va. 251, are cited, but this is not the instruction that was given in those cases. The similar instruction which has been approved by this court reads as follows: "The evidence of physicians, especially those who attended the testator, and were with him considerably during the time it is charged he was of unsound mind, is entitled to great weight." In this case two of the physicians were with the testator at the time of his alleged unsoundness of mind, and testified from personal knowledge of his condition, while the other three testified as experts, and without any personal knowledge whatever of the matter in controversy. It is important to note here that, in the cases in which this instruction has been heretofore approved, the physicians who testified all had some personal knowledge of the condition of the person whose sanity was in question. They were not only personally acquainted with him, but had prescribed for him, or talked with him with the view of ascertaining his mental condition. That this is an important distinction which the court should

have noted in its instruction appears from the case of *Harrison v. Rowan*, 3 Wash. (C. C.) 580, Fed. Cas. No. 6,141, where it is held that when several physicians, as experts, give their testimony on a question of mental capacity, the court may properly tell the jury that the opinion of the physician who attended the testator in his last illness is entitled to more regard than that of the others. In *Thompson on Trials*, § 2429, the true rule concerning expert testimony is said to be that "the testimony of experts is to be considered like any other testimony—is to be tried with the same tests, and is to receive just as much weight and credit as the jury deem it entitled to when viewed in connection with all the circumstances." In support of it, numerous authorities are cited. In 8 *Ency. Pl. & Pr.* 775, it is said that, "while the court may not infringe this right of the jury to determine the weight of the evidence, it is, however, proper for it to announce to them rules sanctioned by reason and experience, to enable them to rightly weigh the evidence submitted to them." An illustration of this principle is that it is proper to tell the jury that, in estimating the value of the testimony of an expert, it is proper to consider his means of knowledge and his opportunities to know whereof he speaks. *State v. Hinkle*, 6 Iowa, 380; *Benjamin v. Walbank*, 38 Minn. 313, 87 N. W. 447; *Roberts v. Johnson*, 58 N. Y. 613; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 81 L. Ed. 497; *Insurance Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371. These principles make it manifest that this court, in laying stress upon the value of the testimony of physicians in the cases cited, means nothing more than to say that the evidence of witnesses who testify from their personal knowledge, being at the same time possessed of professional knowledge, learning, skill, and experience which enables them to better understand the matters to which they testify than persons not possessed of such superior advantages, is entitled to more weight than the testimony of persons not so possessed. In those cases the physicians did not testify as experts, nor did the instructions characterize them as experts. As three of the physicians who testified in this case—a majority of them—testified only as experts, it was error to instruct the jury that the evidence of the physicians who testified in the case was entitled to great weight. *Drs. Thomas and Barber* did not testify merely as experts. The former testified from both personal and scientific knowledge, and the latter from personal knowledge only, except on cross-examination. As their testimony was not entitled to any greater weight than that of other witnesses, the court might as well have selected any other class, and said their testimony was entitled to great weight. Unless there is some substantial ground, in respect to means of knowledge and power to know, upon



which to base a distinction between the value of the testimony of some witnesses and that of others, the court cannot make such distinction by giving an instruction, without invading the province of the jury.

As has been indicated, the instruction given for plaintiffs varies from the one which has been approved by this court as proper to be given under the circumstances of the cases of *Jarrett v. Jarrett*, *Kerr v. Lunsford*, and *Nicholas v. Kershner*, in failing to indicate the superiority of the evidence of physicians testifying from personal, as well as scientific, knowledge. Their instruction construes the language used in those cases, and applicable to their peculiar facts, to mean what it clearly never did mean. In no case decided by this court, or the court of last resort of Virginia, has it ever been held that purely expert testimony is entitled to great weight, or that the evidence of physicians, testifying as experts only, is entitled to such weight. We are truly told there were giants on the Virginia bench when the rule laid down in these West Virginia cases was first announced, but they never, in a single instance, applied it to purely expert evidence. It was first announced in *Burton v. Scott*, 3 Rand. 399, decided as early as 1825. In that case Drs. Cabell and Stevens were the physicians who testified, the former having been the family physician, and the latter a personal acquaintance, of the testator, and it does not appear from the report that a single hypothetical question was put to either of them. In *Parramore v. Taylor*, 11 Grat. 220, the physicians testifying had both been family physicians of the testator. In *Simmerman v. Songer*, 29 Grat. 9, the testifying physicians had been regular attending physicians of testatrix for many years. In *Cheatham v. Hatcher*, 30 Grat. 56, 32 Am. Rep. 650, the physician who testified had evidently been attending the testatrix professionally at the time the will was executed. In *Montague v. Allen's Ex'r*, 78 Va. 592, 49 Am. Rep. 384, Drs. Harris and McGuire had attended the testatrix in her last illness, the former regularly, and the latter on a special occasion, and Dr. Cunningham had known her and testified from personal knowledge. In *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492, Dr. Hopkins, who testified, had been the family physician of the testator. The principle of law deducible from any case is to be determined by what has been decided. Hence, to learn the meaning of language used in a headnote, it must be read in connection with the opinion. So reading the Virginia and West Virginia cases, it is ascertained that it has never been decided that purely expert testimony is entitled to great weight as matter of law. Rogers on Expert Testimony, after having cited some of these cases, says, at section 204: "We have seen in the preceding section that courts have asserted that the opinions of physicians on questions of mental capacity are entitled to greater weight than those of ordinary wit-

nesses. An examination of those cases, however, shows that the opinions of medical men are considered entitled to greater weight than the opinions of nonprofessional persons, provided the physicians have had personal observation and knowledge of the person whose capacity is the matter in issue." A critical examination of the language used in *Jarrett v. Jarrett* shows that it is open to construction. It says "the evidence of physicians \* \* \* is entitled to great weight." They sometimes testify as experts, and sometimes from personal knowledge. The language used does not say which kind of testimony from physicians is entitled to such weight. The latter is the only kind found in any of the cases. Does not that make it clear that no other kind is meant? Can it be said that the court decided a matter not submitted to it?

Much reliance is placed upon the following from 8 Ency. Pl. & Pr. 777: "By other authorities it is held that a court may instruct the jury to accord great and especial consideration to the opinion of those who are manifestly and pre-eminently skillful in the matter concerning which they testify." This text is likewise misconceived. It does not mean what is claimed for it. With one or two exceptions, the cases cited in support of it show that the witnesses having scientific knowledge who testified in them had personal knowledge of the material subject to which their evidence related. It would be an unjustifiable waste of time to take them up one after another and demonstrate the truth of this assertion. The books are accessible to any person who may care to verify it.

In this connection, it is further objected by counsel for appellees that the appellants cannot complain of this instruction, because, at their instance, the court gave another similar one. It reads as follows: "The court instructs the jury that the evidence of physicians, especially those who attended the testator, and were with him during the time it is charged he was of unsound mind, is entitled to great weight." This instruction embodies the vicious principle propounded by the other one, it is true, but the record shows that the court had given the other when this was asked for, and ruled that it should go in, and that afterwards this was requested by the contestees. From this it is apparent that this one was taken merely to offset the mischief done by putting it in the qualified form approved in the cases of *Jarrett v. Jarrett* and others referred to. Whether, by so doing, the contestees have waived their objection, it is unnecessary to decide, as a new trial must be awarded on other grounds, and the question is not likely to be again presented.

The next objection is to the action of the court in giving plaintiffs' instruction No. 15, which reads as follows: "The court instructs the jury that, unless discredited by the facts and circumstances appearing by the evidence in this case, next to physicians, and those

who were present either as attesting witnesses of said alleged will of said Brigham Ward, or otherwise, at the time the same is alleged to have been executed, are those whose intimacy with the said Brigham Ward in attending to his rooms and daily wants is such the jury, from the evidence, believe has given them an opportunity of seeing said Brigham Ward at all times, observing his actions and conduct, and watching the operations of his mind." The general principle sought to be applied by this instruction is asserted in *Jarrett v. Jarrett*, cited. But the instruction is objectionable in limiting the class whose intimacy gave them opportunity to observe the testator's actions, conduct, and operations of his mind, to those who attended his rooms and daily wants. The doctrine as asserted in *Jarrett v. Jarrett* is not so restricted, nor is it in *Burton v. Scott*, 3 Rand. 399, where it was first announced by Judge Carr. Many of the witnesses testifying maintained intimate relations with the testator, and did not attend to his rooms and daily wants. Upon what principle of law can the court say to the jury that the evidence of one class of persons whose intimacy gives opportunity for knowledge is to be preferred to another class of witnesses whose intimacy gives perhaps equal opportunity? The testator had a wide acquaintance in the city, especially among business people. With some of them he was intimate, and often called upon them at their various places of business, and met them on the streets, and conversed with them after closing out his business in 1893. J. E. Dana knew him well up until the time of his death, and says he met him every three or four days, and always stopped and talked with him. F. W. Abney, a merchant, knew him from 1876 until the time of his death; thought he was a fairly good business man; had heard that he had the habit of talking to himself; had been informed by his wife that people had noticed this eccentricity at Red Sulphur Springs, but he had regarded him as sane. Andrew Ruffner had known him and sold him goods for 15 or 20 years; regarded him as a good business man; he had often come into their store after he had quit business, and on these occasions gave every evidence of being a rational man; had heard he had the habit of talking to himself. A. M. Scott kept up an acquaintance with him for many years, up to almost the time of his death; he had met him on the streets and talked with him a short time before he died; he regarded him as a sane man. C. C. Blain had known him for a great many years; he frequently came to Blain's store and conversed with him; was there a week or ten days before his death, for possibly half an hour; witness had no reason to believe his mental condition was different from what it had been; he considered him perfectly sane; witness had been to testator's room three or four times; the last occasion being probably

a year before his death; witness had heard him talking to himself. Mrs. C. C. Blain had known him well. In July, 1895, he had been at her house, and she had talked with him; soon after that she went to his room to arrange for her brother to go with him to the springs. A. Burlew, a lawyer, had maintained an intimate acquaintance with him for many years; associated with him in politics, and had boarded at the same hotel with him for a while, and regarded him as a very clear-headed man during all the time he knew him, above the general average of men; he had seen him and talked with him in 1895 on his return from the springs, and testator had invited him to his room, saying he had some canes he had cut in the mountains, and would give him one if he would come down. C. A. Gates had known him for many years, and transacted business with him, and he regarded him as a sane man. W. F. Goshorn, a hardware merchant, had carried on his business only about 200 feet from where testator had done business, and knew him well, and considered him sane. After testator had closed out his business, witness carried on his business in the building adjoining that in which Ward had his rooms, and had heard him talking up in his rooms, but did not know whether others were present or what he said. S. C. Burdette, a lawyer, had known him very well, and had heard him talking to himself in his store, but he considered him sane. He never suspected insanity. John Slack had known him since 1863 or 1864, and had talked with him for a considerable time about the 15th or 20th of March, and he regarded him as being perfectly sane and a man of good judgment. He had on one occasion, while on the street, heard Ward talking to himself in his room, but thought he was talking in his sleep. Mr. and Mrs. Minsker, the substance of whose testimony has been given, were undoubtedly intimate with him, and had good opportunities to know his mental condition. J. W. M. Appleton had Ward with him at his hotel at Salt Sulphur Springs in 1894 for a week, and had seen nothing in his conduct which suggested insanity, and he had formerly known him very well. There was so much testimony of so many intelligent people who had had fairly good opportunities of forming a just estimate of the mental condition of the testator at the time when it is said that, by reason of his eccentricities, delusions, illusions, and hallucinations, he must have been insane, that it was clearly wrong to subordinate it to the testimony of certain other persons who had at various times had opportunities to know the condition of his mind.

Another objection to this instruction is that it gives undue prominence and weight to the opinions of the witnesses. It has been very properly held by this court, in *Jarrett v. Jarrett* and *Kerr v. Lunsford*, that the opinions of witnesses who are not ex

perts are entitled to little or no weight, unless supported by good reason and facts. The principal inquiry in all cases of this kind is whether the person who made the will had sufficient mind and memory to understand the nature of what he was doing, and to recollect the property which he meant to dispose of, the object of his bounty, and the manner in which he wished to distribute it. *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668. This inquiry goes to the time of the execution of the will, and evidence of the facts and circumstances of prior date tending to show imbecility of mind is only important as bearing upon the question of the mental condition of the person at the time of the execution of the will. There may be facts showing loss of memory, forgetfulness, and other facts tending to show impairment of mind and memory, but, if the acts and conduct of the testator at the time of the making of the will or execution of the deed show that he had the power of memory and reason and intelligence sufficient to understand what he was doing, these facts are accorded more weight than those of the other class. Thus in *Beverley v. Walden*, 20 Grat. 147, 159: "By the deed written by himself with great particularity and technical precision, and by letters relating to the sale and the execution of the deed, expressing his regret that his wife had refused to unite in the deed, and on other subjects, all furnishing intrinsic proof of a sound mind. Evidence of this kind has always been held by the courts to be entitled to far more weight and importance than the opinions of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak." *Temple v. Temple*, 1 Hen. & M. 476; *Mercer v. Kelso's Adm'r*, 4 Grat. 106; 3 Rob. Pr. (Old) 335; 1 Lomax, Ex'rs, 9, 10. The point of time at which the testator's competency is to be tested is that of the execution of the will; his antecedent or subsequent condition is chiefly important as it may bear upon that epoch. *Sloan v. Maxwell*, 3 N. J. Eq. 563, 572. In this case the court said of the testimony of one witness: He "relates very few important facts bearing upon the question of capacity; all, however, that he does state are of competency, none of incompetency. Everything that was said or done by the testator at the execution of the will was rational, appropriate, and in proper time and place." To the same effect see *McDaniel's Will*, 2 J. J. Marsh. 331. On the subject of the standard of capacity for the making of a will, the court properly instructed the jury that it was only necessary that the testator should have understood the nature of the business in which he was engaged, and had sufficient mind to recollect the property he meant to dispose of and the objects of his bounty, and to know the manner in which he wished to distribute it, and that such

capacity might exist notwithstanding the testator was subject to hallucinations, delusions, and illusions. But, as the evidence of these facts tending to show mental derangement was not directly contradicted, this instruction could only have gone to the weight of the opinions of the witnesses, and that in the face of their own testimony and the testimony of other witnesses that up until within two days of the time of the execution of the will the testator attended to all his business affairs in a competent manner. *Debolt* testifies that on Thursday, when testator took to his bed, he still had sufficient mental power, memory included, to collect his rents and pay his debts. *Shawver* on that day paid him his rent, took his receipt, and talked with him about the increased rent for the future. On the same day testator went to the bank and had *Shawver's* check cashed. On Friday evening he sent for *Rogers* to come up to his room, and there paid him his rent. It thus appears from the evidence of the plaintiffs themselves that, until after the testator had been attacked by his last sickness, he still retained sufficient mental power to attend to ordinary business matters. Whether he did so until the time of the execution of the will is the vital question in the case. All antecedent facts tending to show mental derangement and deterioration of mind were to be considered as bearing upon that question, and, according to all authorities, the opinions of the witnesses testifying to those facts are entitled to much less weight than the facts themselves. Hence the instruction was vicious, not only in making an unwarranted classification of this opinion testimony, but also in giving it too much prominence and weight, whereby the legal standard of testamentary capacity was obscured.

It is further claimed that the court erred in giving plaintiffs' instruction No. 5, which reads as follows: "The court instructs the jury that if they believe from the evidence that *F. S. Thomas* signed the name of *Brigham Ward*, deceased, to the paper writing offered in evidence as his last will and testament, dated April 5, 1896, and that at the time the attesting witnesses were engaged in signing the same the said *Brigham Ward* did not possess sufficient consciousness to recognize and understand what said attesting witnesses were doing and to assent to their acts, or that he did not possess sufficient consciousness, and sufficient physical strength to have dissented from the said attestation, and to have arrested and prevented the same by indicating his dissent or disapproval, if he had desired to do so, then the jury must find that the said paper is not the will of said *Brigham Ward*." The grounds of this objection are: First, that it is founded upon a distinction between the testator's condition at the time he signed the will and his condition at the time it was attested, without evidence tending to estab-

lish such distinction; and, second, that there is no evidence to show that, if the testator was sane at the time the will was executed and attested, he did not have sufficient physical strength to dissent from the attestation. A careful reading of the instruction leads to the conclusion that it relates only to the time of the attestation, but, if it relate to both the execution and attestation, they occurred practically at the same time. The instruction was approved as a proper one in *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, and the court did not err in giving it.

The next objection is to the giving of plaintiffs' instruction No. 6, which reads as follows: "The court instructs the jury that the attestation of the paper writing dated April 5, 1896, purporting to be the last will and testament of Brigham Ward, deceased, given in evidence in this case, is absolutely necessary to its execution; and if the jury believes from the evidence that before this important part of the execution of said paper writing, and while it was duly done, said Brigham Ward, by reason of unconsciousness, or mental or physical inability, was unable to dissent from the attestation, and to arrest and prevent the same, by indicating his dissent or disapproval, if he had desired to do so, the said paper writing is not valid as a will." The objection to this is that there is no evidence to show that the testator had not physical strength to dissent. There is some evidence of that kind, but it must be conceded that the testimony of the witnesses for the plaintiffs who were present at the execution of the will is chiefly in reference to testator's mental condition at that time. However, as there was evidence tending to show that he was very weak, it was proper for the jury to make that inquiry. This instruction was also taken from *McMechen v. McMechen*, and although it is largely a repetition of instruction No. 5, and the court was not bound to give it for that reason, it was in its discretion to do so.

A further assignment is that the court erred in giving plaintiffs' instruction No. 8, which reads as follows: "The court instructs the jury that if they believe from the evidence that there is a doubt of the competency of said Brigham Ward, deceased, to make a will on the 5th day of April, 1896, and that he had at that time relations living of whom he knew (whether nephews or nieces), and that by the paper writing of April 5, 1896, purporting to be his last will and testament, he devised and bequeathed all his property, real and personal, to others than his relations, then the fact that he made such devise and bequest is proper to be considered by the jury." The contention is that the relationship here is so remote, and the testator knew so little of his relatives, that the principle of law embodied in the instruction ought not to be applied. There seems to be no exception to the rule. No authority for it is cited,

and the principle is asserted in *McMechen v. McMechen* without qualification or exception. This assignment is not well taken.

Another assignment is that the court erred in refusing to give the following instruction asked for by the defendants: "The court instructs the jury that, if they believe from the evidence that the witness Mattie Jenkins signed her name as a witness to the paper writing in controversy as the will of Brigham Ward, then by her act of attestation she solemnly testified to the sanity of the said Brigham Ward. And the court further instructs the jury that if they also find from the evidence that the said Mattie Jenkins, subsequently to her attestation of said paper, testified on oath before the county court of Kanawha county that at the time of such attestation the said ward was of sound mind, that then the jury will be justified in rejecting her testimony on this trial that the said Ward at the time of such attestation was not mentally capable of executing a will." The only objection to this instruction seems to be that the witness was designated by name, and that it is the same in substance as defendants' instruction No. 12, which has been quoted. It is not fully covered by instruction No. 12, for it includes, in addition to the act of attestation, the testimony of the witness before the county court when the will was probated. In *Kerr v. Lunsford*, the court held that an instruction that the evidence of Dr. J. W. Bates, Jr., the physician who attended the testator and was his family physician, was entitled to great weight, was properly refused. But that was not upon the ground that the name of the witness was used, but because it was equivalent to telling the jury that the evidence of a certain witness was entitled to great weight. In *Ammerman v. Teeter*, 49 Ill. 402, it is held that the court, under the circumstances of that case, did not err in naming a witness in an instruction which was applicable to his testimony. In *Insurance Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353, it was held to be improper to give an instruction requiring the jury to consider, in connection with the evidence of a certain witness, his interest in the subject-matter of the suit. But that was upon the ground that the instruction would have given undue prominence to that fact, as some of the witnesses on the other side of the case were also interested. So it amounts to nothing more than that the instruction was too narrow. No case has been found in which it has been held that the mere naming of a witness in an instruction vitiates it. One fault in this instruction is that it is too narrow. It tells the jury they are justified in rejecting the testimony of the witness, but it does not tell them they may give it such weight as in their judgment it is entitled to. While it is apparent that the witness testified falsely either in the county court or in the circuit court, if the testimony for the plaintiffs is true, it was for the jury

to say in which instance she had testified falsely, and if, from her own evidence and other evidence in the case, they were satisfied that her testimony in this case was true, and her attestation of the will and her testimony in the county court were false, it was in their power to give credit to her testimony in this case, and the instruction should have been broad enough to cover both phases of the question. An equally fatal objection is that, in giving it, the court would have invaded the province of the jury in another way. The instruction assumes that the witness has testified falsely. She doubtlessly did on one occasion or another, and, in jurisdictions less jealous of the rights of the jury, the court might say so to the jury. A very strict rule on this subject is laid down in *State v. Thompson*, 21 W. Va. 741, where the court holds that "it is error for a court in the trial of a case to intimate any opinion in reference to matters of fact which might in any degree influence the verdict, nor can the court instruct the jury as to the weight to be given by them to the evidence of any witness, whether the witness be impeached or not, or whether he is contradicted as to the material facts or not." In lieu of this instruction, the court, on its own motion, gave the following: "The court instructs the jury that they are the judges of the evidence and the weight to be given thereto, and of the credibility of witnesses testifying in this case; that if they believe that any witness has testified falsely in this case as to any matters in issue, that then the jury have the right to disregard such false testimony, or give to it and all the evidence of such witness such weight as the jury may in their opinion believe it was entitled to." The action of the court in giving this instruction is also complained of, it being insisted that the jury should not have been told that they might give to the false testimony such weight as they might think it entitled to. Instructions of this class have been carefully considered in *State v. Thompson*, in which the following was approved as a correct enunciation of the law: "If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material fact in this case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony." In *Thompson on Trials*, § 2425, this instruction is approved as a good model. It is difficult to see, however, how the jury could believe testimony which they had found to be false could be entitled to any weight, and the court told them they could give only such weight as they might believe it entitled to. They were not directed to give it any weight. The instruction left it wholly dependent upon whether they believed it entitled to any weight. But the

instruction is bad in this: that it does not inform the jury that they may reject the whole of the testimony of the witness who willfully testifies falsely as to material matters.

The next objection is to the action of the court in refusing to give defendants' instruction No. 14, reading as follows: "The court instructs the jury that if they believe from the evidence that Dr. F. S. Thomas was the physician who attended the testator during his last illness, and who had been his physician for at least three years previously thereto, and that he was present at the execution of the will, and attested the same as a subscribing witness thereto, and that said Thomas is a credible person and a man worthy of belief, then his evidence is entitled to great weight." It ought to have been given. It submitted to the jury the question of the credibility of the witness, and told them, if they found him to be a credible person and a man worthy of belief, his evidence was entitled to great weight; and this was proper because of his superior opportunities to know the condition of the testator's mind at the time of the execution of the will. He had been testator's physician, and was present at the time of the execution of the will. He was the only attesting witness who testified in favor of the will in this case. He not only had superior opportunities to know the truth, but his conduct as a witness was consistent, and, as has been shown, it was no objection that he was named in the instruction. How far he was discredited, if at all, by his supposed interest in the bequest to the hospital, was left to the jury. This instruction is widely different from the one disapproved in *Kerr v. Lunsford*, which did not submit to the jury the question of the credibility of the witness. It simply told them that the evidence of a certain witness was entitled to great weight. This instruction does nothing of the kind. But it was properly refused, for others had been given substantially covering the same ground. The court was not bound to give more than one instruction of a kind.

The action of the court in refusing defendants' instruction No. 15 is also assigned as error. That instruction is as follows: "The court instructs the jury that if they believe from the evidence that E. B. Knight prepared the will in question in this cause at the request of B. Ward; that said Knight was a lawyer of conspicuous ability and very high standing in his profession, and a man of pure and upright character; and that said Knight was present when said will was executed, and superintended and directed the testator and witnesses in the execution of it; and that said Knight was well acquainted with Ward for many years before said will was executed—then it is proper for the jury to consider whether, in view of these facts, it is probable that said Brigham Ward was insane at the time said will was executed, or

that said will was procured to be executed by him by means of imposition, fraud, or undue influence." This was properly refused because instruction No. 1, which the court gave, is to the same effect and in almost the same language.

The next complaint is that the court erred in permitting Dr. Ewing to state that the inability of a man, by reason of his physical condition, to sign his name, and his making marks in various places around the place at which his name should have been written, was evidence of mental defect. The witness was testifying as an expert. It was a hypothetical question. No specific objection was made to it, and none appears.

The next objection is that the court erred in refusing to allow witness J. F. Brown to state the reason why the hospital was leased to Dr. Thomas on the terms contained in the written lease. As there was evidence introduced tending to show interest on the part of Dr. Thomas in the hospital, which could have had no purpose other than to affect his credit and throw suspicion upon his conduct in connection with the execution of the will, it was proper to permit the introduction of evidence to show the extent of that interest and the circumstances under which it was acquired. It is urged here by the contestants that, as the contract was between Dr. Thomas and the city of Charleston, a municipal corporation, no inquiry could be made beyond what was shown by the record. This position is not tenable. It is not a proposition to show that the contract was different from what it was shown by the record to be, but simply to show under what circumstances the lease was made, as shedding light upon the interest of the witness. Mr. Brown had been a member of the city council, and was thoroughly familiar with the facts, which could not be had from the city, as a corporation, which is termed in law an artificial person, incapable of testifying. The evidence could only come from documents or living witnesses, and it has been shown that Mr. Brown was conversant with the facts. Hence he should have been permitted to answer the question.

The contestants cross-assign error in the action of the court in admitting testimony relating to the character of E. B. Knight, and instructing the jury that it was proper for their consideration. As it was shown before this evidence was introduced that an effort had been made, when too late, to take the testimony of Mr. Knight, and much of the evidence introduced by the contestants reflected upon his conduct and capacity at the time of the execution of the will, it was most just and reasonable to permit the jury to know and consider the character and ability of the man. It is well settled that evidence of character of third persons, as well as parties, is admissible, to a limited extent and in an exceptional way, even when parties are alive. That being true, the reason

is much stronger when death has closed the lips of the person whose good faith and integrity is called in question. It is admitted that Mr. Knight was present at the time of the execution of the will, and superintended and directed what was done. His connection with the *res gestæ* being established, and the bona fides of the transaction being questioned, and he being dead, so that the jury could not hear what he might have said had he been alive, nor have seen him and formed an estimate, from his appearance, demeanor, and testimony, of his character and capacity, it was proper to supply that omission to the extent of showing what his character and capacity were. In *Rowt's Adm'r v. Kile's Adm'r*, Gilmer, 202, it is held, "on the plea of non est factum, it being proved that a son of the plaintiff said he could counterfeit the hand of the defendant, evidence may be given to show the infamy of the son's character, circumstances existing to render the execution of the instrument doubtful." This is on the opposite side of the proposition, but it illustrates the principle. If it is proper to show bad character on the part of one who is connected with a transaction, why should not evidence of good character be admissible? Coalter, J., in this case said: "But the other evidence not set out in the bill of exceptions may have tended to prove an agency in Richard Rowt in the execution of the paper in question, and thereby have legalized the evidence touching his capacity to imitate the handwriting of the intestate John Rowt; and, if so, I can see no good reason against an inquiry into his general character. Surely the plaintiff might have proved the fairness of his character on the one side, and I can therefore see no reason why its foulness might not be relied on as a circumstance on the other." While the general rule is that a party to a civil action, or some person concerned in the transaction out of which the transaction arose, being charged with fraud or moral delinquency, will not generally result in allowing evidence of character to be admitted, the rule is not without its exceptions. 5 Am. & Eng. Ency. Law (2d Ed.) 863, 864. In *Ruan v. Perry*, 3 Caines, 120, it was held that in an action of tort in which the defendant was charged with gross depravity and fraud, upon circumstances merely, evidence of his good character was admissible. This was followed in *Dawkins v. Gault*, 5 Rich. Law, 151; *Werts v. Spearman*, 22 S. C. 200; *Townsend v. Graves*, 3 Paige, 453; *Henry v. Brown*, 2 Helsk. 213. But it was disapproved in *Gough v. St. John*, 16 Wend. 646; *Fowler v. Insurance Co.*, 6 Cow. 673, 16 Am. Dec. 460; *Houghtaling v. Kelderhouse*, 2 Barb. 149; *Pratt v. Andrews*, 4 N. Y. 493; *Ward v. Herndon*, 5 Port. 382; *Church v. Drummond*, 7 Ind. 17; *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61; *Simpson v. West- enberger*, 28 Kan. 756, 42 Am. Rep. 195; and other cases. But the doctrine has been re-

vived in New York in *Bowerman v. Bowerman*, 76 Hun, 46, 27 N. Y. Supp. 579; *Pape v. Schofield*, 145 N. Y. 598, 40 N. E. 164. As bearing upon the admissibility of this evidence, the following note is found in *Buller's Nisi Prius*, 296: "But, where the surviving subscribing witness was called to impeach a will for fraud in obtaining it, Lord Kenyon permitted the devisee to call persons to the general good character of the two subscribing witnesses, who were dead." While Mr. Knight was not a subscribing witness, he had far more to do with the execution of that paper than the subscribing witnesses, and was in at least as good a position to know the state of the testator's mind as the subscribing witnesses. He had conversed with him, and received directions for drafting the will, and talked with him afterwards. His intelligence was such as to enable him to know the condition of the testator's mind. While not a subscribing witness, he would be competent to testify as fully as they. But, whether this evidence is admissible for the purpose of showing testamentary capacity or not, it is competent in rebuttal of the charge of undue influence. Reason suggests that it is competent for both purposes, and should have such weight as the jury may think it entitled to.

Express authority for this is found in some of the English cases. In *Stephenson v. Walker*, 4 Esp. 50, Lord Kenyon said: "In the great case of *Jolliffe's Will*, Lords Dudley and Ward and other persons were examined as to the character of the person by whom the will was prepared, and the legality of admitting such evidence was not doubted." In *Bishop of Durham v. Beaumont*, 1 Camp. 207, 210, Lord Ellenborough said: "I fully accede to the doctrine laid down in *Doe*, on the demise of *Stephenson v. Walker*. There the attesting witnesses whose character was disputed were dead, and it was properly held that the party claiming under the will should have the same advantage as if they had been alive. In that case they must have been personally adduced as witnesses, when their character would have appeared on their cross-examination, and, being dead, justice requires that an opportunity should be given to show what credit was to be attached to their attestation of the will. In like manner the Court of King's Bench held, in the time of Lord Mansfield, that evidence of the conduct of deceased witnesses might be received, to attract credit to their testimony, or to destroy its effect." To the same effect is *Provis v. Read*, 5 Bing. 435.

Errors having been found in the record, it remains now to determine whether they are such as constitute cause for reversal and the granting of a new trial. On this question, the latest and most exhaustive work on the subject of appeal and error, the *Cyclopedia of Law and Procedure*, vol. 3, p. 386, says: "The next question which arises is, how is the reviewing court to determine

whether error shown by the record is harmless or prejudicial? The decisions are, at least apparently, very conflicting, but it is possible that the statements therein, when applied to the particular facts of the cases, may be harmonized. There are two rules promulgated by the decisions, and they seem to be radically opposed to each other. Thus one line of decisions holds that, if there is error apparent on the face of the record, a presumption of prejudice arises which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial." That is undoubtedly sound law, under the decisions of this court, when the error is in the giving of improper instructions. *Clay v. Robinson*, 7 W. Va. 348; *Beaty v. Railroad Co.*, 6 W. Va. 388; *State v. Douglass*, 20 W. Va. 770; *Hall v. Lyons*, 29 W. Va. 420, 1 S. E. 582. In this last case Judge Green says: "It has been repeatedly decided by this court that, when an erroneous instruction has been given by the court to the jury, the presumption is that the exceptor was prejudiced thereby, and the judgment will be reversed for this reason, unless it clearly appears from the record of the case that the exceptor could not have been prejudiced by the giving of such erroneous instruction, in which case the judgment will not be reversed for such cause." *State v. Kerns*, 47 W. Va. 266, 34 S. E. 734; *State v. Dickey*, 46 W. Va. 319, 33 S. E. 231; *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859. Another rule established by this court is that, whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the record that, even under the instruction, a different verdict could not have been rightly found. *Boggess v. Taylor*, 47 W. Va. 254, 34 S. E. 739; *Nicholas v. Kershner*, 20 W. Va. 251; *Bank v. Waddil*, 27 Grat. 451. From the lengthy quotation and review of the evidence in this case it will be seen that it is very contradictory, and that a correct verdict turns upon two questions, which must be resolved in the light of what occurred, and what the conditions were at one and the same time and place, subject to such light as is thrown upon them by antecedent and subsequent occurrences, and that as to all these matters the evidence for plaintiffs and defendants involves grave questions of credibility of witnesses, which belongs to the province of the jury, and that the objectionable instructions which were given, and the correct instructions which were refused, bear directly upon these delicate questions and the weight and value of certain testimony. Few cases are to be found in which the giving of improper instructions, and refusal of proper instructions, would be more likely to prejudice the parties interested.

As there must be a new trial, it is unnecessary to pass upon the action of the court in refusing to set aside the verdict as being contrary to the law and the evidence. Any dis-



cussion of the evidence in that connection would be improper under the circumstances.

For the errors noted, the decree entered in this cause on the 29th day of April, 1899, by the circuit court of Kanawha county, must be reversed, the verdict of the jury set aside, and a new trial of the issue awarded.

BRANNON, J., dissents.

(52 W. Va. 616)

McNEELEY et al. v. SOUTH PENN OIL CO. et al.

(Supreme Court of Appeals of West Virginia. March 28, 1903.)

LIMITATIONS—ADVERSE POSSESSION—ESTATE BY ENTIRETY—CURTESY—JOINT TENANCY—HUSBAND AND WIFE—EXECUTORY CONTRACT OF SALE—COLOR OF TITLE—CONSTITUTIONAL LAW—TITLE OF ACT.

1. Husband and wife being seized as joint tenants of land, her interest being separate estate, the husband alone, during coverture, sells the whole tract by executory contract, and the purchaser goes into possession during the coverture, and later the wife dies, leaving the husband and children surviving her, and later the husband conveys the whole tract to the purchaser by deed. The possession of the purchaser is not adverse to the wife in her lifetime, and right of entry or action does not accrue to her children until the husband's death, and the statute of limitations begins to run against them first at his death.

2. Survivorship in estate by entirety was abolished 1st July, 1850, by section 18, c. 118, of the Virginia Code of 1849, continued in the West Virginia Code of 1868, c. 71, § 18.

3. Curtesy in a wife's separate estate vests in her husband first upon her death.

4. Quære: Where man and wife are jointly seized of land, her interest being separate, and adverse possession under a distinct hostile title begins during the coverture, but, before the period fixed as a bar by the statute of limitations has run out, the wife dies, leaving children and husband surviving her: Does the statute stop running as to the heirs until the close of the curtesy by the death of the husband? Does his failure to sue affect them? Is there a second or separate right of entry or action accruing to the heirs at the husband's death? How when the husband during coverture has conveyed to the occupant by deed purporting to pass in fee the whole tract? Does the statute run against the heirs before the husband's death?

5. The conveyance of land to husband and wife since 1st April, 1869, does not create an estate by entirety, but a joint tenancy, and the wife's interest is separate estate.

The joint effect of section 18, c. 71, abolishing survivorship in estate by entirety, and of chapter 66, relating to separate estates of married women, of the Code of 1868, is to abolish estate by entirety. The husband is not entitled to sole possession during coverture, but has curtesy in his wife's half after her death.

6. Possession by a purchaser under an executory contract of sale, made by the husband alone, of land owned in joint tenancy by husband and wife, is not adverse to the wife.

7. When a husband, by executory contract during coverture, sells land owned by him and his wife as joint tenants, and the purchaser takes possession, and then the wife dies, and then the husband conveys to the purchaser the whole tract by deed, the possession is not adverse to the heirs of the wife until the husband's death, as until then they have no right of entry or action, and the statute of limitations does not run against them until then.

8. An executory contract for the sale of land, stipulating for the future conveyance of legal title, the purchase money payable in future, is color of title under the statute of limitations as to hostile claimants.

9. There can be no constructive actual adverse possession of land by reason of possession of part of the occupant's land, where there has been no actual possession of some part of the land of another person, which he might treat as a trespass and sue for.

10. Where an occupant's boundary covers adjoining lands of separate owners, his possession on land of one of them will not be adverse possession of land of the other, without actual possession of such other's land, on the theory that possession of part is possession of the whole.

11. Chapter 61, p. 152, Acts 1872-73, fixing three years' limitation for suits to recover land leased for oil or other minerals, was repealed by chapter 102, p. 298, Acts 1882, re-enacting chapter 104 of the Code of 1868.

12. The said chapter 61, p. 152, Acts 1872-73, is unconstitutional and void because of failure in its title to express the object of the act.

13. A married woman will not, by reason of estoppel in pais, lose her right to land owned jointly by her and her husband simply by knowledge that her husband is negotiating an exchange of the whole land in his name, or has exchanged it as his sole land, or by expressing, casually, satisfaction with the exchange after it has been made. Silence does not bar her right. Nor will her heirs be so barred by mere silence, though they know of improvements put upon the land by or under the other party to the exchange.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by C. B. McNeely and others against the South Penn Oil Company and others. Decree for defendants, and plaintiffs appeal. Reversed.

(a) By deed, 4th April, 1873, Edgell conveyed to Nathan Higgins and Mary Higgins, his wife, a tract of 100 acres of land. By a written agreement, 23d September, 1873, between Nathan Higgins and John W. Starkey, they exchanged lands; Higgins agreeing to convey to Starkey said tract of 100 acres, and Starkey agreeing to convey to Higgins a tract of 50 acres. Mary Higgins was not a party to this agreement. She died 12th February, 1875, and her husband in April, 1898. The agreement recited that the land was the Allen Edgell farm. It provided that Starkey should pay Higgins \$125 boot, payable in future by installments. By deed 26th July, 1875, Nathan Higgins conveyed to Starkey the 100 acres, reserving a lien for unpaid purchase money. The agreement provided for immediate delivery of possession of the two tracts under the exchange, and a son of Nathan Higgins, living on the 100 acres, moved from it, and another son moved on the 50 acres, and Starkey moved from the 50 acres, and took actual possession of the 100 acres, 3d October, 1873. The deed from Higgins to Starkey referred to date and record of the deed from Edgell to Starkey and wife.

† 8. See Adverse Possession, vol. 1, Cent. Dig. §§ 430, 431.



(b) By certain conveyances the Corning Oil Company and others, derivatively from Starkey, became lessees of 26 acres of the 100 acres under a lease for oil and gas purposes, and the South Penn Oil Company became lessee of the residue 74 acres. About 11th February, 1897, the Corning Oil Company and others, jointly owning with it the lease of the 26 acres, went into possession and bored several producing oil wells on the 26 acres. On 21st August, 1895, the South Penn Oil Company, under its lease of the 74 acres, took actual possession, and bored several producing wells. G. B. McNeeley and others, having acquired the interests of certain children and heirs of Mary Higgins, together with certain other heirs, in January, 1899, filed a bill in chancery against the South Penn Oil Company and others, calling for an account of all oil taken from said land, and payment to the plaintiffs for it.

(c) The case resulted in a decree dismissing the bill, from which decree the plaintiffs took an appeal.

Thomas P. Jacobs, Edward A. Brannon, and Thomas R. Hornor, for appellants. Erskine & Allison, Fleming & Fleming, W. S. Haymond, U. N. Arnett, Jr., and Arnold, Morton & Irvine, for appellees.

BRANNON, J. (after stating the facts). A vital question in this case arises on the statute of limitations. Is the right of the plaintiffs to that half of the tract of 100 acres vested in Mary Higgins lost to them by reason of the statute of limitations? The defendant oil companies say that when Starkey, under the executory contract of exchange between him and Nathan Higgins, took actual possession of the 100 acres, in October, 1878, the statute at once began to run, and had run the limitation period of 10 years long before the commencement of this suit. That depends upon the question whether that possession was adversary to Mary Higgins. Counsel for plaintiffs say that it was not adversary, for the reason, first, that the conveyance to Nathan and Mary Higgins created, not a joint tenancy, but an estate by entirety, and that he could not sell either his own or his wife's estate in the land, and his contract of sale would constitute no color of title, but was nugatory for all purposes, and, besides, that Nathan had the right to the control, possession, and rents and profits of his wife's share—in short, a life estate therein, just as by common law a husband had a life estate in the sole land of a wife—and under settled principles the statute would not begin against her or her heirs until the death of the husband. The defense says that the conveyance of the land did not create an estate by entirety, but simply a joint tenancy, by the law ruling at the date of such conveyance. By common law, land conveyed simply to a husband and wife did not, as in the case of a conveyance to two persons not

husband and wife, create a joint tenancy, but an estate by entirety. "It is a sole, not a joint, tenancy. Each holds the entirety. They are one in law, and their estate one and indivisible. If the husband alien, if he suffer a recovery, if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession; something which he had not before; the right of the deceased. But husband and wife have the whole from the moment of the conveyance to them, and the death of either cannot give the survivor more." This statement of the nature of this ancient estate in land, dating far back in time, in *Thornton v. Thornton*, 3 Rand. 179, is supported by all the authorities. No partition, voluntary or involuntary, can be made between husband and wife of such an estate. 11 Am. & Eng. Ency. Law, 49; 2 Minor, 471. One dying, the survivor gets the whole. In such land the husband had at least an estate for his life, and if he outlived his wife he simply retained the whole. His conveyance of the whole would operate to confer on his grantee an estate during his life, and, if he survived, it would pass the fee to the whole. 1 Washb. R. Prop. § 913; Bl. Comm. bk. 2, p. 182; *Gray v. Bailey* (N. C.) 23 S. E. 318.

If Nathan and Mary Higgins did take an estate in entirety, and she had outlived him, on common-law principles the statute would not count against her in favor of Starkey until his death, because until then Nathan's marital right of possession would not expire. Until then she could not recover of Starkey either her own or his interest, but, as she died first, there could not be, by common law, any question of the statute, as his contract with Starkey would upon her death confer right of possession upon Starkey. But this could not be the case, because at the date of the contract the statute found in Code 1868, c. 71, § 18, was in force, providing that "if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy or dower as the case may be." This enactment has been in force since the Virginia Code of 1849 took effect, 1st July, 1850; and therefore Nathan and Mary Higgins took subject to it, and Nathan could not take the fee upon his wife's death, as he would have done by common law, and his exchange with Starkey did not confer a fee in his wife's moiety upon her death, as the fee in reversion went to her heirs. But the statute says that he shall have curtesy in his wife's moiety, and it is settled that the heirs would not be subject to the statute until the close of the curtesy estate by the death of Nathan Higgins, the life tenant by curtesy. *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359;

*Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. But here a question of nicety arises, on which but one case has been cited, and on which I have been able to find but little authority. Say that, as the right of Mary Higgins was separate estate, the statute began to run against her in her lifetime. *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. If it had run out during her life, she would have been barred, and her heirs would have been barred, as they derived only from her; and, if her right had been lost and passed by the statute, so would theirs have been. But the statute had not barred her right before her death. All authority does say that, if the statute begins to run against an ancestor, it goes on against his heirs, even though infants. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580. That is because they can sue. How is it where the husband has made a deed conveying all his right to a third party, carrying with it his curtesy, which curtesy in her separate estate first vests at her death? *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; 15 Am. & Eng. Ency. Law, 819. Does that rule apply then, or does the statute stop until the close of the curtesy? It is an axiom of the law of statutes of limitations that, to apply them to bar title to land, there must be a right of entry. Citations in *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. 56. Nobody can maintain ejectment unless he have a right of entry. *Adkins v. Spurlock*, 46 W. Va. 139; Code 1899, c. 90, § 4. From the last breath of Mary Higgins to the last breath of Nathan Higgins, there was no right of entry in her children. They could maintain no suit to recover possession from Starkey. How, then, can the period of duration of the curtesy estate be counted against her children? Bar a right when there is no right of suit for it! Counsel for the Corning Oil Company, seeing this trouble, argues that the children could have maintained a suit in equity to remove cloud from title, and cite *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. I do not see that they could do so, as they were not in possession. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, and *Christian v. Vance*, 41 W. Va. 695, 754, 24 S. E. 596. *Austin v. Brown* does not say that one who is neither in nor entitled to possession can maintain such a bill. It cannot be cited to uphold the proposition that the Higgins heirs could sustain a chancery suit to impeach Starkey's right to the curtesy estate or to get possession while it existed. If they could have maintained a suit for an injunction against extraction of oil, or for an account of oil taken from the land, that would not give possession. They could have no partition during the curtesy. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56. To bar their legal title, you must prove that, when the right vested by descent in them, they could maintain ejectment to vindicate

their title and admit them to full actual possession. They held legal title, but only as reversioners, and that title had no force to give them possession in a law or equity forum during the life of Nathan Higgins. We are talking of full common-law remedy giving full possession. It cannot be unqualifiedly asserted that, when once the statute starts, it stops for no after event. If a statute suspends its operation, it stops for the period of suspension because of the mandate of the law. 1 Cyc. 1023; 1 Rob. Prac. 624. Now, when the law creates an estate by curtesy, operating to suspend entry and action, why should not the statute of limitation stop? More so because infants can sue, but a reversioner or remainderman cannot. The law commands it to cease running in consideration that it tolls for a time the right of entry. We are told of that rule that disabilities arising after the start of the statute do not stop its currency, but the vesting of the estate by curtesy is not a disability. This argument was made in *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 434, 447. There were two disabilities—infancy and coverture—when adverse occupation began, and they were both removed by death; but then curtesy began, and it was held that the curtesy suspended the statute, and that the intervention of a particular estate was not a disability; that is, it could not be pleaded like a supervenient disability arising after the accrual of cause of action; in short, that the intervention of the curtesy operated a suspension of the statute; that in fact the land did not descend during curtesy so as to give right of entry. The opposite has been held in *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340. The decision there was that, when adverse possession begins in the wife's life, her death does not suspend it, notwithstanding the husband's curtesy. There being no right of entry, I consider the New York case the more logical.

In our case the husband sold and later conveyed his curtesy to Starkey, and Starkey had right, as against the children of Mary Higgins, to occupy the whole land during curtesy. The possession of a life tenant is not adverse to the remainderman, as the life and the remainder estates are consistent, not adverse. *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207, and authorities in *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. 56; 1 Cyc. 1056. But as Starkey purchased in fee, and was expressly a life tenant, I will treat the possession as adverse, for argument's sake, and make the intervention of the tenancy by curtesy beginning with the death of Mary Higgins as working a suspension of the statute. Or may we not say that there were two rights of entry—one to Mary Higgins, and the other to her children at her death? As the coming of the life estate ended her right of entry, a new and distinct right of entry first arose upon the death of Starkey

in favor of her children. Judge Holt, in *Austin v. Brown*, 37 W. Va. 369, 17 S. E. 207, using the words of *Stevens v. Winship*, 1 Pick. 318, 11 Am. Dec. 178, said: "A remainderman is not obliged to enter for a forfeiture by tenant for life, and a new right of entry accrues to him at the death of the tenant for life." In *Tilson v. Thompson*, 10 Pick. 359, it is held that "a reversioner is not obliged to enter during the life of the tenant for life for a disseisin of such tenant or a forfeiture for waste, but a new right of entry accrues to him at the death of such tenant." *Tyler on Eject.* 117. If such is the law, no right of entry was born to these heirs until the death of Nathan Higgins. If the ouster occurs during the curtesy after the wife's death, who would deny that the statute only runs from the death of the tenant by curtesy? What in reason differentiates the case where the ouster was in the wife's life?

I have been considering the case, not of an occupant under distinct adverse title, hostile to both husband's and wife's rights, but of one who has a conveyance from the husband, passing his curtesy. In the former case it may well be said that the statute, having begun to run in the wife's lifetime, keeps on against her heirs. It does surely if she leaves no husband, but if she leaves a husband entitled to curtesy, and he does not sue the intruder for himself to vindicate his curtesy and the reversion, does the statute go on while the curtesy lasts, and bar the heirs, even in the case of possession under such distinct title? Only the husband can sue while he lives. It seems hard that his default should detriment the heirs after his death. The law protects the heirs from the statute. "The right of entry in the person entitled in remainder can in no case be affected by the statute during the existence of the particular estate, and the laches of a tenant for life will not, as a general rule, affect the party entitled." *Angel on Lim.* §§ 371, 415; *Buswell on Lim. & Adv. Poss.* § 271. How can the remainderman or reversioner be protected against such laches in failing to sue, except by holding either that the statute commencing in the woman's life is suspended, if there is but one right of entry, or that the heirs have a new right of entry born on the death of the tenant by curtesy? But the question of a hostile stranger entering is not the question in this case. We have the case of one buying from the woman's husband the whole tract, by conveyance passing the whole right, including curtesy. Nathan Higgins could not sue the purchaser, and the heirs could not, because, to sustain ejectment, there must be a right to present possession, under Code 1899, c. 90, § 4, and *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121.

Another question is this: Did the conveyance to Higgins and wife create an estate by entirety, or had that estate been then

abolished? If that estate was then existent, the contract of exchange between Higgins and Starkey gave Starkey lawful right to hold during the joint lives of Higgins and wife, and also during the life of Nathan Higgins, after the wife's death, by reason of curtesy; and the statute of limitations did not begin in the lifetime of Mary Higgins, as she had no right of entry, and could not sue Starkey, nor could her husband, and there could be no color to say that a right of entry or suit vested in her heirs until his death. Subject to survivorship, the husband "is entitled during coverture to the full control and usufruct of the land, to the exclusion of the wife, and has, according to the weight of authorities, the power to sell, mortgage, or lease for the same period, and his life interest is subject to the claims of creditors." 15 Am. & Eng. Ency. of Law, 849; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 465. When we read that neither can sell, that only means that they cannot thus destroy the right of survivorship. *Hardenbergh v. Hardenbergh*, 18 Am. Dec. 386. It would be the same as a sale by the husband of a wife's land, not separate estate, in which he had present right of possession, in which case adverse possession affecting her right would not exist until the husband's death. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797; *Kerr, Real Prop.* § 1976. But when this land was conveyed to Higgins and wife, section 3 of chapter 66, Code 1868, was in force, giving the wife power to take and to hold to her separate use land, and its rents and profits, as if unmarried, and denying power in the husband to dispose of the land, or its rents and profits. This would give the wife sole possession, and it would seem to prevent estates by entirety from arising thereafter as they did before that statute. In a few states it has been held that the separate estate acts do operate to abolish estates by entirety. Those cases hold that such estates spring from the old common-law rule that man and wife are one person, and therefore an estate conveyed to them is a unit of indivisible parts; they hold per tout, et non per my (by the all, and not by the moiety), while a conveyance to two persons, not man and wife, makes a joint tenancy, making a unit of divisible parts—joint tenants holding per tout et per my; and that separate estate acts were designed to do away with the legal rule that, as to property, man and wife are one. Those decisions say that, as these acts provide that the wife shall hold the land and its profits as if single, that excludes all idea that the husband can have possession of his wife's half, take its profits, lease it, convey for his life, as he could do with his wife's maiden land by the common law, since the new acts were passed to destroy the common-law right in toto, and to hold that estates by entirety still exists would defeat that object. Sep-

arate estate acts mean, I think, not simply to give the wife possession of her half and its profits, free from her husband's control and disposal, but also to take away his right to retain his wife's interest by survivorship on her death, because the acts say that she shall take and hold "in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." I would think that this is the plain import of our separate estate act. *Robinson's Appeal* (Me.) 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; *Hardenbergh v. Hardenbergh*, 18 Am. Dec. 388, note; *Chandler v. Cheney*, 37 Ind. 413; *McCurdy v. Canning*, 64 Pa. 41; *Cooper v. Cooper*, 76 Ill. 57.

But it will be found that the very decided weight of authority from other states is to the effect that the married women's acts do not abolish estates by entirety. Our own act comes from New York, and there the holding has been that it was not the effect of the section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and, whatever the effect of a conveyance to a husband and wife was prior to that statute, so it remains. If the operation of such conveyance was to pass the entire estate to each of the grantees, so that each became seised of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture what she did not have at common law—the use, benefit, and control of her own real estate, and the right to convey and devise it as if unmarried. *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. A mass of law sustains this position. *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 484; 10 Am. St. Rep. 213, and note page 99; *Pray v. Stebbins*, 142 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Robinson v. Eagle*, 29 Ark. 202; *McDuff v. Beauchamp*, 50 Miss. 531; 2 Jones on Conv. § 1793; 15 Am. & Eng. Ency. Law (2d Ed.) 850; 1 Wash. R. Prop. § 915; 3 Kerr, R. Prop. § 1976. The case of *Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220, has no bearing on the point in hand, because in it the land was conveyed to the man and wife before the separate estate act. In the case of *Bertles v. Nunan*, cited, the court did not consider what effect the separate estate act had on entirety estates as to use and control by the husband during coverture in the wife's interest; but in a later case (*Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305), it is again held that the separate estate act does not destroy estates

by entirety, yet it deprives the husband of the sole control of the wife's interest during their joint lives—takes away his power to lease—because, as the court said, this right in the husband was not a quality of an estate by entirety, and did not arise from it, as, if it did, it would not be abrogated by the separate estate act, but that such power in the husband was a power in him by common law as to the wife's maiden land, and the separate estate act took that from him. She was held entitled, like a joint tenant, to half the rents and profits with him. The case followed *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52. But I do not regard these decisions in other states as controlling in this state. They were based materially on the fact that a cardinal quality of an estate by entirety was the right of survivorship. They did not consider that the separate acts intended to abolish that element in conveyances operating by common law to vest an entirety estate. Survivorship in joint tenancy had been abolished, but it was not considered that statutes turning joint tenancies into tenancies in common, and thus abolishing survivorship, touched estates by entirety. *Bertles v. Nunan*, 44 Am. Rep. 363; *Pray v. Stebbins* (Mass.) 4 N. E. 824, 55 Am. Rep. 462; *Robinson v. Eagle*, 29 Ark. 206. So it was held that the act abolishing survivorship between joint tenants did not apply to that peculiar estate known as an "estate by entirety." *Thornton v. Thornton*, 3 Rand. 179. Therefore, in estates by entirety, the unfair rule that on the death of the husband or the wife the survivor took the whole still prevailed; but by a provision in the Virginia Code of 1849, going into force 1st July, 1850 (chapter 116, § 18), it was enacted that "if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to dower or curtesy, as the case may be." This destroyed survivorship in estates by entirety. This statute is found in Code W. Va. 1868, c. 71, § 18. A reason exists, from this, in this state, for saying that estates by entirety have ceased since the married woman's act, that does not exist in other states. Survivorship has perished under the Code of 1849. The right of the husband to control and take the profits of and convey for his life the interest of the wife in entirety estates has been taken away by the separate estate act. What is left of an estate by entirety? Is its indivisibility or impartibility still left? I think not, as I think the statute of partition applies to it. From these considerations, I conclude that we cannot say that the statute of limitations does not apply because Higgins and wife had an estate by entirety, since I think that, by the joint operation of the act abolishing survivorship between husband and wife and the separate estate act, Higgins and wife held the land as joint tenants, not an estate by entirety. But

Higgins had curtesy after his wife's death.

There is a second reason why the plaintiffs' right is not barred by the 10-year limitation. Nathan Higgins, in the lifetime of his wife, sold to Starkey the whole tract, as if he were sole owner, by an executory contract in terms providing for a future deed to convey the legal title, the purchase money also payable in future, and then Starkey went into possession; and later Mary Higgins died, and still later Nathan Higgins made such deed to Starkey. The burden of the argument for the defense is that the statute, having begun to run in the lifetime of Mary Higgins, had run out its 10 years before this suit began. An answer is that Starkey's possession began and continued during the life of Mary Higgins, under that executory contract, and was never for one moment adverse to her, and never, in any view, could become adverse until the death of the husband. No cause of action accrued in the lifetime of Mary Higgins. Some authority from a few states is cited to show that the possession of a purchaser under an executory contract is adverse, not only to a stranger title, but as to the vendor, also. We cannot so hold in the face of so much binding authority at home, which authority holds that possession is not adverse to the vendor. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832; *Core v. Faupel*, 24 W. Va. 239; *Hudson v. Putney*, 14 W. Va. 561; *Clarke v. McClure*, 10 Grat. 310; *Williams v. Snidow*, 4 Leigh, 14. The defense would reply to this position that, whilst Starkey's possession was not adverse to Nathan Higgins, Mary Higgins was another person—she and her heirs—and that the law is that possession, even under an executory contract, is adversary to strangers, and so it was as to Mary Higgins and her heirs. This is a very refined distinction—to say that when one of two joint tenants sells by a contract the whole land, so that the holding under it is not adverse to him, it is as to his fellow. He sells a unit. How can we thus split it? Higgins and Starkey treated it as a unit, but still it is not a unit as to Mrs. Higgins! They contemplated no bisection. The possession could not bear one hue or character as to one joint tenant, and another as to the other. Starkey entered that tract in recognition of the title of Nathan Higgins to the whole tract as an entire thing, recognized a still subsisting title in Nathan Higgins for the whole, as the cases cited say that when a purchaser enters under an executory contract, as a matter of law, whatever his real mind, he thus recognizes a still subsisting title in the vendor to the tract sold; and this being so, and the sale being one of the whole tract, that entry imports a still subsisting title in Higgins for the whole tract, and that would inure to the benefit of the co-tenant, Mary Higgins, and, the possession not having the quality of adverseness to Higgins, neither had it as to his wife. This character of nonadverseness continued,

from the character of the writing, until Higgins made a deed after his wife's death. If one tenant in common convey the whole by deed passing a legal title, it is an ouster of his co-tenant; but not if it is only a contract for title, for it is not adverse then to either owner. There had been no partition between Higgins and wife. They claimed and held possession as joint tenants, per my et per tout. The physical possession by Starkey of each and every acre was the same as that of each and every other acre.

The possession of one joint tenant or tenant in common or parcener is the possession of the other, and the possession of Starkey being under one co-tenant, and not adverse to him, it was the friendly possession of the other. It bore the same cast as to Mary Higgins that it bore to Nathan. She was a joint tenant with him. I find a case bearing on this feature of the present case. *Ormond v. Martin*, 37 Ala. 598. A purchaser under a bond conditioned to make a deed took possession. The bond was made by an agent who had authority from several joint owners, but not from others. The court held the possession not adverse to any of the owners, saying, "The character of the possession is the same as to all the owners;" that is, it not being adverse to some, it was not adverse as to other co-owners.

When possession under the executory contract ceased with the execution of the deed by Higgins to Starkey, then the possession became adverse to Higgins, but not to the heirs of Mary Higgins, for the reason that an estate by curtesy was at that date actually vested in Nathan Higgins, and Starkey was entitled by his deed to hold the half of Mary Higgins until her husband's death, and right of entry and action never accrued to the heirs until his death. *Cent. L. Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 8 L. R. A. 826, 25 Am. St. Rep. 797; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207.

But let us separate Mary Higgins from her husband, and say that the fact that possession was not adverse to Nathan Higgins would not protect her right from limitation. Treat her as a stranger with a stranger title, not in privity with her husband's title. In reading up this case, this question occurred to me: Is the executory contract, not purporting to convey legal title, but stipulating for future conveyance of title, good color of title to sustain adversary possession? I do not find that the question has been pointedly considered and decided in the Virginias, and it is of some importance that it be discussed. Color of title is essential to give adverse possession to the whole boundary claimed, so as to apply the statute of limitations. *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178; *Core v. Faupel*, 24 W. Va. 242. A writing must, to give color of title, show an apparent transfer of title. "Consequently, as a mere exec-

utory contract or bond to convey does not itself purport to transfer title, but only promises a conveyance in future, such instrument does not ordinarily confer color of title." 1 Am. & Eng. Ency. Law, 859. In addition to cases there cited, I note *Isaacs v. Edwards*, 7 Humph. 465, 46 Am. Dec. 86, and *Rigor v. Frye*, 62 Ill. 507; the latter case holding that a "bond conditioned for execution of a deed on compliance with its terms in future is not color of title." 8 Washb. R. Prop. § 1881, so states the law. In *Osterman v. Baldwin*, 6 Wall. 116, 18 L. Ed. 730, a land company issued a certificate of purchase showing that it had sold a lot, received payment for it, and promising to make a deed in future. The act involved required possession for three years under "title or color of title." The Supreme Court held: "If this writing, upon its face, professed to pass title, but failed to do it, either because the city company had no title, or for want of proper execution, it could be used as color of title. But an agreement to convey title at some future period is not color of title, within the meaning of the law." I am surprised to find so much law to this effect. I have made patient search, and, though innumerable instances of papers making color of title are found, I have not found many making contracts for title color of title, though it must be that innumerable cases of their use have occurred. It will be noticed that in our own cases language is used importing that any claim of title, "legal or equitable," will do. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, following cases there cited; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395. From this language it might seem that a title bond or a contract would furnish color of title; but a deed purporting to pass title instantly would be good color, though in fact its maker had no legal title, but only an equity, as where one having right only under a title bond makes a deed purporting to presently convey legal title. I have found no case where the point was actually considered. In our cases, except *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121, showing such liberality as to instruments giving color, the documents were those purporting to pass then and there actual title. Liberal as is the holding in the cases just cited, the general law seems to call for a paper giving "semblance or appearance of title"—"any instrument, however defective, no matter from what cause invalid, purporting to pass or convey title to land."

In *Adkins v. Spurlock* the question is not considered, though, as it was directly involved, the adverse possession resting on an executory contract, we must count that case as authority for the proposition that such a contract is good color of title. For reasons about to be given, I think that decision is sound law. The profession in the Virginias has, I would say, generally regarded an executory contract as good color for adversary

possession against strangers to the contract, and I have been surprised to find so much law to the contrary. The rule elsewhere is based on the theory that a mere contract to convey confers no present estate, and in a court of common law is utterly unknown as a muniment of title, and is known only in equity, where it gives only an equity. It does not purport to pass even present semblance of title. By the common law, one purchasing by executory contract has no right to possession until he gets his deed, unless the contract so provides, but is only a tenant, if in possession. It is different where a deed is made, passing legal title. That gives instant right to possession as following the legal title, the title drawing with it right of entry. Under an executory contract the vendor could turn the purchaser out of possession by entry or ejectment. So little does such a mere contract avail at law the vendor retaining legal title which vests him still with the right of possession. *Newell on Ejectment*, § 18; 2 Min. Inst. 229. There are some cases elsewhere holding an executory contract sufficient color of title against all persons except the vendor. *La Frombols v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *Elliott v. Mitchell*, 47 Tex. 445; *Bell v. Coates*, 56 Miss. 776; *Power v. Kitching* (N. D.) 86 N. W. 737, 88 Am. St. Rep. 718. The *La Frombols* Case, just cited, makes the fact that purchase money has been paid, entitling the purchaser to a deed, essential to constitute the contract color of title; but the Texas case says, as I say, that is immaterial. Between the parties the possession is not adverse, and, as to strangers, what is it to them that the contract has or has not been complied with? It is none the less a holding hostile to them. So we find respectable authorities holding under the common law that such a contract is good color for adverse possession, and where is the substantial soundness for a contrary position? If I sell to A. a boundary of land, and put him in possession, under written contract binding me to convey that boundary, where is the sense in allowing a hostile claimant, against whom A. has held for the statutory period, to say to A., "You have no legal title or semblance of title"? A. should be allowed to present his actual possession, and impute it to his vendor's title for color. And viewing him only as a tenant—and surely the writing would give him that character at law—why could he not defeat the adversary claimant?

But if this position be not sound, then I refer to Code 1899, § 20, c. 90, providing that "a vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." And then, too, I may refer to Code 1899, c. 93, cl. 6, saying that no one shall without a writing be chargeable "upon any contract for

the sale of real estate, or of the lease thereof for more than a year." These statutes give an executory contract for the sale of land validity, operation, and effect in all courts—law or equity. The first utterly changes the rule that a vendor can turn out his purchaser. He must now go into equity to enforce his rights according to the contract, and can no longer recover possession at law, whether the purchaser owes for the land or not. *Suttle v. R. F. & P. R. Co.*, 76 Va. 284; *Dobson v. Culpepper*, 23 Grat. 354; *Williamson v. Paxton*, 18 Grat. 475; *Hutchinson*, Land Titles, § 476; 2 Min. Inst. 229.

Upon these statutes, I hold that such a contract is recognized at law, even against the vendor, to defend the vendee's possession, though not as color of title; and for a stronger reason has it virtue against a stranger, to show color of title and give bounds to the possession.

I have considered the effect of possession by Starkey during the life of Mary Higgins, and up to the date of the deed from Nathan Higgins to Starkey under the executory contract; but what is the effect of Starkey's possession after that deed? I have virtually answered this question above. Counsel argue that the heirs of Mary Higgins were co-tenants with their father, and that the conveyance by him to Starkey of the whole tract was an ouster of the heirs, and the statute commenced to run at latest from the date of that deed. There are two reasons why this cannot be so. One is that the tenancy by the curtesy was then vested in Nathan Higgins, and his deed gave it to Starkey. If no sale or conveyance had been made by Higgins, he would have had for his life sole and exclusive possession of his wife's half of the tract, and the law is that the life tenant's possession is in harmony with, not adverse to, the reversioner or remainderman. The heirs had no right of entry against their father or one claiming under him. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. So, when the father conveyed, he conveyed that life estate, and the holding of Starkey during its continuance was not adverse to the heirs. Section 3 of *Austin v. Brown*, cited, so holds. But it is asserted that such possession was adverse, because the father conveyed the fee to the whole tract, and that this was an ouster of the heirs. We admit that if one joint tenant convey the whole, and the grantee takes possession under his deed, claiming the whole, the conveyance is an ouster of the co-tenant, and the possession adverse to him, and the statute runs against him. *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Talbot v. Woodford*, 48 W. Va. 449, 37 S. E. 580; 1 Cyc. 1078; 1 Am. & Eng. Enc. Law, 806. That is the case of simple co-tenants, where each is, at the instant of the conveyance, entitled to immediate possession; but it is not so in a case like this, where one of the joint ten-

ants has a right to possession not only of his own half, but also of that of his co-tenant for the former's life, so that the co-tenant's right of possession is deferred by law until the close of the life estate. These heirs of Mary Higgins had not a right of entry for one moment from the last breath of their mother to the last breath of their father, because of that estate by the curtesy. It is that curtesy which makes the difference. That brings in the rule that the statute does not run against the reversioner or remainderman until the life estate ends. *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. It is not material that the conveyance was of the whole from Higgins to Starkey, and that Starkey claimed in denial of any title in the heirs, because neither Nathan could sue Starkey by reason of his deed, nor could the heirs by reason of that same deed conveying an estate good against the heirs until the death of Nathan Higgins. If it be said that after the deed Starkey's possession was adverse to Nathan Higgins, and therefore also adverse to the heirs, the reply is that, if the life tenant suffer an ouster, those vested with subsequent estate need not sue, even if they can, as in case of distinct adverse title, but may wait until the end of the life estate, on principles and authorities given above, as a new right of entry comes to them for the first time at the close of the life estate. *Buswell on Lim. & Adv. Poss.*, § 270, says: "Rights of Reversioner Preserved. It was a general rule of the common law that an undisturbed and uninterrupted possession for sixty years created a complete title in the possessor, as against every other person, but this is only true when the claimant or demandant not in possession might have asserted his right to enter at any time during the sixty years. Thus an estate for life or years may continue for upwards of sixty years, and yet the reversioner may at the expiration of such estate prosecute his right of entry by ejectment. As, in theory, the remedy only, and not the right, is barred by the statute, it is possible that an intervening estate might be enjoyed for centuries, and then be at last recovered." That was the case even where the titles are distinct, but in this instance there is but one title, and the hands of the heirs were tied by imperative law until the close of the curtesy estate. I find the case of *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121, sustaining this position. Two heirs of a mother held her estate subject to their father's curtesy. He conveyed his interest to them, but a claimant under another title had been in possession for the statutory period. In a suit by the heirs while the father yet lived, we held that his deed passed nothing to the heirs, as his life estate had, by the statute of limitations, passed to the hostile occupant, and the heirs could not sustain ejectment while the father

lived, but we recognized their right to sue when the life estate should come to an end. Equally—more so—is such the case in the present instance, where the father has conveyed his life estate to Starkey, and Starkey was in by right until the end of the life of Higgins.

The other of the two reasons mentioned above why the deed from Higgins to Starkey is not an ouster of the heirs, starting the statute against them, is that, to make a conveyance of the whole tract by one joint tenant to a stranger so operate, there must be a possession taken under that deed, attributable to it alone. *Freeman on Co-Ten.* § 226; *Hannon v. Hannah*, 9 Grat. 146. "The making of a deed for the whole property by a co-tenant to a stranger is not such act of ouster, unless actual adverse possession is taken thereunder." *Parker v. Brast*, 45 W. Va. 399, 82 S. E. 269 (Syl., point 5). It is, on similar principles, held that, if one asks to enforce an oral contract for purchase of land, he must show entry into possession under it in execution of it. *Gallagher v. Gallagher*, 81 W. Va. 9, 5 S. E. 297. In the case in hand, Starkey was already in possession lawfully under the executory contract, and he made no change, but simply continued on under it—did no fresh act of assumption of possession—and we cannot say that his possession is ascribable to the deed. Rather should we say that his continuance in possession is to be ascribed to the executory contract.

The South Penn Oil Company says that, even if Starkey's possession does not bar the plaintiffs under the ten-year statute, it cannot be ousted of possession or called to account, because it leased the land for oil, and developed the same, and under its lease had held possession for more than three years before this suit was brought, and is protected by chapter 61, p. 152, Acts 1872-73, which reads as follows: "That any person or persons, in peaceable possession of lands claiming title under a lease of the same for the purpose of operating for oil or minerals, and who may have continuously remained in such possession for the space of three years, and have bored for, and in good faith expended money in such boring and operating, shall be entitled to plead said facts in bar, and said facts shall be a bar to any action at law, or in equity, instituted to establish title to recover possession of said lease, or to recover the profits received therefrom: provided, that nothing in this act contained shall be so construed as to authorize a tenant to set up as a bar to a recovery an adversary possession against his landlord, and that this act shall not affect any suit brought within twelve months after the passage of this act." It may be questioned whether this act at all enters into this case. It may be questioned whether it applies at all between a claimant in fee of the land and a lessee—between one claiming the land in opposition to the lease

and the lessee. It may be applicable only in a contest between claimants of the lease. It is indefinite and badly drawn, but let us say that it has the broader application. Several questions occur under it.

Is this act still in force, or was it repealed by the act of 16th March, 1882, p. 298, c. 102, found in chapter 104 of the Code? Its object was to amend and re-enact chapter 104 of the Code as it had before existed. Its general comprehensive subject is, "Limitation of Suits." I may say that the act gives periods of limitation for suits generally. One of its subjects is, "Limitation of Entry on, or Action for Land." This is very broad. It covers right to recover land by one claiming in fee, for life, for years; actions to recover possession, that being an essential element of title. So the act of 1873 is an act to limit a suit to recover possession of land. Both acts therefore limit the time for recovery of possession. One gives ten, the other three, years, and they seem inconsistent. But for the act of 1873, I suppose that an action against one in possession under an oil lease would be ten years, as it would be against any other occupant, under chapter 104, but after the act of 1873 it would be three years. This fact shows inconsistency between the two acts; in other words, the act of 1873 by strong implication amended section 1 of chapter 104 as it had before been. Afterwards, in 1882, the Legislature re-enacts section 1, c. 104, in the very words it contained before the act of 1873, making the future law, and making no exception of oil leases; giving them no shorter limitation than actions for recovery of possession in other cases, but bringing them under the ten-year limit, unless the act of 1873 still stands out alive, unaffected by the act of 1882. The act of 1882 closes with the section, "All acts and parts of acts inconsistent with the provisions of this act, and coming within the purview thereof, are hereby repealed." This repealing section has great import and force.

I have stated that the act of 1873 is inconsistent with Code 1863, c. 104, § 1. It is also within its purview, for the purview is all the act after the preamble—the whole scope of the enactment. "When an act repeals all former laws within its purview, the intention is obvious to sweep away all existing laws upon the subjects with which the repealed act deals. The purview is the enacting part of the statute, in contradistinction to the preamble, and a repeal of all acts within the purview of the repealing statute should be understood as including all acts or parts of acts in relation to all cases which are provided for by the repealing act, and no more." *Sutherland, Stat. Construct.* § 137. Now, the act of 1882 surely legislates on the same matter covered by the act of 1873, as it gives a limitation to actions for the recovery of the possession of land. To repeal an act under it, that act must not be merely within its purview, but must also be inconsistent. So I think the repeal of the act of 1873 is expressed in the act of 1882. The



act of 1873 was regarded as necessary to take oil leases out of section 1, c. 104, of the Code. If so, why does not the literal re-enactment of Code, § 1, not saving oil leases, put them back as before the act of 1873?

The opinion by Judge Dent in *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, sustains the positions above stated as to repeal by expression. An act in 1871 (Acts 1871, p. 247, c. 194) provided that a tax sale should confer all the state's title acquired by sale for taxes upon any one who should buy the land afterwards at a tax sale. Later an act was passed (chapter 31 of the Code), a general statute covering the whole subject of tax sales and the title vested in purchasers thereby, just as chapter 104 covers the whole subject of limitations of actions for recovery of land, and it repealed all acts inconsistent with it. The court held that the act of 1871 was repealed by the expression of the act of 1882, and also that of 1872-73, by reason of said repealing clause. The later act made full provision as to what title should pass by a tax sale, but contained nothing to give the sale force to pass the state's title, and thus impliedly, if not expressly, repealed the act of 1871. There is a consideration lending decided support to the view that it was not likely the intent of the Legislature, and it should not be understood as meaning, to keep alive the act of 1873. That act makes a discrimination between persons not very readily approvable. Here is a person, occupying land, engaged in farming. He must be in peril from a hostile title for ten years before time gives him peace. On adjoining land is an occupant of an oil lease. He is kept in suspense only three years. The better title had the advantage of ten years in one case, and another of only three years. Against this view it is argued that the act of 1873 is a special act applying a special limitation for oil leases, shorter because oil developers spend large sums in development, and the act tends to improvement of the country to favor them; but men that fell the forest and build fences and homes spend labor and money. Many others than oil lessees spend large sums in improvement.

But it is said that the act of 1873 being thus special, and chapter 104 of the Code general, the former is not repealed by the latter. There is some law to support this claim. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263, may be cited for this purpose. An act provided that the time during which the suitor's test oath prevailed should be excluded from computation under the statute of limitations, in favor of one who could not take that oath; and it was held that the re-enactment of chapter 104 on limitations, though it did not except such cases, did not repeal the special act. But there is the later case of *Totten v. Nighbert*, cited above. The argument is made that section 1, c. 104, of the Code of 1868, is literally the same as its re-enactment by the act of 1882, and that its

re-enactment did not make it a new law; that there was never a moment since 1st April, 1869, when it was not law, by reason of the principle that, when a statute continues former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new are gone, and only new provisions are new laws. *State v. Mines*, 38 W. Va. 125, 18 S. E. 748 (Syl., point 7); *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101. I suppose the idea is that there was the Code of 1868; then the act of 1873, operating as an exception to its generality; then the act of 1882, repeating the very words of the Code of 1868, leaving the act of 1873 as if standing aside unharmed. But I would say that it is more logical to hold that as the Legislature knew of the act of 1873, and did not insert in 1882 the exception made by it, the intention was to repeal it.

There is another reason why the three-year statute does not protect the South Penn Company. It has not proven that it entered upon and bored for oil on the Higgins land three years before suit. It must so show. Starkey and wife leased to that company a tract of 104 acres, made up of 74 acres, part of the 100 acres conveyed by Edgell to Higgins and wife, and the balance of other and distinct land. In August, 1895, the company went upon the land and began work of development, but that was not on the 74 acres. The second well was on this Higgins land, but that well was not begun until December, 1895. The company claims that its possession and work on that part of the lease outside the 74 acres was possession and work on the whole. Generally possession of part under a color of title is possession of the whole; but where the land within the boundary given by the instrument includes land of two separate owners, and the actual *pedis possessio* is only on land claimed by one of those persons, and there is no actual *pedis possessio* on land of the other, there is no constructive actual possession as to the claimant whose land has never been invaded by actual physical possession. He cannot sue until the foot of his adversary is planted on his land. The mere claim of that adversary does not call his adversary into action. The South Carolina court said: "There can be no constructive adverse possession of land against the owner where there has been no actual possession which he could treat as a trespass, and bring action for." *Steedman v. Hilliard*, 3 Rich. Law, 101; *Buswell on Lim. & Adv. Poss.* § 256; 1 Am. & Eng. Ency. Law, note 3, p. 865. Moreover, the curtesy did not end so the heirs could sue until 1898, when Nathan Higgins died, and that would protect the heirs against the three-year statute as well as the ten-year statute.

Another important question has presented itself to my mind: Is the title of the act of 1873 sufficient, under section 30, art. 6, of the Constitution, reading, "No act hereafter pass-

ed shall embrace more than one object, and that shall be expressed in the title"? The title of the act is, "An act concerning the limitation of actions in certain cases." This is very general and indefinite. It concerns the limitation of actions, but what actions, and how or wherein it concerns them, it does not indicate or hint. For what actions does it propose a limitation, or in what cases or character of cases, it does not indicate. It is true that the title of an act need not be a detail or index of the contents of the act, but it must reasonably and fairly indicate its object and subject, as stated in *State v. Mines*, 38 W. Va. on page 139, 18 S. E. 748, on the authority of *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431. See *Crookston v. Board of County Com'rs* (Minn.) 82 N. W. 586, 79 Am. St. Rep. 464; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609. The "object" of an act is the aim or purpose of the enactment, while the "subject" is the matter to which it relates and with which it deals. *State v. Ferguson*, 104 La. 249, 28 South. 917, 81 Am. St. Rep. 123. This does indefinitely give the subject of the legislation (that is, legislation concerning limitations), but does it indicate the aim, object, purpose? It does not indicate an intent to fix a limitation of suits to recover oil and mineral leases. It is not a general act of limitations, but only in certain cases, and those not indicated. Its aim is not given, further than it imports legislation touching the statute of limitations in certain cases. What cases, is not indicated; and there are dozens of subjects to which limitations apply, and those of diverse nature. I think "An act to prescribe the limitations of actions and suits" would be a good title, but here it is not such. It says it is an act concerning limitations, but, not stopping there, it confines such limitations to "certain cases," and those it fails to give; those words seeming to me to call for a specification. The act does not intimate that it concerns oil leases. You could not learn that without reading the act. The title does not tell you so. I grant, as a rule necessary to avoid unreasonably hampering the Legislature, that it is only necessary that the title should not detail, but merely indicate the object in a general way. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; *Bobel v. People* (Ill.) 50 N. E. 322, 64 Am. St. Rep. 73. It is not required that the title detail the items of the object of the act, or every enactment that is germane and cognate to the title, for, if it be not germane, the enactment is bad, both because not germane to the title, and there is a distinct object not expressed. But our point is whether there is a sufficient title. The reason for requiring the object to be expressed is that the members of the Legislature and the people shall not be misled by the title; to prevent surprise in legislation; to attract the attention of both to the particular object. It

must not be so general as to conceal the real enactment—the real aim. *Brown's Case*, 91 Va. 772, 21 S. E. 357, 28 L. R. A. 110. It may be general, but must be specific enough to fairly give notice of the actual enactment. *Suth. Stat. § 88*. *Cooley's Con. Lim.* 173, says that the title must point to the enactment so far as to prevent fraud or surprise by means of provisions of which the title gives no intimation, and which might be overlooked and carelessly and unintentionally adopted, and to fairly apprise the people, through the publication of legislative proceedings usually made, of the subjects of legislation, in order that they may be heard by petition or otherwise. If the title "clearly and distinctly expresses the whole object of the legislation," it is sufficient, is the rule put in *Carter v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701. Does the title in question do this? I think not. Counsel for the South Penn Company cite *Perdue v. Coke Co.*, 40 W. Va. 372, 21 S. E. 870. It did not at all consider whether the act of 1873 had been repealed or was constitutional, but simply held that a plea setting up an oil lease as protected by it was not a good plea, for failure to specify the lease; that is, the plea did not raise the question of the act in any wise.

The subject of the validity of the act of 1873 when tried by amendment 14 of the national Constitution is not passed on, as it is not relied upon by counsel for the plaintiffs. So we conclude that the act of 1873 does not bar the right of the plaintiffs against the oil companies.

It is claimed that the plaintiffs are barred of recovery by estoppel in pais, from conduct of Mary Higgins and those claiming under her. When asked what constitutes the estoppel, a brief answer is that Mary Higgins knew that Starkey was negotiating the exchange of tracts with her husband, or must have known, and that it had been consummated and carried into effect by removal of their son from the 100-acre tract, and by the taking of possession by another son of the 50-acre tract received by Nathan Higgins in the exchange, and the delivery of possession of the 100 acres to Starkey, and of the 50-acre tract to a son of Mary Higgins, and her knowledge that Starkey was claiming the land as his own, and that she said that she was glad of the exchange. The utmost that we can find to operate against Mary Higgins and her children is silence, except that a witness says he heard her say in a casual conversation that she was glad of the exchange, as her son, who lived on the 100 acres, could not get along with a neighbor. This was after the exchange. It did not cause or further the trade. It did not induce Starkey to change his condition, or induce the oil companies to spend money. To constitute an estoppel, it must have so operated. *Railroad v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman*

v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 506. Starkey was not present; and it is not shown that he ever heard of this remark of Mary Higgins. It was only a remark. It has not the gravity necessary to make an estoppel. As to Mary Higgins' knowing of the exchange, it is not claimed that she had any active participation in it. She simply was silent. That is not enough. In *Heavener v. Godfrey*, 3 W. Va. 426, it was held that a wife had not lost her right to a fair partition by the fraudulent acts of her husband, nor by her explicit participation in and consent to a partition made by her husband with another. Mrs. Godfrey was active; Mrs. Higgins, only silent and passive. We all know, from our knowledge of human nature and experience in human affairs, that married women are not alert to assert their rights or dissent from the action of their husbands. In fact, Mary Higgins was then in a late stage of consumption, and very soon died. She was in no condition to be charged with full knowledge and acquiescence in this transaction, so far as to charge her with an estoppel. But she did nothing but maintain silence. She is guilty of no act of fraud. The Code allows a woman to pass her land only by a deed joined in by her husband, and acknowledged by both. Can she convey by mere silence, as is claimed in this case? Can she thus lose her land? This subject is discussed in *Williamson v. Jones*, 43 W. Va. 571, 578, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, and it is there held that by even fraudulent conduct she cannot lose her land. She may make a void deed, afterwards admit its validity, and see her grantee make valuable improvements, yet is not thereby barred of her right to her land. Positive fraud is essential to bar, if even that will take away her land by estoppel in pais. 15 Am. & Eng. Ency. Law (2d Ed.) 802. There is nothing shown against the plaintiff to work an estoppel by conduct, except silence. There must be some overt act to show intent to mislead. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. A man is not bound to speak, unless he is so situated as to the rights of others that the law calls upon him to speak out. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302. The true owner need not seek an adverse claimant and tell him of his rights. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (Syl., point 8), 38 L. R. A. 694, 64 Am. St. Rep. 891, note p. 920. A clear, strong case of estoppel must be made out where a clear legal title to land, requiring written conveyance to pass it, is to be divested out of its owners and vested in others as if a conveyance had been made. *Williamson v. Jones*, cited. The mere expression of satisfaction with the exchange made by Mary Higgins is utterly abortive to lose her title, for, if she had expressly admitted that Starkey had her title, that

would not divest her of it, even if she had been single; and much less she being married, in the face of the statute requiring a deed. *Suttle v. Railroad*, 76 Va. 284; *Jackson v. Davis*, 15 Am. Dec. 451, 459, cited in *Delaplain v. Grubb*, 44 W. Va. 617, 30 S. E. 201, 67 Am. St. Rep. 788, to this point. There is no ground to bar the plaintiffs on the basis of estoppel. It is not shown that Starkey or the oil companies, in reliance upon that casual expression of Mary Higgins (it does not appear that they ever heard of it), spent money or changed conditions; and without this, even as to persons *sui juris*, there is no estoppel. *Western, etc., Co. v. Peyton, etc., Co.*, 8 W. Va. 406 (Syl., point 12); *Railway v. Perdue*, 40 W. Va. 442, 21 S. E. 755, and the person must have a purpose to mislead.

This decision may, in its results, bear hard on the defendants, but they have to blame themselves. The deed of joint estate in Higgins and wife was on record, open to all. Nothing but neglect to take the simplest usual course to know the condition of title is the source of the trouble. A purchaser should look a little to see whether his grantor has good right. And, as just occurs to me, the very deed of exchange between Higgins and Starkey, in words, recited that the 100 acres had been conveyed to Higgins by the Edgell deed, by date and page of record, thus warning him of that deed; and the exchange agreement called it the Allen Edgell land. Starkey simply risked good title, or bad, rather.

We reverse the decree of the circuit court, and send the case back to it to be further proceeded in according to principles above stated, and further according to the rules and principles governing courts of equity in such cases.

NOTE BY BRANNON, J. Upon a petition for rehearing, the court carefully examined the case, and saw no ground for rehearing. It occurs to me to add this note, to present a further view for the position taken in the above opinion that never for a moment was there an adverse possession until after the death of Nathan Higgins. I have stated above that it is impossible to say that, as the possession under the executory contract was not hostile to Nathan Higgins, it was nevertheless hostile to his wife; and I say again that there could not be a possession adverse to half the tract, half the acre, half the pebble, half the molecule. But reflect further that nobody will say that as to Nathan Higgins the possession as to the whole tract was adverse. Every one must admit that it was friendly. This being so, we then bring in the fact that between Higgins and his wife there was a relation of privity and unity—that of joint tenancy—and the same character the possession bore to Nathan Higgins it bore to his wife. The possession being by executory contract while the wife lived, and not being adverse to him, neither was it adverse to her. He was her tenant, as well as his tenant. Dry law views them as such. A court of law views them as such, and adverse possession is governed by this view. Had Higgins made a deed, instead of a contract, the possession would have been adverse to him;

and, being adverse to him, so it would have been as to her.

But even if the possession had been adverse to Mrs. Higgins while she lived, at her last breath the law cut off that adverse possession because of her husband's curtesy. Her heirs were instantly barred from suit by an act of God, for which they are not responsible, and they should not suffer therefrom. Upon her death the law gave their father curtesy, and that prevented their suit, and they had to obey the law. So far as disability of infancy is concerned, the statute did not stop. As to it they could sue; but then that curtesy stood in their way, and it prevented them from suing until the last breath of their father. That was not a disability, and is not tested by the law of disability. How can it be said, with reason or justice, that, when only two years of adverse possession had passed, the heirs are barred? They are entitled to the full period given by the statute. It is immaterial to say whether the statute was suspended during curtesy, so as to allow possession before the death of the wife to be tacked to that after the death of the husband, or whether the possession during her life was tolled—taken away—and a new cause of action accrued after the husband's death.

(53 W. Va. 87)

**HURXTHAL v. ST. LAWRENCE BOOM & LUMBER CO.**

(Supreme Court of Appeals of West Virginia. April 4, 1903.)

**COVENANT RUNNING WITH LAND—PERSONAL COVENANT—ENFORCEMENT—PURCHASER AT JUDICIAL SALE—RES JUDICATA—BREACH—WHAT CONSTITUTES—DAMAGES.**

1. In order that a covenant be a real covenant running with land, it must be in a grant thereof, or some estate or interest therein. There must be a privity in estate between the parties. It is not sufficient that it merely concerns land.

2. In an agreement one party covenants with the other to maintain and repair dams to supply water to the mill of the covenantee, and to prevent trash from gathering in a mill race conveying the water. This is a personal, not a real, covenant.

3. A covenant not in nature and kind a covenant real, but providing that the heirs, devisees, and assigns of the covenantee shall have its benefit, which covenant benefits and does not charge land, can be enforced by an alienee deriving the land from the covenantee.

4. One purchasing at a judicial sale lands sold from a person is a privy in estate with such former owner, and is entitled to the benefit of a real covenant running with the land, and bound as *res judicata* by a decree binding a former owner.

5. In a suit by an administrator under section 7, c. 86, Code 1899, to convene creditors of a decedent, when a creditor presents his demand before a commissioner taking an account of debts for allowance against the estate, a decree allowing or disallowing such demand is *res judicata* as to the creditor, and also the representatives of the estate, and a party purchasing land of the estate under the decree.

6. In a suit by an administrator to convene creditors of a decedent under section 7, c. 86, Code 1899, if one claiming a demand against the estate under a contract with the decedent binding one to maintain dams to supply water to a mill presents it in such suit for allowance, and it is resisted by the administrator and heirs of the decedent on the ground that the covenant was broken, and that the party was not entitled to compensation for maintaining

such dam for that reason, a decree allowing such demand is conclusive to show that such agreement was not broken in the lifetime of the decedent, as between the covenantor and an assignee of the land benefited by the covenant, to show compliance with the covenant in the lifetime of the decedent.

7. A covenant to maintain and repair dams to supply water for a mill. One breach of it will not be a total breach during its whole term, and abrogate the contract, and entitle the covenantee to recover permanent damage, past and future, in one action.

8. Where there is a breach of a contract, and the party suing for damages has failed to do an act which he can do reasonably, and thus enhances the damage originating from such breach of contract, he is not precluded by his negligence from all recovery, but the increased damage caused by his negligence is to be excluded in assessing damages. His negligence goes in mitigation of damages.

9. The subject of negligence by a party injured by a breach of contract discussed.

10. In an action for breach of contract the damages recovered must be such as will give, and only such as will give, compensation for the actual loss directly flowing from the breach of the contract.

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by Josie M. Hurxthal against the St. Lawrence Boom & Lumber Company. Judgment for plaintiff. Defendant brings error. Reversed.

John W. Harris, for plaintiff in error. Williams & Dice, for defendant in error.

BRANNON, J. Josie M. Hurxthal brought an action of covenant against St. Lawrence Boom & Manufacturing Company in the circuit court of Greenbrier county, and recovered a verdict and judgment for \$4,000, and the company sued out this writ of error.

Ben Hurxthal owned a flour and grist mill on Greenbrier river, which was supplied with water by a race fed by a dam in the river near the head of the race. The said company owned a sawmill, which was also fed by said mill race at a point some distance above the Hurxthal mill. The said company had booms in the river above the mill race for catching logs. The logs sawed on the company's sawmill were floated down the river to the head of the mill race, and then down the mill race to a point a little above the sawmill, at which point the logs left the mill race and were floated to the mill on a lateral channel leading from the mill race to the river. Near the point where this channel entered the river the channel was divided into two parts by an island, and across the two mouths of this channel, which channel is called a "log pond," there were two small dams erected to prevent the water which flowed into the mill race at its head from going into the river through the log pond, not only to keep the pond from being too shallow, but also to keep it from being lost from the gristmill further on down. These dams had been erected by the boom company. On the 13th day of June, 1894, said

boom company and Ben Hurxthal entered into an agreement under seal by which the said company bound itself to "maintain and keep in good repair the said dam in Greenbrier river" and the two small dams at the foot of the log pond for a period of five years. The said river dam was to be maintained at the height which should give the same head of water as if erected at the site of an old dam which stood just below the head of said mill race, and had been built at the latter point seven feet high from the surface of the water at low stage; the object being to make the dam equivalent to a seven-foot dam on the old site. The agreement further bound the company to maintain in good repair the two dams at the foot of the log pond at such height as should prevent the water in the mill race from being drawn off through the channels closed by said two small dams. The agreement gave the right to the company to maintain the trestle that crossed the race leading to the said gristmill at the point where the trestle then stood, and also to maintain the bridge across the race which then stood across it, and to use said trestle and bridge, and bound the company to keep the trestle and bridge free from such trash as might impede the flow of water through the race to said gristmill. For maintaining said dams the agreement bound Ben Hurxthal to pay the company \$75 per year, and said "the obligation to pay the same shall, in addition to being a personal one, be a covenant running with the land, and binding upon said Ronceverte Flour Mills, mill race, and water power, into whosoever hands they may pass." The agreement contained the language: "This agreement shall continue in force for the period of five years next ensuing the date thereof, and at the option of said party of the second part, his heirs, representatives, or assigns, to be exercised by notice in writing to said party of the first part, given within the said five years, shall continue in force ten years from the date hereof." Several years after the date of this agreement Ben Hurxthal died, and Josie M. Hurxthal, as his administratrix, brought a chancery suit to convene all the creditors of said decedent's estate, ascertain their debts, and sell his real estate, including said gristmill property, to pay such debts, and under a decree in that case the said gristmill was sold on March 16, 1899, and purchased by Josie M. Hurxthal, the plaintiff in the action of covenant. On June 13, 1899, Josie M. Hurxthal gave a written notice to said company that she would extend the operation of the said agreement for the additional period of five years, as provided therein. She paid \$75 to said company for the maintenance of said dams for one year after 13th June, 1899. In her bill in the said chancery suit brought by Mrs. Hurxthal as her husband's administratrix to convene her husband's creditors she specified various debts against her husband's estate and its

lands, and stated that "the St. Lawrence Boom and Manufacturing Co. claims a debt against said Ben Hurxthal, which was contested by him." The said company presented its claim in that suit before the commissioner for \$300 against Hurxthal's estate for compensation under said agreement for the maintenance of said dams for four years during the lifetime of said Hurxthal. The estate of Hurxthal contested this demand of the company, and took evidence to repel it, and the company took evidence to sustain it. The commissioner disallowed the claim. Then the company filed its answer to the bill, setting up the said agreement, and claiming the said \$300 for keeping up the said dams for said four years, the said company having been made a formal party defendant to the bill filed by said administratrix. The case was referred back to the commissioner to report the debts of said estate, and before him both sides took evidence to sustain and repel such demand, and the result was that the commissioner again rejected said demand as a claim against the estate; but upon an exception to his report by the company the court allowed the said demand, and decreed it as a debt against Hurxthal's estate, but only as a general debt, and not as a lien on the gristmill property. Then the company appealed the case to this court because of the refusal of the circuit court to decree its debt as a lien under said agreement, and accord to it its proper preference over other debts and this court declared it such lien, as will be seen in 45 W. Va. 584, 32 S. E. 237. Afterwards, as first above stated, Josie M. Hurxthal brought said action of covenant against said company, claiming that the company had not kept the covenant contained in said agreement of June 13, 1894, but had broken the same in failing to maintain the said dam across Greenbrier river and said two dams at the foot of said log pond at the height stipulated by said agreement, and in suffering and permitting debris to accumulate in the mill race at the points where the company's bridge and trestle crossed said race, thereby preventing the flow of a sufficient quantity of water to the plaintiff's gristmill to operate the same.

A question going to the very root of the case, because involving the very right of the plaintiff to sue upon the agreement on which her suit is based, arises upon the plaintiff's first instruction, saying that if she, before June 13, 1899, gave the company written notice that she elected to extend the agreement of June 13, 1894, for five years after June 13, 1899, then the plaintiff had succeeded to the rights of Ben Hurxthal under that agreement. This involves the question whether the covenants in said agreement binding the company to maintain the dams as therein provided, and not to suffer or permit the accumulation of trash in the mill race, are covenants real running with the gristmill property and inuring to the benefit of the plaintiff

as its owner derivatively from Ben Hurxthal, and thus entitling her to sue for an infraction of that agreement; or are mere personal covenants binding the company only as such, and not authorizing the plaintiff, as successor in ownership of the gristmill, to sue for the infraction of the agreement. "A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land." 8 Am. & Eng. Ency. Law, 134. When the company made those covenants, it passed no estate in the mill property to Hurxthal. The company and he were strangers in estate. To create a covenant real, there must be a privity in estate between the parties; otherwise it is simply a personal obligation, neither binding nor benefiting the land in the hands of heirs, devisees, or assigns. *Lydick v. Railroad*, 17 W. Va. 427; *Trans. Co. v. Pipe Line Co.*, 22 W. Va. 631, 46 Am. Rep. 527; 2 Minor, Inst. 715. "It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenant." 8 Am. & Eng. Ency. L. 147. "A covenant does not run with land unless contained in a grant thereof, or of some estate therein." *Fresno Canal Co. v. Rowell* (Cal.) 22 Pac. 53, 13 Am. St. Rep. 112. It is true that this covenant has one element of a covenant real in the fact that it benefits the estate of the covenantee, the mill property; but it lacks another material element—privity in estate—as the company conveyed no interest in the mill, but merely made a personal obligation on the company touching the mill. So this covenant is not, in its inherent nature, a real covenant. But does its language make it such? The agreement makes the obligation of Hurxthal to pay for maintaining the dam one running with the land. It seems, under the law above stated, that this would not, perhaps, make it a covenant real; but it was clearly a lien in its terms as an equitable mortgage. There is no such provision as to the covenants made by the company, and we infer it was not so intended. But there is the clause in the agreement giving the right to the assignees of Hurxthal to continue the agreement for five years. What is the effect of that clause? It seems to be well settled in law that if a covenant is not, in nature and kind, a real covenant, the mere declaration of the parties that it shall run with the land will not make it a real covenant, though so stated in the document. 8 Am. & Eng. Ency. L. 134; 2 Washb. R. Prop. §§ 1203, 1205; *Gibson v. Holden*, 56 Am. Rep. 146, 149. Under this authority I do not see how a covenant not one of such nature as to run with land could, by declaration in the agreement, be made such, so as to place an obligation on the land in the hands of subsequent owners; but this

covenant is one not placing a burden on the Hurxthal mill, but benefiting it, and the company agreed that benefit should go to the use of the assigns of Hurxthal. The point is not without difficulty, but it does seem to me that under these circumstances this consent of the company, while it would not place a burden on the company property, would give the mill property of Hurxthal the benefit of the covenant, so as to enable the plaintiff as alienee to sue upon it. I do not know that it will add anything to the strength of this position, in a legal point of view, to rely upon the fact that the company accepted from the plaintiff pay for one year's maintenance of the dam. If the covenant does not give her right, it would be doubtful whether an oral agreement would do so under the statute of fraud, as being a contract not performable in one year, though the statute is not pleaded. This is not material, however, because I hold that the plaintiff is entitled to sue for a breach of the covenant occurring during her ownership, by reason of the clause giving the benefit of the agreement to the assignee of Ben Hurxthal. There can be no question but that the plaintiff is a privy in estate with Ben Hurxthal, and an "assign" within the meaning of that word used in said agreement; for she purchased at the judicial sale, which by law cast upon her the entire estate of Ben Hurxthal, and she is as much an assignee of the property from Ben Hurxthal as if he had conveyed it to her. 8 Am. & Eng. Ency. L. 146; *Rawle on Cov.* § 213; *Tiedeman, R. Prop.* § 860; *Mygatt v. Coe* (N. Y.) 38 N. E. 870, 24 L. R. A. 850. So the plaintiff can recover if the defendant failed in its covenants after the plaintiff acquired the property March 16, 1899, the date of her purchase at the court sale. Upon these questions of fact, in view of a new trial, we decline to pass. Therefore plaintiff's first instruction is good, and defendant's first and second bad, because denying right to sue.

Another question arising in the case comes from the claim of the company that the matter in controversy in this suit was adjudicated finally, and the plaintiff barred by reason of the decree in the suit of the administratrix mentioned above, brought to convene the creditors of Ben Hurxthal's estate. The bill brought before the court for adjudication the question whether the company had a valid debt against the estate. Though the bill presented this matter very indefinitely, yet it presented it, and made the company a defendant, and it could not have presented it for any other purpose than for adjudication. I apprehend that a bill of that character need not specify the debts against the estate with particularity which would be called for in suits of a different character, the suit in question being only one to bring the assets of a decedent before the court for adjudication, and the creditors and their debts come in before the commissioner without pleading or formal issue. Section 7, c.

86, Code 1899, makes such a suit the vehicle of relief to all creditors, whether parties or not, or whether their debts are specified or not in the bill. The section provides that evidence respecting the claim of any creditor may be taken just as if such creditor were made a formal party, and his rights set up in the bill. The reference to a commissioner enables that creditor to present his claim and present his evidence, and gives to that evidence just the same effect as if the matter were set up in the bill. In this instance the company was made a formal party. Even if it were not so, I doubt not but that the company would have been barred of its demand had it not presented it in the case, because section 9 of that chapter so operates. For stronger reasons would it have been so barred as it was made a party and its claim presented to the court. If it would be a bar on one side, it ought to be also on the other. The answer of the company set up its demand as arising out of that agreement with full definiteness for compensation for the maintenance of the dams for four years at \$75 per year. Much evidence was taken on both sides upon the question whether the company was entitled to that compensation. Depositions were taken on the side of the estate to show that the company had not maintained the dam of the requisite height to give sufficient water to the gristmill, and had not maintained it in the manner demanded by the written agreement; and depositions were taken by the company to repel this charge, and to show that the agreement had been complied with fully. Thus a specific controversy arose before the commissioner. It is true this controversy was not made by formal issue in pleading. That is never done, or very rarely in such a suit. But the bill, the answer, the depositions show what that controversy was. The company demanded \$300 for maintaining the dam, and the estate sought by recoupment to entirely or partially defeat that demand by reason of the breach of the agreement by the company. There could be no other issue. The commissioner rejected the company's debt. Why? Only because he thought the contract had not been complied with by the company. There could be no other reason, since the contract provided that Hurxthal was to pay a fixed amount, and there was no claim of payment, and nothing could defeat the demand, under the facts shown, but breach of the agreement. If the company complied with its contract, it was entitled to its debt. If it had not, then its demand would be defeated by recoupment in whole or in part. The court held the company entitled to its full demand, and thus inevitably decided that there was no cause based on the company's failure to comply with its agreement to deny its demand. The estate could have omitted to make defense by recoupment, and have sued in an action of law, and the decree then would not have bound the estate; but it pre-

sented this defense, and took much evidence to sustain it. The matter was fully litigated and passed on by the court. Is the matter, after long litigation in that suit, again open? That decree settled that the dams had been maintained and repaired at the height and in the manner required by the agreement, and that it had not been violated up to the death of Ben Hurxthal. The plaintiff, as a privy in estate under him, is bound by this decree, as showing that there was no default or violation of the agreement before Hurxthal's death. The plaintiff must prove a breach later, not a mere continuance of the state of things before his death.

It is contended that the declaration seeks damages including time during Hurxthal's life, but I construe it as claiming damages only accruing during the plaintiff's ownership. I do not think there was any call for a new assignment of damages during plaintiff's ownership. The declaration is limited to the plaintiff's ownership. I therefore think that the defendant's instructions 4 and 5, saying that said adjudication precluded the plaintiff from any recovery, are bad. That adjudication only applies to Ben Hurxthal's lifetime. It was a contest between his estate and the company.

I think that defendant's instruction 6 is bad. It declares that the decree would preclude recovery unless the evidence showed that there was some failure of the defendant to keep the covenant, which did not exist when the evidence was taken in the chancery case, but which occurred afterwards. The objection to this instruction is that it goes back only as far as the taking of evidence, instead of the date of Hurxthal's death. If there was a breach after his death which entailed damage on the plaintiff after she became owner, she could sue.

Defendant's instruction 8 is good, except that it fixes the date of the commissioner's report as the date up to which the decree operates as *res judicata*, instead of the date of Hurxthal's death.

The plaintiff was given instruction 2, saying that, if the plaintiff succeeded to the rights of Ben Hurxthal under the agreement, and that the dam in Greenbrier river was not high enough to give a seven-foot head of water, as provided in the contract, and that it was not substantially complied with to furnish such head of water, then there was a total breach of the agreement in that respect, and "the plaintiff may elect to treat the entire contract as abrogated, and has the right to recover whatever damages she has sustained, if any, since March 16, 1899, up to the present time, excluding the time during which Pierpoint and Ammonet had a lease of the mill; also all future damages which they believe must necessarily result from such total breach from the present time down to the end of the five-years renewal of said contract—that is, to June 13, 1904." This instruction is erroneous. It also told the jury that, if



there had been such total breach, they must find for the plaintiff, and in estimating damages must exclude from consideration the plaintiff's evidence tending to show partial breaches occurring since the institution of the action, such as allowing debris to collect against the trestles and the bridge across the race, and leaving open the gates at the foot of the log pond. This material instruction treated the agreement as an entire contract, and allowed the jury to say that, if once broken as to the dams and trash, it was broken in toto, and for the whole time of its duration, and that entire or permanent damages for that duration, for the past and future, might be at once recovered. If this be so, then it would follow that the decision in the chancery suit would operate as a complete bar to any recovery. But I do not think so, as I have above stated, and limited the operation of the chancery suit. The instruction allows a recovery clear through till the 13th June, 1904, for damages before and after the commencement of the suit. Such is not the character of this contract. The plaintiff is entitled to only such damages as were actually received from a breach of the agreement. That was error. There may be a recovery of the entire or permanent damages in case of injury permanently and durably affecting the estate in value, and the declaration must show an intent to claim for such permanent injury. Our cases hold that, if the cause of injury is in nature permanent, and a recovery for such injury would confer license on the defendant to continue it, entire damages may be recovered in a single action; but where the cause of injury is not permanent in character, but such that it may be supposed that the defendant would remove it, rather than suffer at once a heavy recovery for entire permanent and lasting damage, which the injury might inflict if permanent, the entire damages, including future damages, cannot be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues to inflict damages. *Watts v. Railroad*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Henry v. Railroad*, 40 W. Va. 235, 21 S. E. 863; *Guinn v. Railroad*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; *Pickens v. Coal Co.* (W. Va.) 41 S. E. 400; *Hargreaves v. Kimberly*, 26 W. Va. 787, 57 Am. Rep. 121. It is very plain that injury such as the plaintiff imputes to the defendant in this case is not permanent, inflicting enduring and irremovable damage, but may be recurrent, occasional, and in its nature curable by human effort and labor in the removal of the cause. If the dams were too low in fact, or were not repaired, but were leaking, or trash accumulated in the race at the trestle, the injury or damage could be stopped by the use of money and labor. It would not be justice to charge the defendant irretrievably with heavy damage, mulct it at once and for the whole period of

the contract with damage before its infliction, as if on the conclusive presumption that the defendant would not, after one recovery, remove the cause of injury. There could be no recovery in this case for damage arising after the bringing of the suit. If continued, the plaintiff must resort to other actions. For these reasons plaintiff's instruction 3, allowing the jury, in estimating damages, to consider the difference in rental value of the mill from March 16, 1899, to June 13, 1904, with the dams in the condition in which they were and have been since March 16, 1899, up to the present time, and the rental value for the same period if a dam had been maintained at proper height, is bad. For the same reason plaintiff's instruction 5, allowing a recovery of permanent damages, is also bad. And so is the instruction 6 bad as to clauses 1 and 4 relating to special findings, because they allow the jury to find a total breach of the contract for the whole period of its duration from a prior failure on the part of the defendant to observe it.

The court gave plaintiff her instruction 7, saying that, if the plaintiff had negligently permitted gravel and mud to accumulate in the mill race, or had been guilty of any other negligence or act whereby the supply of water to her mill had been diminished, such negligence could only be considered in fixing the amount of damages, and would not excuse the defendant from performing its agreement. This seems to be based on sound law. It is claimed that gravel and mud were deposited by a drain running into the race in times of heavy rain, and suffered negligently by the plaintiff to remain in the race, and that any failure of full supply of water arose wholly or partly from the impediment to the flow of the water caused by such gravel and mud, and that this wholly exculpates the company from liability. In cases of tort, where the plaintiff is chargeable with any contributory negligence, it totally forbids recovery; but this does not seem to be the law in cases where a breach of a contract is a factor in the production of the injury. In such case the party contracts to do or not do a certain thing, and, if he violates his contract, and thus causes injury, he must answer in damages. If the plaintiff, by negligence in doing what he ought to do to lessen the damages, adds to them that negligence goes to mitigate damages. "The acts and negligences of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damages. The defendant is liable for the natural and proximate consequences of his violation of contract and of his wrongful acts; but, if the plaintiff has rendered these consequences more severe to himself by some voluntary act which it was his duty to refrain from, or if, by his neglect to exert himself reasonably to limit the injury and prevent damage in the cases in which the



law imposes that duty, thereby he suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. If he omit to use his opportunities, and does not reasonably exert himself to lessen the damages which may result from the defendant's act, he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power. The measure of his duty in this regard is ordinary care and diligence." 1 Sutherl. on Dam. § 155. We find in 3 Parsons on Contract, 189, the following: "Still it is sometimes difficult to draw the line between what are and what are not the natural consequences of an injury. Always, however, if the consequences of the act complained of have been increased and exaggerated by the act, or the omission to act, of the plaintiff, this addition must be carefully discriminated from those natural consequences of the act of the defendant for which alone he is responsible. If the plaintiff chooses to make his loss greater than it need have been, he cannot thereby make his claim on the defendant any greater." On page 206 (193) we find this: "But from the elements which make up the actual loss are to be eliminated those causes of loss which spring not merely from the plaintiff's conduct, but also from his omission to do what he might by reasonable endeavors have done to lessen the loss." "A party suing for breach of contract is required to do what he reasonably can, and improve all reasonable opportunity, to lessen the injury and reduce the damages caused by the breach." *Sherman v. Leonard*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101, 105. The same principles will be found in *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33, and *Sullivan v. McMillen*, 53 Am. St. Rep. 239, 37 Fla. 134, 19 South. 340. Are there any cases in which a defendant's breach of contract will be totally excused by reason of the negligence of the plaintiff? There are such cases. If the plaintiff's very act or omission is the prime cause of his damage, if it proceeds from the plaintiff's act breaking his contract and causing the injury, the plaintiff could not recover; but if the defendant breaks his contract, and injury follows, the plaintiff may recover, notwithstanding his act or omission contributes to continue or enhance the damage. In 2 Parsons on Contract, 798 (681), we are told that the application of the law on this subject to the facts is difficult, and it is there laid down that: "If the plaintiff's own negligence was an immediate and a principal cause of the injury, without which it probably would not have occurred, it is certain he cannot recover damages. But, though

the plaintiff is proved to have been somewhat negligent, and to have contributed to the injury by his negligence, he may nevertheless recover, if he can show gross or far greater negligence on the part of the defendant, and also that this negligence was the principal and proximate cause of the injury. Language is sometimes used from which it might be inferred that, if both parties are negligent, and the defendant more so than the plaintiff, the plaintiff should recover. The rule may be incapable of exact definition. But we think it is not law that, if both parties are negligent in a nearly equal degree, but the defendant is, on the whole, the most negligent of the two, the plaintiff shall prevail. To sustain the action, a greater than a merely perceptible difference must exist between the two degrees of negligence." Applying these principles to this case, it seems to me that, if the defendant did, by failure to keep the covenant, some act or omission after the death of Hurxthal, entailing damage to the plaintiff's mill after her purchase, then the defendant would be liable for such actual damage; but that any negligence of the plaintiff in allowing sand, gravel, or mud to remain in the race, diminishing the flow of water to the mill, can be shown in mitigation of damage. What is attributable to her negligence should be excluded from the damage. Therefore I think plaintiff's instruction 7 is not objectionable.

Defendant's instruction 9 propounds the proposition that the agreement of June 13, 1894, "is based on the assumption that the then existing dam furnished the height of water therein specified and required, and that, the same being signed by Ben Hurxthal, the presumption arises that he considered such head of water given by said dams." I do not think this instruction is good, as we cannot say that the execution of the agreement by Hurxthal amounted to the admission put by the instruction. The very object of the agreement moving him to sign it may have been to secure such a dam. Still we must remember that the adjudication in the chancery suit forecloses the question of height of the dams, and fixes their height according to the contract of March 8, 1898.

Defendant's instruction 10, saying that the decree in the chancery cause shows that the height of the dams was in controversy therein, is good under the principles above stated upon that subject.

Defendant's instruction 12 is not good so far as it says that the contract is based on the assumption that the dams existing at its date at the lower end of the log pond then furnished the head of water required by it; but the instruction is good in saying: "If the jury believes the said dams then furnished sufficient water, and if the said defendant has maintained said dams to the same height they were on June 13, 1894,

and has kept the trash and rubbish from the bridge and trestle across said race, so as not to obstruct the flow of water, and used due diligence in repairing said dams when necessary, they must find for the defendant," except as to the date, June 13, 1894, the proper date being March 8, 1898.

Defendant's instruction 13 declares the adjudication in the chancery suit extends to the final decree in May, 1899, after the mandate of the Supreme Court reached the circuit court. I do not think the instruction good. I think that decree, for the purposes of this case, relates to the date of the death of Hurxthal. I shall say nothing on the subject of excessiveness of damages, in view of a new trial, further than to say that they were assessed on an improper basis, and made greatly too large, because they cover the whole time from the plaintiff's purchase down to June 13, 1904. As to what damages the plaintiff suffered, if any, we do not say; nor whether the defendant is guilty of a breach of the contract. These matters are left for the new trial. It is very certain that in an action for breach of contract the measure is more strictly confined than in cases of tort. The primary and immediate results of the breach are alone to be looked to. In *Wood's Mayne on Damages*, p. 14, § 12, punitive damages are confined to torts, and even then damages must be compensatory only as a general rule. *Talbott v. W. Va. Cent. & P. R. Co.*, 42 W. Va. 560, 26 S. E. 311; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980. Damages must not go beyond fair compensation for actual loss sustained. They cannot be punitive in action on contracts. 3 *Parsons on Contracts*, 179 (169); 8 *Am. & Eng. Ency. L.* 632. Compensation for actual loss is the test, the standard of damages in actions on contract. 1 *Sutherland on Dam.* §§ 12, 75. Damages for breach of contract in excess of actual compensation are unwarranted, and a ground of new trial. *Rowland L. Co. v. Ross* (Va.) 40 S. E. 922; *Douglass v. Railroad*, 51 W. Va. 523, 41 S. E. 911. Neither in tort nor contract do damages go beyond such as are the reasonable and probable consequences of the act complained of, except in some cases of tort. *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909.

The plaintiff cross-complains that the court erred in allowing the record in the chancery suit, including depositions of witnesses, to go in evidence; but, as above shown, it was admissible. The evidence of John Driscoll, a shareholder in the defendant company, was not admissible as to any conversation or transaction with Hurxthal; but that part of his evidence was excluded and disclaimed by the defendant. I do not see that any conversation between Driscoll and Bailey as to leveling estimates of the height necessary to build the dam before it was built can be admitted. But I do not

see any objections to evidence that leveling was done by Bailey. I do not think, under the principles above stated, that defendant's instruction given by the court is objectionable. It declared that the record in the chancery case shows that the height of the dam was in controversy, and was the matter in issue between the estate of Hurxthal and the company. It was the very essence of the controversy between them.

The plaintiff complains of the action of the court in admitting as evidence minutes of the defendant company in 1881 to show Ben Hurxthal's connection with the company at that time, and that the stockholders of the company claim under Ben Hurxthal, and to show his acquaintance with the business and properties of the company, the minutes being in his handwriting. Hurxthal had parted with all interest in the company before the dam was built and before the agreement, and I do not see that this evidence is relevant to the case or relates to it with sufficient closeness to authorize its admission.

We therefore reverse the judgment, set aside the verdict, and grant a new trial, and remand the case.

(53 W. Va. 286)

MATTHEWS et al. v. TYREE et al.

(Supreme Court of Appeals of West Virginia.  
April 1, 1908.)

WILL—IMPEACHMENT BY HEIRS—BILL TO CON-  
STRUE—DECREE—MODIFICATION.

1. The executors of a will duly probated cannot compel the devisees, who are also heirs, to surrender their statutory right to impeach such will in the mode provided for by statute by filing a bill to construe such will, and, as incidental thereto, asking the court to affirm the probate thereof; but the court, if the heirs so request, should reserve to them such right to so impeach such will.

2. After a decree in a chancery cause has been passed upon and entered by the circuit court, it may be modified or set aside during the same term for good cause shown. What is sufficient cause is a matter in the sound discretion of the circuit court, subject to review by this court.

3. Where a testator divides his whole estate, without regard to its legal division, into two parts, called "personal fund" and "real estate," and it is plainly his intention, gathered from the will, the codicils, and other writings, that such real estate shall bear the expense of the conversion thereof into money, equity will carry out such intention, and charge such expenses to the proceeds of such real estate, although there is a general provision in the will for the payment of all debts from such personal fund.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Bill by Alexander F. Matthews and others against Samuel F. Tyree and others. Decree for plaintiffs, and defendant William P. Bolling and others appeal. Modified.

Mollohan, McClintic & Mathews, for appellants. A. F. Mathews and Gilmer & Gilmer, for appellees.

DENT, J. William P. Bolling and others appeal from certain decrees of the circuit court of Greenbrier county in the chancery cause of Alexander Matthews and J. W. Johnston, executors of the last will and testament of Wm. M. Tyree, plaintiff, against the appellants and others, defendants, and rely on numerous assignments of error, which may be considered under the following classification: (1) In adjudicating the validity of the will in this suit. (2) In erroneously adjudicating the validity of the will on the pleadings, and without affording the parties opportunity to produce their proof. (3) In not suspending proceedings until the validity of the will could be determined in a subsequent suit instituted by Mollie T. Tyree, one of the defendants, in the Circuit Court of the United States for the Southern District of West Virginia at Charleston for this purpose. (4) In deciding that the Davis and Priddle claims were properly payable out of the personal fund, rather than the proceeds of the real estate sold to J. L. Benry.

The plaintiffs filed their bill for the main purpose of having the will construed, and, as incidental thereto, they allege "that the said will and codicils were in all respects valid and effective, that they are free from every infirmity, and are not subject to objections on any ground or for any reason whatever"; and they pray that the court "will pass upon and decide as to the validity and force of said will and the true construction thereof." The purpose of such allegations was to require the defendants, if they had any objection to the probate and validity of the will for any cause, to assert it, so that there might be an end to litigation, and the court's labor in construing the will might not turn out to be useless and abortive. 22 En. Plead. & Pract. 1215; 2 Story's Eq. Jur. § 1447; 1 Pomeroy (Ed. 1881) §§ 171, 183. In 2 Story's Eq. Jur. § 1445, it is said: "But although \* \* \* courts of equity will not, in an adversary suit, entertain jurisdiction to determine the validity of a will, yet whenever a will comes before them as an incident in a cause they necessarily entertain jurisdiction to some extent over the subject, and, if the validity of the will is admitted by the parties, or if it is otherwise established by the proper modes of proof, they act upon it to the fullest extent. If either of the parties should afterwards bring a new suit to contest the determination of the validity of the will so proved, the court of equity which has so determined it would certainly grant a perpetual injunction." Section 1446: "The usual manner in which courts of equity proceed in such cases is this: If the parties admit

the due execution and validity of the will, it is deemed *ipso facto* sufficiently proved." But, if the parties contest the validity of the will, the court either suspends proceedings in the cause until the parties try its validity before the proper tribunal, or it directs an issue of *devisavit vel non*. "In such cases the jurisdiction exercised by courts of equity is somewhat analogous to that exercised in cases of bills of peace, and it is founded upon the like considerations, in order to suppress interminable litigation and to give security and repose to titles." Section 1447. It is also said in a note to said section that "the heir at law cannot come into equity for the purpose of having an issue to try the validity of the will at law, unless it be by consent." And, further, "Courts of equity do not seem to have any direct or original authority to establish the validity of a will of real estate *per se*, but only as incidental to some other object." Mr. Pomeroy, on page 171, § 171, enumerates among other powers of a court of equity the establishment and construction of wills. There seems to be no good reason why executors in filing a bill to construe a will should not, as an incident thereto, call upon the devisees, parties to the suit, to admit or deny the validity of the will, that there may be an end to litigation, and they elect to accept the provisions of the will or repudiate them; being analogous to cases of election, wherein it is said "that a person who is entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right or interest the assertion of which would defeat, even partially, any of the provisions of that instrument." 11 A. & E. En. Law (2d Ed.) 60. In *Birmingham v. Kirwin*, 2 Sch. & Lef. 449, it is held, "The general rule is that a person cannot accept and reject the same instrument." A summoned party who fails to answer and accepts the provisions of the will would be bound by the decree, and could not afterwards attack the validity of the will thereby established. But it is claimed that the jurisdiction to impeach or establish wills is fixed by statute, and is mere probate jurisdiction. In the cases of *Dower v. Church*, 21 W. Va. 23, *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346, and *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 688, following Virginia decisions, this court held that in a suit to test the validity of a will on an issue *devisavit vel non* the functions of the suit were exhausted when this question was settled, and it was improper to proceed to a construction of the will, and rightly so, for the good reason that a person cannot accept and reject the same instrument at the same time. A court of equity will not entertain such inconsistent pleadings. The Virginia decisions hold that in suits brought to impeach the validity of a will the court performs no other function

than to superintend the jury; that it is the duty of the court to make up and submit the issue, and there its function ends. The language of the Virginia statute is, "An issue shall be made up whether the writing produced be the will or not." About making up this issue neither the court nor the parties have any discretion. Our statute (Code 1899, c. 77, § 32), ever since the division of the state, has been entirely different, and is, "If required by either party, a trial by a jury shall be ordered." In Virginia the court had no authority, even by consent of parties, to determine the validity of a will. In our state the parties may waive a jury as in all other cases of conflicting evidence, and submit the question of validity to the court for determination. Hence the court has the power to determine the matter without the intervention of a jury. This makes a vast difference in the law, although a court of chancery may still be regarded a probate court in passing on the validity of a will. But when it comes to the establishment of a will an entirely different question is presented. While there is a conflict between the impeachment of the will and its construction, there is none between the establishment of a will and its construction. To construe a will is to establish it according to the intention of the testator. In the case of *Robinson v. Allen*, 11 Grat. 785, it was held that, where a will has been regularly admitted to probate in the proper court, its validity could not be questioned in a collateral proceeding. Samuels, J., said: "It is well settled by the decisions of this court that the sentence of a court of probate of competent jurisdiction, admitting a will or writing in nature of a will, to probate, is conclusive evidence of the due making thereof, and that it cannot be denied in any collateral proceeding touching the will; that its validity can be tested only by resorting to the means provided by law for this specific purpose." This decision was rendered under the provisions of the statute of Virginia that gave the chancellor no power in will cases except to impanel a jury. Under our statute, without the parties require a jury, the chancellor must pass upon and determine the validity of a will. And there is no good reason why, having the power to establish a will, he should not have the power to construe it, the necessary parties in interest being before the court; otherwise in a suit to establish a will, he must say: "This is a true will of the testator, but before I can construe it, and thus establish it according to the intention of the testator, the parties must all walk out one door of the courthouse and come in the other." It is true that it might be necessary to have other parties before the court, such as the executor, who could not be appointed until the will was established. Hence the court must wait until a new bill is filed

bringing in all necessary parties interested in the construction of the will. This does not prevent the executor in filing a bill to have the will construed from calling upon the devisees to either accept or reject the will, for they will not be permitted to do both. *Dickinson v. Dickinson's Adm'r*, 2 Grat. 493; *Kinnaird v. Williams' Adm'r*, 8 Leigh, 400, 31 Am. Dec. 658.

The will having been duly probated is unimpeachable except in the manner provided by statute. The devisees under the will may waive statutory right to impeach the same. As they would have the right to file a bill for impeachment in the same court which has jurisdiction of the subject-matter, they may be bound by a decree to which they impliedly consent confirming the validity of the will. If they wish, therefore, to avoid the legal effect of such decree, they must have their statutory right to impeach the will in some manner reserved to them. The question has been mooted as to whether a devisee who is also an heir could file a cross-bill or an answer in the nature of a cross-bill to test the validity of a will in a suit brought to construe it. He can undoubtedly file an original bill in the same court for such purpose, and have the matter determined by the same judge. A cross-bill or an answer in the nature of a cross-bill would accomplish the same end. The same process would have to issue. The same judge could make the same orders, and have the same jury trial under all three. Or he could treat them interchangeably, one for the other under our liberal practice. This might not be proper in Virginia, for the reason that a devisavit vel non must always be tried by a jury. This, being a matter of practice not necessary for the determination of this controversy, is left for future decision of the court, when a proper case may arise. The appellant defendants did not file in the circuit court either an original bill, a cross-bill, or an answer in the nature of a cross-bill. As for myself, I view our statute as clothing a court of chancery with the same jurisdiction in will cases, subject to the statute of limitations of five years where the will has been probated *ex parte*, as in other matters.

Out of deference to the view of other members of the court, who still stick to the separate probate idea, and who claim that the statute confers the right of impeachment or establishment upon individuals rather than jurisdiction upon a court of chancery, I, for the present, yield my own, and submit to their views. There is no doubt, however, that this is a case wherein the parties in interest may waive their right to a separate suit, and consent to the jurisdiction of the court. 17 Am. & En. En. Law (2d Ed.) 1065. In the interest of peace, the quieting of titles, and the settlement of estates, the court should have the power in a proper case to compel submission to its jurisdiction with-

out the circumlocution of unnecessary pleadings and procedure.

The defendant Samuel F. Tyree filed an answer admitting that the will should be declared valid. This, however, while a good admission as to himself, has no binding effect upon the other defendants, nor does such answer otherwise add any force to the bill.

The appellants, though duly notified, failing to appear or make any defense, the court entered a decree by confession, and an order of publication declaring the will valid, and construing it. Afterwards, at the same term of court, the appellants appeared, and filed the affidavit of George W. McClintic, one of their attorneys, and moved the court to set aside or reform the decree so as to prevent it being an adjudication of the validity of the will. This motion being overruled, they presented and filed the petition of appellants, and renewed their motion, which was again overruled, but the court granted them the privilege of demurring to and answering the bill. They afterwards demurred to the bill, and filed their answers, to which plaintiffs replied generally, and again moved the court to set aside the decree, and suspend all further proceedings until a suit brought by one of them in the Circuit Court of the United States in and for the District of West Virginia for the purpose of testing the validity of the will could be heard. It appears that such suit was not instituted until about the time the decree complained of was entered. The court overruled the demurrers, refused to set aside the decree, continue the cause, or to suspend proceedings awaiting the validity of the will to be determined by another tribunal. It has been held by this court that: "Until the term ends, every judgment or decree entered may, for good reason, be modified or set aside in whole or in part. The court has a discretion to do this, in the exercise of which this court will not interfere, except for the most cogent reasons." *Bank v. Neal*, 28 W. Va. 744. What is good reason for setting aside a judgment at law has been settled in the case of *Post v. Carr*, 42 W. Va. 72, 24 S. E. 583, where it is said in first point in syllabus: "Such good cause can only appear by showing fraud, accident, mistake, surprise, or some other adventitious circumstance beyond the control of the party, and free from neglect on his part." When we look at the motions made and the answers and affidavits filed by the appellants, the conclusion is forced upon us that the only object sought by the appellants was to have the right reserved to them to impeach the will under section 32, c. 77, Code 1890. This right so reserved to them under such section cannot be taken away from them, unless they have in some manner waived it as heretofore shown. They did not want the validity of the will for some reason finally determined in this suit. All they did in this direction appears to have been pure matter

of desperation. If appellants had appeared and asked it in time, it was the duty of the court to have reserved to them their right of impeachment under the statute. The affidavits show that by a misunderstanding between counsel appellants' counsel neglected to appear and insist on a reservation of their right of impeachment prior to the entry of the decree. It is plain that they never intended to surrender this right, and, if lost to them, it was caused by oversight or misunderstanding. In such cases the rule of equity practice is almost as stringent as that at law; yet equity always endeavors to relieve against surprise and mistake, and preserve to parties all their legal rights, unless they have clearly waived or surrendered them. While there was no good ground for continuance or stay of proceedings presented, and while the case was rightfully for the plaintiffs, as there was no proper issue as to the validity of the will made up between the proper parties in the method required by the statute, and the court did not err in overruling appellant's motion and refusing to set aside the decree, the court should have reserved to appellants their statutory right to impeach the will in any proceeding they might be advised to bring for that purpose. It was not error for the court to refuse to postpone its decree or proceedings to await the suit alleged to have been instituted in the Circuit Court of the United States.

Nor was the circuit court nor is this court called upon to determine the jurisdiction of such circuit court in probate cases. This is a question to be determined by that court alone. All that this court can do is to amend the decree so as to reserve to appellants their statutory rights to file a bill to impeach the will of their testator, without regard to what court they may select to determine the question for them. Under the circumstances of this case, this appears to be proper, otherwise the appellants, by mere inadvertence of counsel, will be deprived of a plain statutory right. It would be inequitable so to treat them. This, however, should not delay the construction of the will, as such suit may never be prosecuted, at least successfully, and creditors are entitled to the payment of their debts.

The construction of the will requires a careful examination thereof and its codicils. It is as follows, to wit:

"I, William M. Tyree, do hereby make and publish this as and for my last will and testament in manner and form following, viz.:

"1st. I direct that my executors, hereinafter named and appointed, shall proceed to collect according to their judgment and discretion, all debts and demands due and belonging to me and evidenced by notes, bonds, open accounts or otherwise, except certain notes or bonds which I hold on and of J. A. Amick and W. A. Amick, and which they

shall not press for payment and collection until certain lands, owned jointly by me and the said Amicks shall have been sold. And I further direct that my said executors shall only charge and collect from the said Amicks interest on their said notes at the rate of three (3) per cent. per annum from the time and dates at which they become interest bearing.

"2nd. I hereby authorize, empower and direct my said executors to sell all the personal property in the way and form of goods and chattels belonging to me, and which I may have, except such of said goods and chattels as are hereinafter specifically bequeathed and also to sell all the real estate of which I may be seized and possessed or which may belong to me either in law or in equity and which I own either severally and solely or jointly with some other person or persons. And in the term 'Real Estate' as here used, I mean, intend and include, besides other property, my interest in what is known as the 'Upper Potts Creek' or 'The Potts Valley Furnace and Mining Co.' property, notwithstanding the fact that my said interest is represented by certain shares of stock in the said Company, and might and probably would but for this express direction and provision to the contrary, be regarded and considered as personal property.

"And I further direct that whenever and in whatever connection the words 'real estate' are used in this papers they shall be understood and construed as meaning, intending and including my said interest or stock in said 'Upper Potts Creek' or the 'Potts Valley Furnace and Mining Company' property. And I also further direct that the said term 'real estate' wherever herein used shall be taken, understood and construed to mean, intend and include not only lands owned by me in fee and absolutely, but also all mineral rights owned by me under lands I do not own the surface.

"3rd. I direct, empower and authorize my said executors to make said sales either publicly or privately, at such time or times, at such place or places, in such manner and form, and upon such terms as they may deem proper, most judicious and best for the interests of my estate.

"(4) I hereby authorize and empower my said executors to execute any and all deeds, title bonds and other papers that may be proper or necessary to carry out, effectuate and consummate any and all sales to be by them made as aforesaid. And I further empower and authorize them to execute any deed or other papers that may be necessary or proper to carry out and perfect any contract or agreements, whether oral or in writing, which I may have made and which still remain unexecuted.

"5th. Out of the personal fund of my estate, consisting of money on hand, the proceeds of collection and of the sales of goods and chattels, I direct that my executors re-

tain and use a sufficient amount for the payment of any and all debts due from and owing by me, and of all levies, taxes and assessments accrued or that may accrue on my entire estate, real or personal until the same shall have been converted, disposed of and distributed and the business of my whole estate wound up and closed, as herein by this my will provided and directed.

"6th. I give and bequeath my gold watch and chain to my nephew W. F. Tyree; my 'Harry Beirne' bay mare, my saddle and bridle to my nephew Harry Tyree; my buggy and harness to J. W. Johnston; and my black horse to Mary Feamster, a daughter of Frank Feamster, dec'd, who lives with John Johnston.

"7th. I give and bequeath and direct my said executors to pay, out of the personal fund of my estate the following sums or legacies to the following names persons severally and respectively, viz:

"To my brother Samuel F. Tyree (3000) three thousand dollars.

"To my nephew W. F. Tyree (1000) one thousand dollars.

"To my nephew Frank A. Tyree (1000) one thousand dollars.

"To my niece Martha Tyree, daughter of my deceased brother John (1000) one thousand dollars.

"To my nephew William P. Bolling (1000) one thousand dollars.

"To my nephew John Bolling (1000) one thousand dollars.

"To my nephew Dr. Lewis Bolling (1000) one thousand dollars.

"To my niece Mrs. Annie Erwin née Bolling (1000) one thousand dollars.

"8th. I give and bequeath and direct my executors to pay the rest and residuum of the personal fund, as aforesaid of my estate to the pecuniary legatees above named in the 7th clause of this papers, and to my niece, Mrs. Mollie Tyree, née Bolling, to be given, shared and distributed between them upon the basis and in the proportion of the legacies above bequeathed, and as to the said Mrs. Mollie Tyree as if she were a legatee herein, and had been hereby given a legacy of (1200) twelve hundred dollars.

"9th. I give, devise and bequeath to my brother, Samuel F. Tyree, all the net proceeds of all my real estate as aforesaid, to be said by my said executors as aforesaid and as and when sold. And I direct my executors to pay over to my said brother the said net proceeds as and when collected and realized from such sales to be by them made.

"10th. I direct that there shall be no inventory, appraisement or sale of any or all of my estate either real or personal save and except such sales as are hereinbefore authorized and directed and which shall be made as herein provided for and fully set forth.

"11th. I hereby appoint my friends Alex's

F. Mathews and J. W. Johnston to be the executors of this my last will and testament. And having entire confidence in their business capacity and integrity I direct that no security be required of them on their executorial bond.

"And

"In witness of all the foregoing I hereto set my hand and affix my seal this the 1st day of August, 1900.

"William M. Tyree. [Seal.]

"Codicil No. 1.

"I, William M. Tyree, do hereby make, publish and declare this to be a codicil to my will, dated August the first, 1900, and to which this codicil is to be annexed and attached, in manner and form following, viz.:

"1st. In the term and words 'Real Estate' as used in my said will, I mean, intend and include, besides other property my interest in what is known as 'The Lower Potts Creek' or 'The Potts Valley Mining and Manufacturing Co.' property notwithstanding the fact that my said interest is represented by certain shares of stock in the said company, or by an interest in the notes executed for said property by 'The Valley Ore Co.' to Alex's F. Mathews, Trustee, and might and probably would but for this express direction and provision to the contrary, be regarded and considered as personal property. And I further direct that whenever, and in whatever connection the words 'Real Estate' are used in my said will they shall be understood and construed as meaning, intending and including my said interest or stock in said property, in the said 'Potts Valley Mining and Manufacturing Co.' and in said notes of 'The Valley Ore Co.'

"2nd. I hereby give and bequeath to my brother Samuel F. Tyree all of my wearing apparel and all of my personal chattels and belongings which are not by the terms of my said will specifically disposed of and bequeathed.

"3rd. I hereby give and bequeath to my said brother Samuel F. Tyree my bay horse recently bought by me from W. W. McClung but subject to this provision and condition that the said W. W. McClung shall have the right at his option to purchase said horse from my executors at the price paid him therefor by me, which is \$150.00.

"4th. In the event W. W. McClung exercises said right and purchases said horse from my executors at said price then I hereby give and bequeath the said amount to arise from such sale to my said brother Samuel F. Tyree, and direct the same to be paid over to him by my said executors.

"5th. I hereby direct that, as to the said wearing apparel, my other personal chattels and belongings and as to said horse in the above items 2nd, 3rd, and 4th of this codicil mentioned items 2nd and 8th of my said will be modified accordingly.

"And

"In testimony of all the foregoing I hereto set my hand and affix my seal this the 20th day of December, 1900.

"Wm. M. Tyree. [Seal.]

"Codicil No. 2.

"I, Wm. M. Tyree, do hereby make, publish and declare this to be codicil No. 2 to my will dated August 1, 1900, and to which this codicil is to be annexed and attached in manner and form following, viz.:

"Whereas, if the real estate owned by me at the time and date of the execution of my said will, and of what is meant and intended by and included in said term 'real estate,' as used and defined in said will and in codicil No. 1 thereto attached, some part or portion, or parts or portions may be sold, aliened and disposed of by me and converted thus into personal property, now therefore in the event of any such sale or alienation of any part or parts of said property by me and in my life time as aforesaid, I do hereby will and direct that all the proceeds of such sales and alienations either not collected by me, or if collected, not used and disposed of by me in person and so far as said proceeds remain at my death either uncollected or if collected, not used and disposed of by me, notwithstanding the then personal character of said proceeds shall be understood to be meant and intended by and included in the term 'real estate,' and shall be disposed of as real estate under the provisions and directions of my said will and codicils whenever, wherever and in whatsoever connection therein the said term is used. And no part of such proceeds shall be treated or disposed of as personal property within the meaning and purposes of said will and codicil.

"And

"In testimony of all the foregoing I herewith set my hand and affix my seal this the 15th day of January, 1901.

"Wm. M. Tyree. [Seal.]"

"Greenbrier County Court, April Term, 1901, April 9, 1901. A paper purporting to be the last will and testament of Wm. M. Tyree, dec'd, with two codicils thereto, was this day produced in open court and proved by the oaths of Alex'r F. Mathews and Mason Mathews subscribing witnesses thereto and ordered to be recorded as the last will and testament and codicils thereto of Wm. M. Tyree, dec'd.

"Teste: C. B. Buster, Clerk.

"A copy. Teste: C. B. Buster, Clerk."

During his lifetime, and about the time of the making of his last codicil, the testator sold and conveyed a large tract of land, or, rather, many tracts of land, in conjunction with others, to J. L. Beury, the purchase price of which is a very large sum of money, being at the rate of \$10 and \$11 per

acre. In connection with these sales he executed the two following papers, to wit:

"Out of the sale of the lands this day made situated in Fayette, Greenbrier and Nicholas counties, West Virginia, made by myself, J. W. Johnston, W. A. Amick, J. A. Amick, L. E. McClung and S. L. Price to J. L. Beury or D. C. T. Davis as trustee for said J. L. Beury, I hereby promise, personally and individually, out of the cash payment made for said lands, to pay to D. C. T. Davis fifty cents per acre for each and every acre of said lands so sold and conveyed.

"Witness my hand and seal, this 24th day of January, 1901.

"[Signed] Wm. M. Tyree [Seal.]"

"Out of the sale of the land this day made, situate in Fayette and Nicholas counties, West Virginia, made by myself, J. W. Johnston, W. A. Amick, J. A. Amick to J. L. Beury or to D. C. T. Davis as trustee for said J. L. Beury, I hereby promise personally and individually, out of the cash payment made for said lands to pay B. L. Priddle the sum of fifty cents per acre for each and every acre so sold and conveyed in which said Amick now has any interest.

"Witness my hand and seal, this 24th day of January, 1901.

"Wm. M. Tyree. [Seal.]"

The allowance to Davis appears to be commission for making sale, and that to Priddle is to pay him for releasing a prior option he held against a large portion of the lands at \$9 per acre. Hence both of these obligations arise from and were regarded by Wm. M. Tyree as part of the expense of the sale to J. L. Beury. They amount at the date of the decree to the sum of \$9,664.96. The circuit court decreed this sum to be paid out of what the will denominates the "personal fund." The appellants insisted that this sum should be paid out of the real fund, and this matter was necessarily included in their motion to set aside the decree. The circuit court overruled their motion. They now insist that the court erred in this respect. An inspection of the will shows that the testator divided all his property, without regard to its legal division, into two funds, one of which he calls "personal fund" and the other "real estate." Out of the personal fund, after providing for payment of all his debts, he makes numerous specific legacies to those who would have been his legal heirs, and then provides for the division of the residue among his legatees in proportion to their legacies. Samuel F. Tyree is much the largest legatee as to this fund. The testator then provides for the sale of all his real estate, including certain interests in mining stocks, all of which he denominates "real estate," and directs his testator to pay the net proceeds thereof to his brother, Samuel F. Tyree. By codicil No. 2, which was executed

about the time of his sales to Beury, he provides that the proceeds of any sales by him made shall be treated as real estate in so far as not collected, or, if collected, not disposed of by him in his lifetime. It was plainly the intention of the testator to keep the two funds entirely separate, the personal and the real fund. It is just as plainly his intention to have paid the Davis and Priddle debts out of the real fund during his lifetime, but, not having done so, Samuel F. Tyree insists that the will speaking as of the day of his death makes them payable out of the personal fund. But making the bequest of his real estate speak as of the date of his death Samuel F. Tyree is only to have the net proceeds thereof, meaning thereby that the expenses incurred in the sale thereof must be first paid. Codicil No. 2 provides that the proceeds of the real estate shall be disposed of as provided in the main will, and this is that the "net proceeds" thereof should go to Samuel F. Tyree, thus showing plainly that it was his intention that from the sale of his real estate the necessary expenses must be deducted before the "net proceeds" should be paid over to the legatee. The expenses attached to the sale of his real estate made by himself was not contemplated by the testator either at the date of his death or at the date of the will, properly speaking, as such debts as would be chargeable to the personal fund; on the contrary, he shows that he wants the real estate to bear the burden of its conversion into money. This intention he carries out in his dealings with Priddle and Davis, for he executes to them writings showing that the shares due them for their assistance in the sale are to be paid out of the proceeds thereof, even out of the cash payment. This not only shows the time of the payment, but the appropriation or assignment of the fund for this purpose. Equity, regarding that done which ought to have been done, will consider an amount sufficient of the proceeds of the real estate as already appropriated or assigned by the testator prior to his death for this purpose, and hold the executors as trustees thereof. This being the case, and the real estate funds being ample, there would be no debt chargeable against the personal fund by reason of these claims, as ample provision for the satisfaction thereof had been made by the testator during his lifetime. There is no doubt that this is morally, equitably, and legally right, and in full accord with the intention of the testator.

The decree will be so modified and corrected as to provide that the claims of D. C. T. Davis, Jr., amounting at the date of the decree to the sum of \$6,133.30, and B. L. Priddle, amounting at the date of the decree, including a credit of \$500, to the sum of \$3,531.36, be paid from and charged by the executors to the proceeds of the sales of the real estate made by the testator during his lifetime to J. L. Beury, to the relief of the



personal fund, and to reserve to appellants their statutory right to impeach the will of Wm. M. Tyree, deceased, in any proper suit for that purpose, and, as modified and corrected, will be affirmed, with costs to the appellants, to be paid by the executors out of the funds in their hands bequeathed to Samuel F. Tyree.

The cause is remanded for further proceedings.

(53 W. Va. 306)

HASKELL et al. v. SUTTON et al.

(Supreme Court of Appeals of West Virginia.  
April 18, 1903.)

**OIL LEASE—CONSTRUCTION—AUTHORITY OF  
GUARDIAN—DOWER—INJUNCTION.**

1. Petroleum oil and natural gas are included in the comprehensive idea which the law attaches to the word, "land," and are a part of the soil in which they are found. A lease of land, for the purpose of mining coal, or extracting oil or natural gas from the soil, or rock, is, in effect, a grant of a part of the corpus of the land.

2. Without authority from a court of equity in a proper proceeding, a guardian in this state cannot lease the land of his ward for oil or gas purposes, or for other developments.

3. A widow entitled to dower in land is not seised of any part of the land by any right of dower until it is assigned to her.

4. Where a person enters upon land without authority under a void lease, and drills thereon, and takes petroleum oil therefrom, and removes the same from the premises, and threatens to drill other wells, and to take the oil produced therefrom, a court of equity will perpetually enjoin him from all operations under said void lease, will cancel said lease, and retain the cause for all purposes, and proceed to a final determination of all the matters at issue therein, although the plaintiffs may have a remedy at law against the wrongdoer for the trespass.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Hancock County; H. C. Hervey, Judge.

Bill by Haskell Bros. against H. S. Sutton and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Oliver Marshall and Henry M. Russell, for appellants. D. E. Mitchell and John R. Donehoo, for appellees.

MILLER, J. James W. Morrow, died intestate on the 25th day of March, 1878, seised and possessed in fee of a tract of land containing 175 acres, situate in Hancock county, W. Va. He left surviving him his widow, Emma Morrow, and two sons—Walden Morrow, born in 1870, and George Morrow, born in 1876—his sole heirs at law. On the 27th day of October, 1888, said Emma Morrow was duly appointed guardian of her two minor children, Walden and George Morrow. By the death of their father said Walden and George Morrow became the joint equal owners and possessed in fee of said tract of land, subject

to the dower therein of their mother, Emma Morrow. On the 2d day of November, 1888, said Emma Morrow, in her own right, and as guardian of said infant children, by written agreement of that date, without first obtaining authority so to do, under chapter 83 of the Code of 1899 leased to John McKeown, for oil and gas purposes, for the term of 20 years, 135 of said 175 acres. This lease was duly admitted to record, and recorded in the office of the clerk of the county court of Hancock county on the 14th day of February, 1889. The lessee was, by the terms of the lease, to deliver to the lessor the one-eighth part of the oil discovered or produced on the premises described, and to deliver the same in tanks or pipe lines to the credit of the party of the first part. The lease recites that "the sum of \$4,500 is given and received as consideration for the above lease." McKeown, under this lease, entered upon the land, drilled two holes thereon, one of which had a small showing of oil, before either of said children became of age, and in 1890 he removed therefrom with his tools and fixtures, and has not, since that time, done any further drilling for oil or gas thereon. Some time prior to the 24th day of September, 1898, said McKeown died, leaving heirs. On the day and year last aforesaid Sara McKeown, B. D. J. McKeown, and Scott McKeown, heirs of said John McKeown, assigned and transferred said Morrow lease to Sutton Bros., who are defendants to this suit, which assignment was also recorded on the 17th day of October, 1901, in said clerk's office. On the 4th day of August, 1900, by their agreement in writing of that date, said Emma, Walden, and George Morrow leased said 135 acres of land to Wm. A. Haskell for the period of one year for oil and gas purposes, with the exclusive right to the lessee of operating thereon for oil and gas. The usual royalty of one-eighth of the oil produced and saved from the premises and \$200 for each productive gas well were reserved to the lessors. On the 3d day of August, 1901, by another written agreement by and between said lessors and lessee Wm. A. Haskell, in consideration of \$1 the said lease was extended for two years from the date last aforesaid, and as much longer as oil or gas should be found in paying quantities. In the early part of January, 1901, said Sutton Bros., a company composed of Henry L. Sutton, Alden H. Sutton, Carl E. Sutton, and N. A. Sutton, took possession of part of said 135 acres of land under said McKeown lease, assigned to them as aforesaid, and commenced operations thereon in search of oil and gas. On January 19, 1901, a written notice, signed by said Wm. A. Haskell and Walden Morrow, was served on Sutton Bros., or one of them, notifying them that Haskell held a lease for oil and gas purposes on the said 135 acres of land from Emma Morrow and sons, the owners of said farm, dated August

¶ 2. See *Guardian and Ward*, vol. 25, Cent. Dig. § 193.

4, 1900, and forbidding the Suttons from carrying on any operations on the land for oil and gas. On the 18th day of October, 1901, Haskell Bros., a firm composed of said Wm. A. Haskell and Frank Haskell (the latter being interested in the lease of August 4, 1900), Emma Morrow, Walden Morrow, and George Morrow presented their bill in equity to the judge of the circuit court of Hancock county, duly verified by affidavit, alleging substantially the foregoing facts, and also that said Sutton Bros. had continued their operations on said land, had held possession thereof for that purpose and were producing oil therefrom, to the irreparable loss and damage of plaintiff, without any right or title so to do; that said Sutton Bros. had produced large quantities of oil from said land, which was then in the lines and tanks of the Eureka Pipe Line Company, unsold or otherwise disposed of. The bill also alleges that the said McKeown lease was and is illegal, null, and void, of no binding force whatever, and did not pass to the lessee named therein the interests of said minor children in said tract of land for any purpose whatsoever; that said minors were then of full age, and in possession of said land; and that said illegal and invalid lease, under which said Sutton Bros. were operating, is a cloud upon the title of plaintiffs, which they are entitled to have removed, and their title to said land quieted. The said bill made the said Sutton Bros. and the Eureka Pipe Line Company defendants thereto, and prayed that the said McKeown lease be declared illegal, null and void; that said Sutton Bros. be inhibited and restrained from producing and selling any oil from said premises, and that said Sutton Bros. and the Eureka Pipe Line Company be required to account for the oil produced as aforesaid; that said Sutton Bros. be restrained and enjoined from interfering with plaintiffs in their rightful possession of said land, and also from the further production of oil therefrom; and that the title of plaintiffs Haskell in and to the leasehold estate in the oil and gas rights in said tract of land be settled and quieted, and for general relief.

The said judge thereupon granted an injunction, which inhibited, enjoined, and restrained Sutton Bros., their agents, etc., from further drilling for oil and gas upon said tract of land; and also inhibited, enjoined, and restrained the said Sutton Bros. and the Eureka Pipe Line Company from selling or otherwise disposing of any oil which had been run into the lines of said pipe line company, or any oil that might be produced from the said tract of land, until the further order of the court. On the 31st day of December, 1901, a motion was made by the defendants in the said circuit court to dissolve said injunction; and the cause, as to said motion, being then heard upon the bill, duly verified, the order of injunction, the process duly executed and motion to dissolve the in-

junction, said motion was overruled and disallowed.

The answer of said defendants, Sutton Bros., was then filed. It admits many of the allegations of the bill, but denies that said lease made by Emma Morrow in her own right and as guardian as aforesaid to John McKeown was or is illegal, null, or void, and of no binding force whatever. On the contrary, defendants aver that the lease, when executed, was a valid lease, in so far as it undertook to grant to the lessee the interest of the said Emma Morrow, as the widow of said James W. Morrow, in the oil and gas in or under the land described in the lease; that from the death of said James W. Morrow until that time said Emma Morrow, as widow as aforesaid, had been entitled to her dower interest in the land described in the lease; that until the making of the lease she was entitled to her share, by virtue of her dower right, of the oil and gas; and that she was entitled to, and did by said lease, assign and convey her said interest in said oil and gas to the said McKeown. The answer further avers that the circumstances attending the making of the said lease and the circumstances which have since taken place are such as to make the said lease valid in all of its particulars and details with respect to the rights in the said land of the said George Morrow and Walden Morrow as heirs at law of the said James W. Morrow, and to estop the said George Morrow and Walden Morrow from repudiating or denying the said lease and from interfering with said lease or the rights of these defendants thereunder. Defendants allege that when the said lease was made the said McKeown paid the said Emma Morrow, in consideration of the making of the lease, the sum of \$4,500, and that the said Emma Morrow treated the money so received from the said McKeown as though it belonged to the estate of the said James W. Morrow, deceased, and to her said wards as the heirs and distributees of the said estate. Defendants allege upon information and belief that there were in existence at the time of the making of the said lease and of the receipt by the said Emma Morrow of the said \$4,500 paid to her by the said McKeown a number of large debts due by the said James W. Morrow at the time of his death, which were charges against his estate, and that the personal estate left by the said James W. Morrow was wholly insufficient to discharge these debts, so that they were charges upon the real property of which the said James W. Morrow died seised, and the real estate included and described in the said lease; that one of these debts, amounting to the sum of \$1,200 or more, was due to one Robert Morrow, and another, amounting to the sum of \$1,200 or more, was due to William A. Walden, and another for a considerable sum, although the amount is unknown to defendants herein, was due to Susan Colvig; that out of the said sum of \$4,500 paid to her by the said

McKeown the said Emma Morrow paid and discharged the said three debts due to Robert Morrow, William A. Walden, and Susan Colvig, respectively, and that by such payment the real property included and described in the said lease was relieved from the lien and charge of the said debts, which, but for such payment out of the said money received from the said McKeown, would have been enforced against the said last-mentioned real estate; that, after the payments which were made as aforesaid upon the debts due by the estate of the said James W. Morrow, there remained in the hands of the said Emma Morrow a considerable portion of the said money paid to her by the said McKeown, and that the said Emma Morrow invested the residue for the benefit of her said wards, and that her said wards since, respectively, arriving at the age of 21 years have received a portion of the money which was so invested, and that a portion thereof still remains invested in the manner in which it was invested as aforesaid by the said Emma Morrow, and that the said Walden Morrow and George Morrow have been receiving the returns from such investment, and now have the ownership and control and the benefit and advantage thereof; that the said Walden Morrow became of age in the year 1891, and is now about 31 years old, and that the said George Morrow became of age in the year 1897, and is now 25 years old; that the said Walden Morrow and George Morrow, both before and since they respectively became of age, had full knowledge of all the facts hereinbefore set forth with respect to the said lease to McKeown and the disposition of the money arising therefrom; that they knew that the said lease had been made in the manner in which it was made, and that the said Emma Morrow had received the said sum of money from the said McKeown, and that she had expended portions of it, as hereinbefore set forth, in the payment of the said debts, and that she had invested the residue in the manner hereinbefore stated; and that the said McKeown had in good faith begun and carried forward operations under the said lease, in which he had expended a large amount of money; and that after the drilling of the first two wells the said McKeown and those claiming under him continued to assert the validity of the said lease and to claim all rights under it; and that the said McKeown heirs had transferred and assigned the said lease to these defendants; and that these defendants were in good faith claiming to be the owners of the said lease and of the rights and property described therein; and that neither the said Walden Morrow or the said George Morrow, after coming of age, respectively, as aforesaid, either objected to the said lease as it was made, nor the exercise by the lessee, or those claiming under him, of the rights provided for in the said lease, nor to the disposition which had been made

of the money received by the said Emma Morrow in consideration of the said lease, nor did either of them attempt or offer to refund to the said McKeown, or those claiming under him, the money which had been paid as aforesaid, and of which they received the full benefit, nor did they or either of them in any manner attempt to repudiate the said lease. On the contrary, for years after they respectively became of age they permitted the entire situation to stand as it had been created by the acts of their guardian as hereinbefore set forth. Defendants are advised and allege that the conduct of the said George Morrow and Walden Morrow in this regard has been such as to confirm and establish as valid the acts of the said Emma Morrow with respect to the said lease, and to estop the said George Morrow and Walden Morrow from treating the said lease as in any respect invalid.

Depositions were taken and filed in the cause by both plaintiffs and defendants. On the 25th day of April, 1902, the cause was heard before and submitted to the court, and a decree was therein made and entered declaring the said lease made by Emma Morrow, in her own right and as guardian, to John McKeown, bearing date on the 2d day of November, 1888, to be illegal, null, and void, the temporary injunction awarded theretofore was perpetuated, and the cause was referred to a commissioner to ascertain and report an account of the oil, and value thereof, produced from the said land by Sutton Bros. From the said two decrees defendants appeal, and say that it was error for the circuit court to overrule the defendants' motion to dissolve said injunction; error to decree that the McKeown lease was illegal, null, and void; error to declare the McKeown lease absolutely void, and to refuse to recognize at least the rights of defendants under it derived from Emma Morrow's dower interest in the land.

The first question to be considered and determined is the alleged invalidity of the lease to McKeown. In the case of *South Penn Oil Co. v. McIntire et al.*, 44 W. Va. 305, 28 S. E. 926, it is held: "Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court. A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without approval of the orphans' court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the corpus of the estate of his ward."

Wilson et al. v. Youst et al., 43 W. Va. 826, 334, 28 S. E. 781, 39 L. R. A. 292; Code 1890, c. 83, §§ 2, 12. The said lease, tested by the authorities cited, was and is without legal validity to bind Walden and George Morrow, or either of them. As above shown, it is claimed by the defendants in their answer that said Walden and George Morrow are estopped from refusing to be bound by said lease. It appears by the evidence that McKeown, about a year after the date of the lease to him, drilled one well on the land, in which there was some showing of oil; that he then drilled a dry hole; that afterwards, in 1890 or 1891, he moved everything belonging to him from the land, and has not since operated thereon; that he has made no claim to said land since his removal therefrom as aforesaid; and that he has paid no rentals or royalties for said lease to the said Emma, Walden and George Morrow, or to either of them. The evidence proves the receipt of said \$4,500 by Emma Morrow from said McKeown, and the disbursements and use of the same by Emma Morrow, substantially as stated in said answer. It is also shown that Mrs. Morrow made objection to said Sutton Bros. coming upon the land to operate under said McKeown lease, and that this objection was made to said Alden H. Sutton, just as he was coming upon the land with the first load of materials, on the first day that they were working on the land. It is further shown that the said written notice was served on said Alden H. Sutton on the 19th day of January, 1901, after defendants (Sutton) had material on the ground for drilling purposes, but before defendants commenced to drill. It also appears that Alden H. Sutton was informed by Walden Morrow at the time said notice was served upon him that the McKeown lease was invalid, that the Morrows had leased the land to Haskells, and that, if the Suttons went in under the McKeown lease, they would do so on their own responsibility. It does not appear that at the time of the execution of the McKeown lease the said Walden or George Morrow knew anything about the payment of said \$4,500 by McKeown to their mother; and it does not appear that either of them ever received, or personally used or controlled, any part of said money; or that McKeown was moved by any words or acts or representations of the Morrows, or by their silence, to take such lease, or to pay said money, but evidently hazarded his action on his own judgment. The defendants Sutton Bros. went upon the land under this invalid lease, with notice of its legal invalidity. They not only held the paper by assignment, but were also notified by Haskell and Walden Morrow of the claim of plaintiffs that said lease was void. There was no lease made by either Walden or George Morrow to McKeown, and no contractual relation existed between them. So far as this record discloses, neither Walden

nor George Morrow did, or omitted to do, anything that can estop them from refusing to be bound by said McKeown lease. Williamson v. Jones et al., 43 W. Va. 562, 572, et seq., 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. The title to the oil and gas in said land could not be passed to defendants in that way.

It is also claimed by appellants that Emma Morrow had the right to convey her own interests in the land, whatever they may have been; and that under the McKeown lease defendants were entitled to all of the oil and gas rights which she owned, and were entitled to stand in her place with respect to the oil and gas in the land. As stated in South Penn Oil Co. v. McIntire et al., 44 W. Va. 305, 28 S. E. 926: "Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.'" In Wilson et al. v. Youst et al., 43 W. Va. 834, 28 S. E. 784, 39 L. R. A. 292, it is also said: "So, Washb. Real Prop. p. 208, states the law thus: 'A widow is entitled to dower in mines belonging to her husband in fee, which may have been opened during his lifetime, whether with his own hand or that of another. \* \* \* But though she may work an open mine, under her claim of dower, to exhaustion, she may not open new ones, even within the land set apart to her as dower.'" The question is whether petroleum oil, as it is found in the rock beneath the surface, is part of the real estate in which it is found; and the same law that applies to the ownership of the surface and the soil applies to it. This question has been passed upon by the courts of last resort in different states. Gould, in his valuable work on Waters, in section 291, says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. \* \* \* A lease of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment; and proportionate share of the oil to be produced by an oil well is an interest in land, a parcel sale of which is void under the statute of frauds." The same doctrine is held to be the law as to natural gas. Williamson v. Jones. 39 W. Va. 231, 257, 19 S. E. 436, 25 L. R. A. 222.

Emma Morrow's dower in the land has never been assigned to her. In George v. Hess, 48 W. Va. 534, 537, 37 S. E. 564, 565, the court says, citing 10 Am. & Eng. Ency. Law (2d Ed.) 144: "In fact, that work, page 147, says that until actual assignment of dower the widow cannot alien or subject her dower to the payment of debts, and that neither process of law nor her own act can transfer her right to a stranger, so as to confer on him a right of action at law for

the dower. She cannot convey her contingent dower." Again, on the same page, it is stated: "She is not seised of any part of the land, on the death of her husband, by any right of dower, until it is assigned to her." Emma Morrow, therefore, could not and did not, in the legal sense, transfer or convey her dower interest in said land to McKeown by said lease of November 2, 1888. She had no other interest in the land. The said lease to McKeown was and is void, and is of no effect as to the Morrrows, or either of them. It was not ratified by either Walden or George Morrow. In order that a contract made during infancy may be ratified after full age, it must, of necessity, be a contract merely voidable. The lease under consideration, being void, cannot be confirmed. Nothing but a new agreement, made after full age, could deprive the Morrow heirs of their land, and none such is alleged. *Dellinger v. Foltz*, 93 Va. 729, 734, 25 S. E. 998; *Mechem, Law of Agency*, § 114; *Clark on Con.* 724; *Hammon on Con.* § 26. The premises had been abandoned by McKeown. Sutton Bros. took no better right to the land than McKeown or his estate had thereto under the lease at the time of the assignment thereof to them. The lease made by Emma Morrow, Walden Morrow, and George Morrow to Wm. A. Haskell, bearing date on the 4th day of August, 1900, is by them alleged to be a valid and binding contract on and between themselves for the purposes therein stated. The Morrrows were the undisputed owners of said land, subject to the lease made to Haskell, who was legally entitled to search for and produce oil from said land. Suttons were occupying a part of the land, operating thereon and removing oil therefrom under their void lease, thus working irreparable injury to the property of plaintiffs. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Anderson v. Harvey's Heirs*, 10 Grat. 386. "It makes no difference, if the elements of irreparable injury be present, whether the party doing it be solvent or not." *Bettman v. Harness*, 42 W. Va. 437, 26 S. E. 272, 36 L. R. A. 566. Under the adjudicated cases in this state the plaintiffs were unquestionably entitled to at least the temporary injunction awarded to them in this cause on the 18th day of October, 1901. *Freer et al. v. Davis et al.* (W. Va.) 43 S. E. 164 et seq.; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, and cases cited; 2 *Snyder on Mines*, §§ 1628, 1629. There is no reason stated by appellants why said injunction should have been dissolved on the 31st day of December, 1901. We see no error in the refusal of the court to dissolve the injunction at that time.

The most important question in the case to be determined is the extent to which a court of equity will take jurisdiction of, and finally adjudicate between the parties, the matters alleged in the bill. It is urged here that the acts of the defendants are mere tres-

passes, for which the plaintiffs have a plain, adequate, and complete remedy in an action at law. The bill alleges that James W. Morrow died seised and in possession of said tract of land. It appears that it descended to Walden and George Morrow in fee, subject to the dower interest therein of their mother, Emma Morrow, and that plaintiffs were in possession thereof. This is not denied. It is not shown that plaintiffs Morrow were at any time out of the actual possession of said land, except of such parts thereof as were occupied by McKeown and the Suttons while they were drilling for oil as aforesaid. The evidence proves that Emma Morrow was then living upon the farm. 3 *Pomeroy's Eq. Jur.* § 1398, says: "The jurisdiction of courts of equity to remove clouds from title is well settled, the relief being granted on the principle *quia timet*; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title." But it may be contended that, inasmuch as the McKeown lease was and is void, the court will not exercise its jurisdiction to remove the cloud, for the assumed reason that there is no cloud. Some courts have so held, but we do not understand that to be the law in this state. In *Ambler, Trustee, v. Leach*, 15 W. Va. 696, the court says: "As a void judgment is a cloud upon the title of the real estate of the defendant or his trustee, and is, therefore, calculated to produce an injury, the defendant or his trustee may, as a general rule, maintain a bill to have such cloud removed." *Johnson et al. v. Johnson et al.*, 30 Ill. 215, 224; *Hamilton v. Cummings*, 1 Johns. Ch. 517. We think the bill can be entertained in this case not only for the purpose of the temporary injunction, but also for the cancellation of the McKeown lease, and for the removal of the cloud which it creates upon the title of the Morrrows to the land. *Moore v. McNutt*, 41 W. Va. 695, 700, 24 S. E. 682; *Hoopes v. Devaughn et al.*, 43 W. Va. 447, 27 S. E. 251; *Eckman v. Eckman*, 55 Pa. 269; *Hager v. Shindler*, 29 Cal. 47-55; *Day Co. v. The State*, 68 Tex. 523, 537, 4 S. W. 865; 3 *Pom. Eq. Jur.* § 1399; *Hogg's Eq. Pr.* §§ 46, 47. Although the McKeown lease was void for the reason stated, it had been placed on record, and the assignment thereof to Sutton Bros. as well; and was then asserted by said Sutton Bros. as valid and binding on the plaintiffs.

Having determined that the court can and will take jurisdiction as to the cancellation of the McKeown lease and the removal of the cloud which it creates on the plaintiffs' title to said land, and that the temporary injunction was properly awarded and continued in force, what is the further duty of the court? Must the plaintiffs be dismissed, and sent to a court of law, therein to institute and prosecute their action for the eviction of the defendants and the recovery of dam-

ages for the trespass committed, or will a court of equity, having taken jurisdiction, go on, and do complete justice between the parties? In an action at law the court can treat the McKeown lease as a nullity, and reject it as evidence, but cannot cancel it, or remove the cloud it creates on the title of the owners of the land. That court, with a jury, if demanded, can, in its generally slow and expensive way, ascertain the damages sustained by the plaintiffs, and render judgment against the defendants therefor; but it cannot restrain further acts of trespass. By retaining the cause and adjudicating the matters in difference between the parties, a multiplicity of suits may be avoided. 1 Pom. Eq. Jur. § 243, says: "The multiplicity of suits to be avoided, which are generally actions at law, shows that the legal remedies are inadequate, and cannot meet the ends of justice, and therefore a court of equity interferes; and, although the primary rights and interests of the parties are legal in their nature, it takes cognizance of them, and awards some specific equitable remedy, which gives, perhaps, in one proceeding, more substantial relief than could be obtained in numerous actions at law. This is the true theory of the doctrine in its application to the two jurisdictions." The author, in the same book, at section 181, says: "The concurrent jurisdiction of equity to grant remedies which are legal in cases which might come within the cognizance of the law courts is materially affected by the operation of two important principles, which are now merely stated, and which will be more fully discussed in a subsequent section. The first of these principles is that, when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." Hoopes v. Devaughn, supra. Little, if anything, can be added to what has been so well stated in Bettman v. Harness as to the characteristics of irreparable injury to real estate. We know that lands worth in the market practically nothing a few years ago, by reason of the discovery of coal, oil, or gas thereon, or near thereto, now sell for large sums per acre. While the quantity and quality of coal can be substantially ascertained by proper tests, no one can determine in advance the amount of oil or gas which may be produced, how much will be lost by unskillful or negligent operations in its pro-

duction, or how much it would realize in money were it to remain in the earth a few years longer. It will not do to say that it is to the interest of the landowner to have exploration and development of his holdings; that he generally wants his coal, oil, and gas produced and marketed; and that the trespasser who takes those valuable properties—parts of the real estate—can be compelled to respond therefor in damages. It is true that the quantity of oil or gas actually run into the pipe line may be accurately ascertained, and the value thereof determined, by the market value at that time; but who can measure the amount of the part which may escape or be destroyed by conflagration or otherwise in its production? Unlike timber, coal, and marble, oil and gas are "fugitive" and "volatile" in character. The owner may lease his lands therefor to a person of his own selection, but because he does so a trespasser should not be accorded the same legal rights on or to the land as the lawful lessee thereof. The owner is not obliged to surrender, whether he will or not, his property to another individual. The state, by virtue of its authority of eminent domain, cannot take or injure private property for public use without just compensation to the owner thereof. The trespasser should not be permitted to take the most valuable part of the freehold from the owner; waste it by his negligence or unskillfulness; then escape liability with such damages therefor as may be ascertained and fixed by a court or jury; and afterwards, perhaps, be entirely relieved from any payment by the use of an exemption list, under the statute, or a proceeding in bankruptcy.

It is conceded that in cases of this character, where irreparable injury is being done or threatened to real estate, an injunction is proper. It may be profitable to ascertain what the courts have decided upon this question: In *Sanderlin v. Baxter*, 76 Va. 299, 306, 44 Am. Rep. 165, the court says: "By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages. Kerr on Inj. c. 15, § 1, p. 199. The injury to Baxter's land would be material, and disease and death merely would be grievous. For such injuries there could be no just compensation in dollars and cents." *Moore v. Steelman*, 80 Va. 331, 340, and cases cited; 1 Bart. Chy. Pr. 430; *Com. v. Pitts. & Conn. R. R. Co.*, 24 Pa. 159, 62 Am. Dec. 372. In *Wilmarth v. Woodcock*, 58 Mich. 482, 485, 25 N. W. 475, 476, it is stated: "The bill states a case for equitable relief. The continual invasion of complainant's rights of property by the maintenance of the projection of the cornice over her north line, constituting a permanent injury to and depreciation of her property, addresses itself to, and calls in exercise the equita-

ble jurisdiction of, the court. No remedy at law is adequate, owing to the uncertainty of the measure of damages to afford complete compensation. In one sense it is taking her property without condemnation and without due process of law. No person can be permitted to reach out and appropriate the property of another, and secure to himself the adverse enjoyment and use thereof, which in a few years will ripen into an absolute ownership by adverse possession. \* \* \* Irreparable injury, in the sense in which it is used in conferring jurisdiction upon courts of equity, does not mean that the injury complained of is incapable of being measured by a pecuniary standard." *Wilson v. City of Mineral Point*, 39 Wis. 160. In *Western Union Telegraph Co. v. Rogers*, 42 N. J. Eq. 313, 314, 11 Atl. 14, 15, it is said: "Again, it is urged that the complainant cannot be heard in this court because the court never exercises jurisdiction, unless it appears that the damages threatened are irreparable. This, it is true, is one well-settled rule; but another is equally well settled, viz., that a party will not be driven to his legal remedy where it may appear that that remedy will prove inadequate. In this case there can be no doubt but that the complainant could at law recover. But recover what?" "By the term 'irreparable injury,' it is not meant there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a rational one, and not adequately reparable by damages at law; and by the term 'the inadequacy of the remedy by damages' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not in specie, place the parties in the position in which they formerly stood. The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage. It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete." *Wahle v. Reinbach*, 76 Ill. 326; *And. L. Dic.* 546; *McMillan v. Ferrell*, 7 W. Va. 230. In this suit the parties and subject-matter are before the court; the oil produced from the land is yet in the pipe line of the defendant pipe line company, unsold; the defendants threaten to drill other wells and produce more oil—take out and remove a valuable part of the land. Must the owners of the property stand by, and see a most material and valuable portion of their land taken without authority of law, and then be compelled to go into a court of law for redress? Can it be said that a court of equity is powerless to ascertain the value of the oil already taken; to hold and apply the proceeds of the sale of the oil on hand to the discharge of the defendants' liability when determined; and to perpetually restrain the wrongdoers from further acts of

trespass? We think not. The bill in this cause, tested by the authorities, can be entertained for the purposes stated therein.

There is no error in the decrees complained of. They must be affirmed.

DENT, J. (dissenting). The first question that presents itself is as to whether there is any equity in the bill, or are the grounds alleged mere equitable pretenses to avoid a suit at law? The plaintiffs Frank Haskell and William Haskell are the oil lessees; George Morrow and William Morrow, who join in the bill, are the owners of the land; while the plaintiff Emma Morrow has a dower interest therein. The bill, on its face, shows that it is to enjoin a trespass. Its object is to determine the right of possession. The defendants are in possession operating for oil and gas. Oil lessee plaintiffs have never been in possession. It is settled law that equity has no jurisdiction to restrain a trespass or settle the right of possession. *McMillan v. Ferrell*, 7 W. Va. 223; *Cox v. Douglass*, 20 W. Va. 175; *Schoonover v. Bright*, 24 W. Va. 698; *Cresap v. Kemble*, 26 W. Va. 603; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Clayton v. Barr*, 34 W. Va. 290, 12 S. E. 704; *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112. But it is said this is a case of irreparable damage, sustained by *Bettman v. Harness et al.*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. In that case it was held in broad terms without qualification that: "The unlawful extraction of petroleum, oil, or gas from land, they being part of the land, is an act of irreparable injury. Equity will enjoin it." This is undoubtedly the rule in cases of waste committed by the life tenant, or one joint tenant against another, for the reason that a suit at law for possession cannot be maintained, and the waste committed tends to the destruction of the inheritance. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933; *Anderson v. Harvey's Heirs*, 10 Grat. 386, 398. In the case of *Williamson v. Jones* it was held that: "Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water." Hence the same rules which apply as to the taking of the one should apply as to the taking of the other. The extraction of petroleum oil is no more an irreparable injury to land than to dig coal or cut down timber. As it is said in *Bettman v. Harness*: "The word 'irreparable' means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured." Under this rule irreparable damage can never be done by the extraction of petroleum oil when it is run into the pipes of and measured by a pipe line company, for the true quantity and value thereof is ascertained and determined by the market standard, and, unless the extractor of

the oil and the pipe line company are both insolvent, there is no danger of loss to the owner of the oil. But it is said, is not the owner of the oil entitled to keep "his own oil in his own soil"? Yes, but so is the owner entitled to keep his own timber on his own land, and his own coal in his own coal bank. And undoubtedly, where the owner is not in such legal situation that he can sue for possession, and the act complained of tends to the waste and destruction of his estate or inheritance, he may sue in equity. On the other hand, where he is in condition to sue for possession, and there is no possible danger of loss, the damages being easy of pecuniary estimation, and the parties liable therefor perfectly solvent, the remedies at law are sufficient and adequate, it matters not whether the substance involved is oil, coal, iron ore, or timber.

When the owner of land has granted away the right to extract the oil, he can no longer complain that he is injured by the unlawful extraction thereof, especially if he is secure in his royalty; for, having released his right to retain the oil in place, its extraction can no longer be said to be destructive of his estate either in remainder or reversion, or that the injury is remediless. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884. The right left to the owner is the receipt of the royalty, and, this being secured to him under both the subsequent and prior leases, he can be in no wise injured by the extraction of the oil, whether done by the prior or subsequent lessees. The owners of the land in this case are in no danger of loss, for under both leases their royalty is secure to them, and they have wholly parted with their right to have their oil retained in place. Their royalty in both instances they receive through the pipe line. Hence, as to them, no irreparable injury has or can be inflicted by the extraction of the oil. Nor are they liable on a warranty, express or implied, as against the prior lease, for the subsequent lessees took their lease subject to and with full notice of the prior lease, as the allegations of the bill plainly show, and were themselves to have such prior lease declared invalid. The subsequent lessees are also without right to maintain this suit. They have no interest in the oil in place. Their only interest is to have it severed, and reduced to possession. The severance by the prior lessees cannot possibly be injurious to them, much less irreparably so; for if it is their oil; they can claim it in the pipe line, where it is perfectly safe. The question of insolvency, either as to the defendants or pipe line, is not even mooted. It is said their lease is, in effect, a grant of a part of the corpus of the land. This, in a limited sense, is true, for it is a grant of the right of severance of a part of the corpus of the realty. So is a grant of standing timber; yet such grant amounts to a severance thereof, and converts such timber into personalty

from realty. *Warren v. Leland*, 2 Barb. (N. Y.) 613. So the grant of the right of severance of oil converts the oil that may be after-discovered, and severed into personalty, but on account of its peculiar nature and hidden condition the lessee acquires no estate in the oil in place. Nor has he any right to keep it there. His interest is not to do so, but it is his duty to sever it at once, or as soon as practicable, and reduce it to possession, and then it becomes his property, less the royalty. He may have the right to the possession of the land and of the oil produced. Both these he may acquire by proper suit at law. The severance of the oil and conversion into personalty takes place at the date of his lease, but on account of its fugitive and volatile character it does not become his property until reduced to possession by himself or some one else. *Dark v. Johnston*, 56 Pa. 164, 93 Am. Dec. 732. An unlawful severance thereof by prior lessees, which inures to his benefit, can in no wise injure him, nor should he be heard to complain with regard thereto. If a person has the lawful right to cut timber, and another cuts it for him by mistake or unlawfully, the former, who receives the benefit thereof, has no grounds of complaint; nor has the landowner, who receives his full pay for such timber, the severance of which he has authorized. In the case of the *Oil Co. v. Gas Co.*, 51 W. Va. 584, 42 S. E. 655, it was held that the discovery of oil vests no title to it in place in the lessee, but does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107. An oil lessee has no property in the oil in place, but only the right to extract the same, and reduce it to possession, when it becomes his personal property, the value of which can be peculiarly ascertained, and the loss thereof fully compensated. *State v. South Penn Oil Co.*, 42 W. Va. 80, 102, 24 S. E. 688; *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; *Baringer & Adams, Mines & Mining*, 74, 75; *Oil Co. v. Fretts*, 152 Pa. 451, 456, 25 Atl. 732; *Funk v. Halde-man*, 53 Pa. 229; *Thompson's Appeal*, 101 Pa. 225, 232; *Rynd v. Oil Co.*, 63 Pa. 397; *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566; *Brown v. Beecher (Pa.)* 15 Atl. 608; *Duke v. Hague*, 107 Pa. 57; *Horner v. Leeds*, 25 N. J. Law, 106; 2 Shars. & B. Lead. Cas. Real Prop. 30. His only interest in the land is purely a chattel interest. 5 Am. & En. En. Law (2d Ed.) 1022. He has the right to possession of the land. This he can obtain and preserve by suit at law. He has the right to the oil as personal property when severed from the real estate. For the wrongful deprivation of this he can sue in trover and conversion, and be compensated in damages; or, if it can be identified, he can sue in detinue for its possession. Hence the subsequent lessee plaintiffs were not the owners of the oil in place either absolutely or in reversion, nor



had they any inheritance therein. As to them the oil should be treated as personal property, and for the unlawful taking thereof they have full and adequate remedies at law, to wit, detinue and trover and conversion. *Hall v. Reed*, 15 B. Mon. 479; *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307. As to the land, if they have the right of possession, and are unlawfully kept out of the same, they may regain the possession by action of unlawful detainer or ejectment. *Guffy v. Hukill*, 34 W. Va. 52, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901; *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

Nor does the right to annul the defendants' lease as a cloud on plaintiffs' title give equity jurisdiction. The subsequent lessees whose title is affected by the prior lease never have had possession of the land, while the defendants are in possession thereof. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682. "The possession sufficient to support the action is generally limited to peaceable possession rightfully acquired. 17 En. Plead. & Prac. 317. "Such a bill is only entertained by a court of equity because the party is not in a position to force the holder of or one claiming to defend under an adverse title into a court of law to contest its validity, and this, as a general rule, is the test to which a court of equity will look to determine whether the necessity of the case requires its interference." *Alton v. Buckmaster*, 13 Ill. 205; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340; *Comstock v. Henneberry*, 66 Ill. 214; *Apperson v. Ford*, 23 Ark. 757. If the plaintiffs can sue at law, and the defendant gives them the opportunity to sue at law, they must sue at law. There was nothing in the way of the plaintiffs suing at law. They were out and the defendants in possession and keeping them out. Nor is there any necessity of a multiplicity of suits, as one suit would have finally settled this controversy. Nor does the bill show sufficient grounds to demand an accounting. A bill in a proper case through the necessity of discovery will lie to compel an accounting of the proceeds of mines, etc., because the defendants have peculiar knowledge thereof. *Swearingen v. Steers*, 49 W. Va. 312, 38 S. E. 510. This necessity is obviated in cases of oil wells, by reason of the pipe line company, which keeps accurate accounts of oil produced. It is indifferent as between the parties, and doubtless, on application, will furnish a true statement of the oil produced without the necessity of a resort to a discovery. If the pipe line company should refuse a disclosure on proper demand, such a bill might become necessary. There is, however, no allegation of this kind in the present bill, but all that is said with regard to the matter is mere pretense.

The four grounds on which equity jurisdiction is sought to be maintained, to wit, irreparable damage, cloud on title, multiplicity of suits, and the necessity of an account, are mere pretexts to foist on equity a jurisdiction it does not possess, and this is the determination of the right to possession of land. Nor does the fact that the first lease is void deprive the law of its jurisdiction. *Gall v. Bank*, 50 W. Va. 597, 40 S. E. 390; *Davis v. Settle*, 43 W. Va. 19, 37, 26 S. E. 557. The case presented is simply the ordinary case of property claimed by one party in the possession of another party. It is a mere ejectment bill, and there is nothing to give a court of equity jurisdiction. *Messimer's Appeal*, 92 Pa. 169. Nor is the taking of the oil from the wells under the facts of this case to be adjudged such an irreparable injury as in some cases might warrant the interference of a court of equity. *Erskine v. Forrest Oil Co. (C. C.)* 80 Fed. 583. "A bill to quiet title in complainant to an oil claim under the placer mining laws, which alleges that defendants have entered upon the ground and have extracted and removed oil therefrom, and are engaged in sinking a well thereon, and which asks an injunction to restrain them from proceeding with such work and from taking and removing oil, is, in effect, a bill to obtain possession, and admits the possession of defendants; hence it is not cognizable by a federal court of equity, the remedy being at law." *Oil & Gas Co. v. Miller (C. C.)* 96 Fed. 12. The only object of the bill in the present case, stripped of all its false pretenses of irreparable injury, cloud on title, multiplicity of suits, and accounting demanded, is to try the right of property and dispossess the defendants. In no other kind of a case except an oil case would this court for a moment entertain such a bill, but oil is so lubricating that it sometimes causes the wheels of justice to slip a cog, and, if the guardians thereof are not on the alert, it may cause oleaginous construction of principles of equity to produce more irreparable damage than it prevents.

Nor have the plaintiffs acted with that diligence in presenting their claim that would entitle them to equitable consideration. They were aware, shortly after defendants had taken possession and were about to drill for oil, that defendants were doing so under a claim of right, and they might have, by legal proceedings, at once tested such right. Yet they waited for about eight months, until defendants were actually engaged in producing oil, before they complained to a court of equity. In short, they wanted the oil produced before interfering, and, now that it is being produced, they claim they are suffering irreparable damage, for the reason that the oil is not left in place—a mere pretense to gain the equitable ear of the court.

The bill should be dismissed, and the plaintiffs remitted to their legal remedies.

(53 W. Va. 173)

**MYLIUS v. SMITH.**(Supreme Court of Appeals of West Virginia.  
April 11, 1903.)**EQUITY — CONSENT ORDER — PROPERTY OF  
WIFE—IMPROVEMENTS BY HUSBAND—  
RIGHTS OF CREDITORS.**

1. An order in a chancery cause entered "by consent of all the parties represented by counsel, the pleading and proofs are closed, and this cause is submitted for a final adjudication," is binding upon all the parties who had, at the time of the entry of the order, appeared in the cause.

2. A consent decree can only bind the consenting parties.

3. Where there is a subsisting lien by deed of trust upon a piece of real estate, the property of a wife, and subsequently the husband, with his own means, makes valuable improvements thereon, in fraud of the rights of his creditor, who files a bill, and succeeds in charging the value of the improvements so made thereon, on account of his debt, he has a lien on said improvements to the amount of the value thereof, subject to the deed of trust. *Held* error to require the deed of trust debt to be paid out of the amount decreed to plaintiff against the improvements.

(Syllabus by the Court.)

Appeal from Circuit Court, Upshur County;  
W. C. Bennett, Judge.

Bill by Charles E. Mylius against J. L. Smith. Decree for defendant, and plaintiff appeals. Modified.

S. V. Woods, for appellant. Young & McWhorter, C. C. Higginbotham, and G. M. Fleming, for appellee.

McWHORTER, P. Charles E. Mylius, who held a judgment against James L. Smith and Floyd G. Smith, rendered in the circuit court of Upshur county October 15, 1887, for \$2,200, filed his bill in the said circuit court in November, 1895, against James L. Smith and May Smith, his wife, Floyd G. Smith, John L. Smith, William Post, Perry L. Rohrbaugh, and O. L. Rohrbaugh, for the purpose of charging certain parcels of real estate held by said May Smith, by conveyances, as the property of said James L. Smith, and holding the improvements made on certain other lots of May Smith by James L. Smith, and for setting aside the deeds for said first-mentioned lots as fraudulent, as to plaintiff's judgment, which conveyed the same to said May Smith, and for a discovery as to Floyd G. Smith as to the title of three parcels of real estate which had been conveyed to his wife in 1882, and which had stood assessed in his name from the year 1882 until 1895, and that the equitable ownership of the same might be fixed in him, and declared liable to the plaintiff's judgment, and for general relief.

By deed dated September 15, 1876, John L. Smith and wife conveyed to May Smith, wife of James L. Smith, in consideration of \$1,000, "\$500.00 of which said John L. Smith remits in consequence of relationship which the said May Smith has to him, which \$500 is to be deducted out of James L. Smith's portion of

the father's [John L. Smith's] estate and the remaining \$500 is to be paid in five annual installments from this date, to be paid in saddles at cost valuation, for which deferred payments the said May Smith has this day executed her five notes to John L. Smith and upon further consideration that said May Smith shall pay annually to said John L. Smith the sum of twenty-five dollars so long as he may live." Said conveyance was with general warranty to said May Smith for and during her natural life, remainder in fee to the children to be begotten by her husband, James L. Smith, and, in default of any children, then in fee to the heirs, equally, of John L. Smith; reserving a vendor's lien to secure the payment of the \$500 so to be paid in saddles, and also the payment of the said annuity. Said property so conveyed was a lot in Buckhannon, on Locust street, containing about one-half acre. By deed dated the 24th of November, 1877, John R. Blair, administrator with the will annexed of I. N. Bennett, in consideration of \$200, of which \$66.67 was paid in hand, the residue in three equal annual payments, for which a vendor's lien was retained, conveyed to said May Smith a certain house and lot on the north side of Main street in the town of Buckhannon. By deed dated the 28th of July, 1891, Joseph C. Smith conveyed to said May Smith, lot No. 44 on Cleveland avenue in North Buckhannon, in consideration of \$100. By deed dated the 9th of August, 1892, Leonard Lance and wife, in consideration of \$160 paid, conveyed to said May Smith lot No. 38 on Thurmond avenue in North Buckhannon. By deed dated April 7, 1892, Joseph C. Smith, in consideration of \$200 paid, conveyed to said May Smith lots Nos. 58 and 60 on Harrison avenue, North Buckhannon; and by deed dated the 27th of January, 1893, William Post and wife, in consideration of the sum of \$1,700, of which \$700 was paid, and \$500 to be paid on January 27, 1894, and a like sum on the 27th of January, 1895, for which deferred payments May Smith made her two promissory notes, for the payment of which a vendor's lien was retained, conveyed, with general warranty, to said May Smith, the one undivided one-half interest of a lot therein described, on Main street in the town of Buckhannon; and by deed dated the 24th of February, 1894, Lulu Maud Williams and husband conveyed to said May Smith, in consideration of \$29, lot No. 31 in the town of Hampton.

It is alleged in the bill that the said May Smith did not execute her notes as recited in the said first deed, and did not pay the said \$500 in saddles, or in any other manner, to John L. Smith, but that the same had been paid to said John L. Smith, in saddles or money belonging to James L. Smith, since the year 1882, and that the said annuity had likewise been paid by him; that May Smith had never had the means to pay said \$500 or the \$25, except with the money and means

derived from her said husband, and that said conveyance of September 15, 1876, was made with intent to hinder, delay, and defraud creditors of John L. Smith and James L. Smith, of which intent May Smith had notice, and that, since plaintiff's cause of action had accrued, said James L. Smith, out of his own means, and with the intent to hinder, delay, and defraud his creditors, made valuable improvements on said lot, worth not less than \$500; and that May Smith had notice of such fraudulent intent with which such improvements were made. The bill further alleges that the lot purchased from Blair, administrator, was purchased with the means of James L. Smith, and that he was the equitable owner thereof; that May Smith never had the means with which to buy or pay for the same, and that said lot was kept in her name for the fraudulent purpose of placing it beyond the reach of her husband's creditors, of which purpose she had notice; and alleges that the lien retained in favor of Post on the lot conveyed by him had been fully paid off, and that the lots conveyed to May Smith by Joseph C. Smith, Williams, and Lance were purchased by her husband in her name with intent to hinder, delay, and defraud his creditors, of which fraudulent intent May Smith had notice, and that all the purchase money for said several lots was derived by May Smith directly or indirectly from her husband, and that the same was his money, and the produce of his labor, skill, and economy, and that no part thereof was the money of May Smith, and that she was holding the title thereto for the fraudulent purpose of concealing the true ownership thereof; that James L. Smith, after plaintiff's cause of action accrued, carried on his saddlery business in the name of May Smith; that, since the purchase of the lot from William Post, May Smith has erected a costly and valuable two-story business house, costing not less than \$2,000, the first floor occupied by a stock of general groceries by said May Smith in her name, with a stock of not less than \$500, which grocery business was under the control of James L. Smith, pretending to be the agent in respect thereto of May Smith; that all the improvements made on the Post lot were made with the means of James L. Smith, and the stock of merchandise in the building was purchased with his means, and with the intent to hinder, delay, and defraud the creditors of her husband, of which fraudulent intent she had notice; that to the extent the means and the labor of James L. Smith had gone into the house and lot on Locust street, with the purchase or the improvement thereof, since plaintiff's cause of action accrued, the same was liable, in the hands of May Smith, to be charged to that extent with the payment of plaintiff's claim, and that to the extent that the said lot on Main street conveyed to May Smith on the 24th of November, 1887, was paid for by means or earnings of her husband

after plaintiff's cause of action accrued, it was liable to be charged as a claim due to the plaintiff; that all of the lots, and each of them, conveyed to her by Joseph C. Smith, Lance, Williams, and Post, were liable to be charged in her hands for the debt due the plaintiff; that all of the said improvements upon said Post lot were liable to be charged, to the extent of the value thereof, in the hands of May Smith, for the debt of plaintiff; that all of the said stock of merchandise was likewise liable for plaintiff's debt, upon which debt an execution had been outstanding in the hands of an officer of Upshur county since the — day of September, 1895; that James L. Smith and Floyd G. Smith were insolvent, and had so continued since the plaintiff's judgment was recovered against them.

At December rules, 1895, the defendants James L. Smith, May Smith, Floyd G. Smith, and John L. Smith each filed an answer to said bill, denying all fraud and fraudulent intent, or notice of any fraud or such intent. James L. Smith denied the allegations of the bill that he had for the past 13 years carried on in Buckhannon a thriving and prosperous business in the name of May Smith, as a saddler and large dealer in saddle supplies, and other thriving employments he had carried on in the same time in connection with his said business, and by reason of his skill, thrift, and energy he had accumulated a large sum of money, over and above all the expenses of himself and family, since plaintiff's cause of action arose; that he did not work as saddler or engage in the saddlery business for her, but for Charles M. Smith, and that he had not made, since the plaintiff's cause of action accrued, more than was necessary to support his family, and that he only had what the law allowed him to hold as exempt; that John L. Smith was respondent's father, who had a right to dispose of his estate, upon his death, to suit himself; that the \$500 mentioned in the deed of September 15, 1876, was a donation from said John L. Smith to May Smith, respondent's wife; that May Smith executed to John L. Smith the five notes in the deed mentioned; that said John L. Smith was paid the first, second, third, and fourth notes at or about their respective maturities, and that at or about the maturity of the fifth note John L. Smith gave the same to May Smith; denied that he had any right, title, or interest, legal or equitable, in the house and lot conveyed by said deed; admitted that he paid to Blair the \$200 for the lot conveyed by him to May the 24th of November, 1877, which he intended as a gift to his wife; that he was at that time practically out of debt, and had a right to do so; that plaintiff's cause of action had not accrued until many years thereafter; that May Smith had paid for all and every lot conveyed to her by Joseph C. Smith, William Post, and Williams, out of and with her own money, which she

did not, nor had she received any part thereof, either directly or indirectly, from respondent; denied that they were conveyed to her for fraudulent purposes; denied that the improvements on the Post lot made by May Smith cost more than \$1,000, but which was paid for by May out of her own money; that all said real estate belonged to said May Smith, and that respondent had no interest therein, either legal or equitable; and that any and all of the improvements made on said real estate, or any part thereof, were made at the request of said May Smith, and paid for out of her own money, which she did not derive, either directly or indirectly, from him.

The answer of May Smith denied the allegation of the bill that James L. Smith had carried on in her name a prosperous business as saddler and dealer in saddler's supplies, and had accumulated a large sum of money. She admitted that James L. Smith, her husband, had paid the \$200 consideration for the lot purchased the 24th of November, 1877, from Blair, administrator, of Bennett, but averred that her husband was then practically out of debt, and had the right to make her the gift, which he did; that plaintiff's cause of action against James L. Smith and Floyd G. Smith accrued many years thereafter; and denied that James L. Smith was the equitable owner of said lot; and averred that she had paid for the Joseph C. Smith lots and Leonard Lance lot, the William Post lot and the Lulu H. Williams lot, from her own funds, which she derived from sources other than from her husband, and that he never had any interest in said funds or in said lots; and denied that said lots were conveyed to her with fraudulent intent to hinder, delay, and defraud the creditors of her husband, and denied all knowledge of any such fraudulent intent on his part; averred that she had executed to John L. Smith the five promissory notes, of \$100 each, which were all paid at or about their respective maturity, except the last one, which payee gave to respondent, and denied that said John L. Smith had been paid said annuity, or any part of it, and denied that James L. Smith had, out of his own means, with intent to hinder, delay, and defraud his creditors, made permanent and valuable improvements, and had erected a barn worth not less than \$300 and that said improvements, in the aggregate, made since plaintiff's cause of action accrued, were worth not less than \$500, and that she had notice of said fraudulent intent with which such improvements were made, and averred that all such improvements had been made by her, and paid out of her own money, which she derived from sources other than from her husband, and that he never had any interest whatever in said money.

The answer of Floyd G. Smith denied that for the past 13 years he had accumulated, since plaintiff's cause of action had accrued,

a large sum of money, which he had invested; denied that since said cause of action accrued he had been engaged for himself in the marble business, but that his wife had been for many years the owner of a marble shop in Buckhannon, and that she employed him to work in said shop as a hand, and to manage the same for her, at \$50 per month, which was not more than enough to take care of his family, and that he had not during that time accumulated anything in property or money, and that he was worth less than the law allowed him to hold as a husband and parent, and averred that the real estate alleged in the bill as assessed to him was the real estate of his wife, in which he had no right, title, or interest, legal or equitable; that she had owned the same many years; that the same was kept on the assessor's books in his name through the carelessness and mistake of the officers, as they were given frequent instructions to place said property on the books in the name of Mary E. Smith; that the personal property which respondent owned in 1882 and 1883 was applied by him many years ago on his debts.

The answer of John L. Smith admitted the conveyance by him of the Locust street property to May Smith; that he made a present of the \$500 of purchase money at the time to said May Smith; that she executed her five notes, for \$100 each; that the first four notes were paid as they fell due; that the fifth note he presented to said May Smith; that he retained a lien in said deed for the said annuity; that said annuity had not been paid, nor any part thereof; and denied that the conveyance of said property of September 15, 1876, was made with the intent to hinder, delay, and defraud the creditors of John L. Smith and James L. Smith.

The bill and answers were verified.

At the November rules, 1897, plaintiff filed an amended bill, alleging by way of amendment that the said James L. Smith, although reputed insolvent, had been carrying on the business of retail liquor dealer in connection with his saddlery business; that he had made at his saddlery business alone \$1,000 a year, and in the liquor business had made large profits, of not less than \$1,000 a year; that he had an United States retail liquor license, and no state license; and reiterated the allegations in regard to the purchase of other lots, and the want of means on the part of May Smith, except as she derived the same from her husband; that the purchase money of the Post lots had been paid with the money of James L. Smith, and the last payment, of \$500, due the 27th of January, 1895, then aggregating \$560, was in fact paid to Post for May Smith by C. P. Rohrbaugh, her father, who requested Post to assign said note to him without recourse, which was done; that the said \$560 was the money of James L. Smith, and that C. P. Rohrbaugh did not have said sum of money, nor credit for that sum; and further

that O. L. Rohrbaugh, the son of C. P., and brother of May Smith, after the pretended assignment had furnished the sum of \$560 to pay the debt to Post, and that the assignment of the note should have been made to him, and that he was the holder of said note by assignment from C. P. Rohrbaugh. The bill alleges that this transaction was fraudulent, and a mere shift and device of James L. Smith, his father-in-law and brother-in-law, to place beyond the reach of his creditors \$560 worth of real estate: that C. P. Rohrbaugh was then insolvent and entirely without means; that O. L. Rohrbaugh was a young man about 30 years of age, a telegraph operator, who never had any real estate and never accumulated any personal property, living in Harrison county, a long distance from May Smith, his sister, and had not lived in Buckhannon for many years; had not had any social intercourse with his sister's family for many years, and his interests and associations were not at all in common with hers; that he did not have the sum of \$560 to lend or to furnish to pay the said Post, and that he did not furnish it, and that his claim was a fraudulent scheme on the part of James L. and May Smith, of which said Rohrbaugh had notice, for hindering and delaying and defrauding the plaintiff in the collection of his debt, and had so hindered him by making this amended bill necessary; that the lien in favor of William Post was discharged, and that the \$560 note, notwithstanding the assignment of which, the note, in equity, of James L. Smith, and the Post note, were acquit and discharged from any incumbrances thereon; that said James L. Smith kept a bank account in one of the banks in Buckhannon, in which he deposited from time to time large sums of money in the name of May Smith, but it was the money and effects of James L. Smith, made and carried on in her name, with intent to hinder, delay, etc., of which intent May had notice; that since the institution of this suit James L. Smith had erected on the Blair lot a good one-story brick house, well furnished, the cost of which was not less than \$600; that the same was built by said James L. Smith, out of his own means and substance, on the lot of his wife, with intent to hinder and delay plaintiff in the collection of his debt, of which said May Smith had notice; and prayed that the Post lot might be declared the property of James L. Smith, and the lien thereon discharged; that the \$500 note held by O. L. Rohrbaugh might be canceled; that the improvements upon the Blair lot be charged with plaintiff's debt to the extent thereof, and the house and lot on Locust street be charged with the improvements thereon by James L. Smith, and plaintiff's debt decreed to him; and for general relief.

On the 5th of March, 1898, the record shows that the following order was entered in the cause: "This day came the parties

by their attorneys, and, by consent of all the parties represented by counsel, the pleading and proofs are closed, and this cause is submitted for a final adjudication, and leave is given the parties 'who may so elect to file written arguments herein; and thereupon Mr. Woods, counsel for the plaintiff, filed his written argument, and the court takes time to consider of his decree herein.'" Immediately preceding the order just quoted there appears copied in the record, but without any date, the same order, with the words "represented by counsel" left out. On the 17th of February, 1899, May Smith and James L. Smith filed their demurrer to the amended bill, assigning reasons therefor, although the order filing the demurrer only refers to it as the demurrer of May Smith; and in the same order the said May Smith, James L. Smith, and O. L. Rohrbaugh each filed his separate answer to the amended bill, and leave was given to the plaintiff to reply generally or specially to said answers, or any of them, within 60 days.

The said demurrer and three several answers were excepted to by plaintiff because interposed and filed after the consent order closing the pleading and proofs, and submitting the cause for final adjudication; and the answer of O. L. Rohrbaugh was excepted to for the further reason that it was not signed by counsel, and was filed without authority. On the 12th of June, 1899, the court, having considered the exceptions indorsed by the plaintiff to the demurrer, and to the answers of said James L. Smith, May Smith, and O. L. Rohrbaugh, sustained the said exceptions as to the demurrer and as to the answers of James L. Smith and May Smith, but overruled the same as to the answer of O. L. Rohrbaugh, and leave was granted plaintiff at any time within 60 days to cross-examine said Rohrbaugh, upon reasonable notice to him and to May Smith and James L. Smith.

William Post tendered his answer to the amended bill, setting up his deed of trust made by May Smith and her husband, dated the 3d day of November, 1896, to G. M. Fleming, trustee, conveying two parcels of real estate in the town of Buckhannon—the one on Main street, known as the "Blair Lot," and the other situate on Locust street, the same conveyed by John L. Smith and wife by deed dated the 15th of September, 1876, to secure the payment of a loan of \$330—and averring that his said deed of trust was an abiding lien upon said properties, and that the \$330 was for money loaned in good faith to said May Smith, and that he was entitled to be paid in full out of the proceeds of the sale of said properties.

Depositions were taken and filed in the cause, and on the 15th of June, 1900, "this cause came on this day to be heard upon the original bill and exhibits herewith filed October rules, 1895, taken for confessed against all of the defendants, process duly executed

upon all of the defendants, proceedings at rules regularly had and matured, upon the separate answer thereto of Floyd G. Smith, May Smith, James L. Smith, and the answer of John L. Smith, praying for the enforcement of his vendor's lien for an annuity of \$25 upon the Locust street house and lot in Buckhannon, conveyed to May Smith September 15, 1876, and general replication to each of said answers, and upon all former orders and decrees thereon, upon the amended bill filed therein at November rules, 1897, exhibits therewith, process thereon duly executed upon all of the defendants, proceedings at rules regularly had and matured thereon, the amended bill taken for confessed against all of the defendants, to wit, John L. Smith, James L. Smith, Floyd G. Smith, May Smith, Wm. Post, and Perry L. Rohrbaugh, upon all of the depositions taken on behalf of the plaintiff and filed herein as follows: On the 22d day of September, 1899, the 11th day of October, 1897, and on the 1st day of September, 1899, upon the depositions taken on behalf of the defendants and filed herein on the 4th day of August, 1897, and the exceptions thereto of the plaintiff indorsed on the 3d day of October, 1898, upon page 88 thereof, as to the deposition of O. L. Rohrbaugh, upon the depositions of the defendants filed October 1, 1896, and the deposition and exhibits with the deposition of O. L. Rohrbaugh filed herein September 26, 1899, and the six exceptions to that deposition indorsed thereon by the plaintiff October 3, 1899, upon the consent order entered in term on the 5th day of October, 1898, submitting this cause, and closing the pleadings and proofs, upon the answer of O. L. Rohrbaugh, James L. Smith, and May Smith, all in the same handwriting, and upon the demurrer to the amended bill by James L. Smith and May Smith, in the same handwriting, tendered in open court on the 17th day of February, 1899, after the adjournment of said October term, 1898, and after the said consent order had been entered, and upon the exception of the plaintiff indorsed upon each of said answers, and to the said demurrer to the amended bill, and upon the order of the court sustaining the exception thereto, except as to the answer of O. L. Rohrbaugh, as to which the court overruled the exception and expunging the same and said several answers, except that of O. L. Rohrbaugh, from the record, upon the two 'Pierce memorandum books,' filed with the deposition of May Smith, and indorsed in 'red ink,' by the notary public, 'May Smith, Memorandum No. 1,' and 'May Smith, Memorandum No. 2,' respectively, and upon the bank book and all of the bank checks filed with the deposition of May Smith and James L. Smith, and upon all former orders and decrees herein, upon the answer of Wm. Post this day filed herein, and general replication, upon the special replication thereto tendered by May Smith, and upon motion of plaintiff, and upon his objection thereto rejected by the

court, and upon the argument of counsel.' And after decreeing the judgment of plaintiff against the defendants James L. Smith and Floyd G. Smith, including interest amounting to \$4,026.35, on the 14th day of June, and costs, the court further decreed as follows: "And the court, now proceeding to pass upon the other questions arising upon the pleadings and proofs in the cause, is of opinion and doth adjudge that May Smith has shown herself entitled to the lot conveyed to her by Leonard Lance by deed dated the 7th day of August, 1892, and to two lots conveyed to her by Joseph C. Smith by deed dated the 7th day of April, 1892, being lots 58 and 60 in North Buckhannon, acquit of any liability to the plaintiff, and same are accordingly adjudged to be free from all liability to him. And the court is of opinion, and doth accordingly adjudge, order, and decree, that the lots and land hereinafter mentioned are liable to be charged, in the hands of May Smith, with the debts herein decreed to the plaintiff, who hath acquired a lien thereon for the amount of his debt herein decreed as of the 11th day of September, 1895, by the institution of this suit, and the manner hereinafter set forth—that is to say, that the lot conveyed to May Smith by Lulu M. Williams and her husband, of the 21st day of February, 1894, being lot 31 in the town of Hampton, and the lot conveyed by Joseph C. Smith to May Smith on the 28th day of July, 1891, being lot No. 44 in North Buckhannon, on Cleveland avenue, and the Post lot on Main street in the town of Buckhannon, being the lot conveyed to May Smith by William Post by deed dated the 27th day of January, 1893, the Post lot being first subject to a vendor's lien thereon, which the court finds to exist to, and decreed to be due, O. L. Rohrbaugh, assignee of Perry L. Rohrbaugh, who was the assignee of Wm. Post, for one of the original purchase-money notes, of five hundred dollars, which note is dated the 27th day of January, 1893, and payable in two years thereafter, with interest from its date, now aggregating the sum of \$721.25; and the court doth adjudge all the other purchase money upon said lot to be paid out 'of' the lien therefor discharged. And the court doth further adjudge, order, and decree that the Locust street house and lot conveyed as aforesaid on the 15th day of September, 1876, to May Smith by John L. Smith, is liable to be charged in her hands, for the relief of the plaintiff, with the improvements thereon made by James L. Smith, to the extent of one hundred dollars, with interest thereon from the 11th day of September, 1895, subject, however, to a prior vendor's lien now fixed by the court, and to be paid to John L. Smith out of the proceeds of the sale thereof, for \$25 a year, now aggregating \$971.70, with interest thereon from this date, and to continue for the period of his natural life, beginning next on the 15th day of September, 1900, and accruing annually thereafter, and

the court doth adjudge all the other purchase money thereon to be paid. And the court doth further adjudge that the said Blair lot, in the hands of May Smith, is liable to be charged in favor of the plaintiff to the extent of \$600, with interest thereon from the filing of the amended bill on the 1st day of November, 1897, for improvements thereon made by James L. Smith; but the said sum of \$600, with interest so charged upon the said Blair lot, is charged by the court to be liable for the satisfaction of the residue unpaid to Wm. Post under his deed of trust thereon, which the court finds to be \$460.20, with interest thereon from this date." And providing that, in default of payment by said Floyd G. Smith and James L. Smith, the said properties should be sold by a commissioner then appointed for that purpose. From which decree the plaintiff appealed, and assigned as errors, in decreeing that the lot purchased by May Smith from Leonard Lance, and the two lots purchased by her from Joseph C. Smith, were not liable to be charged with the claim of plaintiff; in that it decreed to plaintiff no more than \$100 as a charge upon the Locust street house and lot; to make a charge of \$100 in favor of plaintiff upon the Locust street house and lot subject to the vendor's lien thereon in favor of John L. Smith; to permit the \$600 charged upon the improvements placed upon the Blair lot in favor of plaintiff to be diminished to the extent of \$460.20, in favor of Post; to decree William Post said last amount out of the improvements on the Blair lots, when he had both the improvements and the fee in the Blair lot and also the fee in the Locust street house and lot bound by his deed, while the plaintiff had only the improvements upon the Blair lot out of which to seek satisfaction for his claim; to decree Post his said claim as a charge upon the Blair lot, because he was a pendente lite purchaser, having obtained his deed of trust more than a year after the filing of plaintiff's bill; to charge the Post lot on Main street with a vendor's lien in favor of O. L. Rohrbach for a sum of \$721.24; to hold that a vendor's lien existed upon the Post lot for \$721.24 after the bill charging the lien to be discharged, and the bill stood taken for confessed; to permit O. L. Rohrbach to file an answer in the cause after a consent decree had been entered which closed the pleading and proofs, and submitted the cause for final adjudication; not to sustain the exceptions indorsed upon the answer of O. L. Rohrbach; to permit any pleading or demurrer after the consent order which closed the pleadings and proofs and submitted the cause for final adjudication; to decree any purchase money on the Locust street house and lot in favor of John L. Smith, without decreeing that petitioner was entitled to be substituted to the \$500 lien and purchase money paid by James L. Smith.

The defendants filed cross-assignments of error as follows: The court erred in over-

ruling their demurrer to the amended bill; in sustaining appellant's exceptions to the several answers of May Smith and James L. Smith to the amended bills; in decreeing to appellant \$100 as a charge upon the Locust street house and lot; in making the Post house and lot on Main street liable to appellant's debt; in making the Blair house and lot liable, to the extent of \$600 to the appellant's debt, or any part of it; in making the lot in Hampton conveyed to May Smith by Lulu Williams liable to appellant's debt; in making lot No. 44 on Cleveland avenue in North Buckhannon liable to appellant's debts; in taking the amended bill for confessed against them.

It is insisted by counsel for appellant that the whole controversy in this cause depends "and must hinge upon the consent decree which was entered in the cause by consent of all the parties, submitting the cause and closing the pleadings and proofs upon the amended bill, which then stood taken for confessed against every single defendant thereto." At the time of the entering of the consent decree, the only parties defendant who had appeared in the cause were James L. Smith, May Smith, Floyd G. Smith, and John L. Smith, who had appeared and filed their several answers to the original bill. The consent order, which the record shows was entered on the 5th day of March, 1898, shows that it was entered by consent of all the parties represented by counsel. This order is entered in the record under a proper heading, showing that it was entered in open court, while another similar order in every other respect, but omitting the words "represented by counsel," is copied into the record, but nothing to show that it was entered in the order book.

It is well settled, as to the effect of a consent decree or order, as said in *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201, 212, 11 S. E. 954, 958, "as such a decree is not the judgment of the court upon the merits of the case, but the act of the parties to the suit, it is obvious that it cannot be modified, set aside, or annulled by any order in the cause made by the court below without the consent of all the parties to the cause, unless set aside during the same term of the court, which would leave matters in the same condition as if it had never been entered. Nor can it be appealed from, nor modified by this court, unless, perhaps, it should be so entirely foreign to the matters in controversy in the cause that for this or some other reason the court below had no jurisdiction or authority to enter any such decree by consent or otherwise." *Manion v. Fahy*, 11 W. Va. 482; *Rose & Co. v. Brown*, 17 W. Va. 649; *Seiler v. Union Manufacturing Co.*, 50 W. Va. 208, 40 S. E. 547; 2 Beach, Mod. Eq. Pr. § 785. That all the parties who had entered appearance prior to the entering of said order were bound thereby, there can be no question. The court afterwards permitted

the filing of the demurrer to the amended bill by May Smith and James L. Smith, and the answers of the same defendants and O. L. Rohrbaugh to the amended bill, which demurrer and answers were excepted to, which exceptions were sustained as to the demurrer and answers of James L. Smith and May Smith, but overruled as to the answer of O. L. Rohrbaugh. The order qualified the consent to the defendants represented by counsel. Neither O. L. Rohrbaugh nor William Post had entered an appearance up to that time. At the final hearing on the 15th day of June, 1900, defendant Post filed his answer, without exception or objection, and to which the plaintiff replied generally, from which it would appear that it was not then even claimed that Post was bound by the order. A consent decree can only bind the consenting parties. In the answer of William Post, he sets up his trust lien upon the Blair lot on Main street, and upon the Locust street property, securing to him the payment of \$330 loaned to May Smith November 3, 1896—a year after the institution of this suit. It is insisted by appellant that Post, in taking said trust deed, was a pendente lite purchaser, and chargeable with notice of all the facts which the record of this suit discloses. It is true, William Post was a party to the original bill, but the only allegation therein against him was that all the purchase money due him on the lot had been paid. The bill showed on its face that the plaintiff had no claim as against the Blair lot, because it was conveyed to May Smith some seven years prior to the time plaintiff's cause of action accrued against James L. Smith and Floyd G. Smith.

The case of plaintiff failed as to the said Blair lot, and the improvements made thereon were only attacked by the amended bill which was filed after the execution of the deed of trust to Post. In order to affect the rights of Post, as a pendente lite purchaser, as to improvements made on the Blair lot, the deed of trust must have been executed subsequent to the filing of the amended bill attacking said improvements. *Woods v. Douglass* (decided at this term) 44 S. E. 234. Post has a valid lien upon the property conveyed by the trust deed, and prior to the lien of plaintiff; but why the amount of the Post debt should be deducted from the \$600 charged in favor of plaintiff upon the improvements upon the Blair lot is hard to understand, or why it should be paid out of that particular part of the property. The doctrine of marshaling assets does not apply here. There are no two funds or two properties involved, where one creditor has two funds, and another but one for security. The Blair lot and the improvements thereon constitute one property, and Post's trust is a lien upon the whole, and prior to plaintiff's charge upon the improvements, but amply sufficient to pay both claims; that is, Post's claim in full, and the \$600—only, in case this one property

should prove insufficient to pay both, then Post could be required to go upon the Locust street lot for any residue. But it is contended, on the other hand, I suppose because it is shown by the deposition of William Post that the money he loaned May Smith went into the improvements on the Blair lot, that the improvements are relieved from plaintiff's claim to that extent; but this cannot avail her under the pleadings, because it is alleged in the amended bill that the improvements were erected on said Blair lot, at a cost and value of not less than \$600, "by James L. Smith, out of his own substance and by his own direction, on the lot of his wife, May Smith, with intent to hinder and delay plaintiff in the collection of his debt, of which May Smith has had notice," which, under the consent order closing the pleading and proofs, and submitting the cause, stands taken for confessed as to both James L. Smith and May Smith, as to said allegation.

The court erred in providing in the decree that the trust deed of Post should be deducted out of the \$600 allowed plaintiff as the value of said improvements.

It is claimed as error to make the charge of \$100 in favor of plaintiff upon the improvements on the Locust street house and lot subject to the vendor's lien thereon in favor of John L. Smith. John L. Smith conveyed to May Smith the Locust street property, reserving his vendor's lien thereon to secure the payment of an annuity of \$25. This annuity had accumulated until at the date of the decree it amounted to \$971.70, which was a valid lien upon said property, and superior to all other liens. Of course, any improvements that were placed upon the property became liable to said lien, and hence his security was enhanced to the extent of the value thereof, and the appellant raises the same question here as in relation to the Post deed of trust on the Blair property. He also raises the same question in relation to the vendor's lien assigned by Post to C. P. Rohrbaugh, and by C. P. Rohrbaugh to O. L. Rohrbaugh. The latter furnished the money to his father to pay the last purchase note from William Post, which, with interest, amounted to \$560. C. P. Rohrbaugh took an assignment from Post of the note to himself, and afterwards assigned the same to O. L. Rohrbaugh, in whose favor the decree was rendered enforcing his vendor's lien to pay said note. Rohrbaugh said when his father assigned the note to him he had taken as collateral security a life policy on the life of his father for \$2,500, and it is contended by plaintiff that he should be required to get his money out of the life insurance policy, and not out of the Post property. The taking of said collateral security was a matter between the Rohrbaughs, and it does not appear that the elder Rohrbaugh ever had any interest in the note. It is shown that the younger Rohrbaugh furnished him the money to take up the note and have the same as-



signed to him, but, instead of doing so, he had the assignment made to himself. The vendor's lien was a valid, subsisting lien, and Rohrbaugh had a right to its enforcement; and there is no reason given why the elder Rohrbaugh should be subject to any liability for the note, and it does not appear why he should have given him any collateral security therefor.

It is contended by appellant that it was error to permit O. L. Rohrbaugh to file his answer after the consent decree was entered, and not to sustain the exceptions indorsed upon the answer. These assignments have been sufficiently answered in discussing the said consent decree. Rohrbaugh had put in no appearance prior to the making of his answer, and was not bound by the consent decree. Counsel for appellant contends that, because the answer of O. L. Rohrbaugh is in the same handwriting or by the same counsel as are the answers of defendants James L. Smith and May Smith, he must have been represented by counsel at the time the consent order was made. This by no means follows. His employment of counsel must date from the time he verified his answer, and his appearance in the cause from its filing.

It is also said that it was error to decree in favor of Rohrbaugh as assignee of C. P. Rohrbaugh, when the amended bill stood taken for confessed against C. P. Rohrbaugh. The answer of O. L. Rohrbaugh was sufficient upon which to establish his claim, without reference to the status of the elder Rohrbaugh, who really had no interest in the matter, and never had any.

Exception is taken by appellant to the deposition of O. L. Rohrbaugh, because unreasonably protracted and delayed by many continuances thereof from day to day. Plaintiff had due notice of the time and place of beginning the taking thereof, yet he entirely ignored the matter, and entered no appearance on the day set for the taking, nor at any other time; and the nonappearance of the witness is reasonably and sufficiently explained in his deposition. The plaintiff was not prejudiced by the taking of the deposition at the time it was taken, any more than he would have been if it had been taken on the day fixed in the notice for the taking.

It is insisted by appellant that the court erred in decreeing any purchase money on the Locust street house and lot in favor of John L. Smith, without decreeing that petitioner was entitled to be substituted to the \$500 lien for purchase money paid by James L. Smith. It appears that a lien was reserved for the payment of five notes, of \$100 each, to be paid in saddles. It further appears that four of said notes were paid as they came due by James L. Smith, and that the last of said notes was paid a year or so before the difficulty between James L. Smith and F. G. Smith with plaintiff, Mylius, which occurred on the 10th of February, 1883, out of which plaintiff's cause of action arose.

It appears from the original bill that plaintiff's action of trespass against the Smiths was instituted on the 15th of February, 1883, and the last note fell due September 15, 1881, so that all of said notes must have been paid some time prior to the time when plaintiff's cause of action arose. The lien reserved by John L. Smith to secure the annuity of \$25 is superior to all other liens upon the Locust street property.

The assignment of appellant that the court erred in decreeing no more than \$100 as a charge upon the Locust street property is not well taken, because that is as much as is proven to be the value of the improvements placed upon it by James L. Smith after plaintiff had a cause of action against him.

As to the cross-assignments of error, the first, second, and third go to the action of the court in overruling the demurrer of the defendants James L. Smith and May Smith, and in sustaining appellant's exception to the answer of said May Smith and James L. Smith to the amended bill; and the tenth, in taking the amended bill for confessed. These parties were both bound by the consent order entered closing the pleading and proofs, and submitting the cause. The fourth assignment goes to the \$100 decreed in favor of appellant as a charge upon the Locust street house and lot; and the fifth, sixth, seventh, and eighth go to the decree affecting the Post house and lot, on Main street, with \$600 improvements on the Blair lot and the other lots mentioned as being liable to appellant's debt. As to the Blair lot, that has been disposed of under the assignment of error thereon by appellant.

Quite a mass of testimony was taken in the case, and it appears that, up to the time of the difficulty between the plaintiff and the defendants Floyd G. and James L. Smith, said James L. Smith was carrying on a profitable business in the town of Buckhannon, after which difficulty he became very suddenly insolvent, and his wife, who had never engaged in any business before, and was shown to have had but little property, as suddenly began to carry on the same business that James L. Smith had been carrying on; he conducting the same in her name. It is shown that she borrowed considerable sums of money from different parties at various times, and that there were paid to her sums for rents and board, a large part of which rents were paid to her by her husband, James L. Smith; and it is shown by her own testimony that out of the rents paid to her by her husband she paid on some of the lots purchased, but it is not clearly and definitely shown that the properties which were made liable to the plaintiff's debts by the decree were paid for by her out of her own funds, derived from others than her husband.

Upon a careful inspection of all the evidence, it appears that the decree of the circuit court is fully sustained in all respects,

except where it makes the \$600 allowed to plaintiff as a charge upon the improvements on the Blair lot subject to be reduced by the sum of \$460.20, with interest, to be paid to Wm. Post, in which respect the decree is modified by requiring the whole of said \$600, with its interest, to be charged against said improvements in favor of plaintiff; and the whole decree, with such modification, is affirmed.

(132 N. C. 721)

**LYMAN v. SOUTHERN RY. CO.**

(Supreme Court of North Carolina. June 2, 1903.)

**WAREHOUSEMEN — LOSS OF GOODS — FIRE — REASONABLE CARE — NEGLIGENCE — PRESUMPTION — EVIDENCE — RES GESTÆ — DECLARATIONS OF AGENT.**

1. In an action against a warehouseman for loss of goods stored, by the destruction of the warehouse by fire which did not originate in the warehouse, evidence of a witness, who arrived some 15 or 20 minutes after the fire had started, concerning what certain other persons, unknown to witness, stated concerning the fire in witness' presence, was inadmissible as *res gestæ*.

2. Where a fire did not originate in a warehouse, a question asked of a witness as to how long, judging from the condition of the warehouse, the fire had been burning when the fire company got there, was incompetent.

3. In an action against a warehouseman for the loss of goods by the burning of a warehouse, a declaration of defendant's agent made a few days after the fire was inadmissible.

4. In an action against a warehouseman for loss of goods, sustained by the burning of the warehouse, the fact that the goods were destroyed by fire raised no presumption of negligence on the part of the warehouseman.

5. In an action against a warehouseman for loss of goods, sustained by the burning of a warehouse, evidence held insufficient to show that defendant failed to exercise ordinary care to save the warehouse and the goods stored therein from destruction.

Douglas, J., dissenting.

Appeal from Superior Court, Buncombe County; M. H. Justice, Judge.

Action by T. B. Lyman against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

F. W. Thomas and Luther & Wells, for appellant. Tucker & Murphy and A. B. Andrews, Jr., for appellee.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of the value of certain personal property in the warehouse of the defendant at Asheville, N. C., destroyed by fire on October 27, 1894. "The plaintiff did not contend that the defendant was liable as a common carrier, but sought to hold it liable as warehouseman." The material facts proved by the plaintiff, and, for the purpose of the decision of the case, taken to be true, are: The plaintiff delivered to the defendant at Raleigh, N. C., on October 12,

1894, the property destroyed as above stated, for shipment to Asheville, N. C.; being a marble bust of the plaintiff's father, of the value of \$400, a pedestal for the bust, a table, and an ebony chair. The goods arrived safely at Asheville, and were kept in the defendant's warehouse, with the understanding that the plaintiff would pay the company for storing them for him. When he applied for the property, he was told by the defendant's agent that it had been destroyed by the fire which burned the warehouse on the morning of October 27, 1894. The plaintiff showed by several witnesses that they were members of the fire company, and when they reached the scene of the fire the north end of the warehouse and several cars near the warehouse were burning. The defendant's agent cautioned the firemen to be careful, saying that there were explosives. Did not say where they were. Witnesses heard two or three small explosions, but did not know where they were. The cars were burning 25 or 30 yards from the depot. Heard an explosion outside. The firemen put two streams of water on the fire. There was a strong wind blowing up the river. The fire company got to the fire 15 or 20 minutes after the alarm was sounded. Fire spread to the cars on the track. There were explosions 75 feet from where they were at work. The nearest car was 50 feet from the depot. The fire company was efficient. There was a hydrant within 200 feet of the depot. The warehouse was nearly burned up before the explosion. It is about one mile from the fire department to the depot. The fire had not reached the warehouse when the fire company got there. Fire in cars at the time, and a strong wind blowing towards the warehouse. There was an explosion in one car after the fire company got there, but it did not deter the firemen. The railroad company had no apparatus about its warehouse for extinguishing fire or turning water on it. The warehouse could have been saved if it had not been for the wind. Fire was first discovered in the building near the warehouse, connected with the warehouse by a shed. The defendant had some barrels in the warehouse, which were supposed to be kept full of water, with buckets connected. There was no evidence that water was in these barrels at the time, nor hose and other apparatus usually kept in hotels and other large buildings. There were water connections close to the warehouse. The defendant demurred to the evidence, and moved to nonsuit the plaintiff. The motion was allowed, and the plaintiff excepted and appealed.

The witness Gennett said that he heard some men talking about the fire at the time, but did not know or remember who they were. The plaintiff asked the witness to state what these men said about the fire and its origin. The defendant objected. Objection sustained, and plaintiff excepted. The question was clearly incompetent. The fire

¶ 3. See Evidence, vol. 20, Cent. Dig. §§ 367, 910, 912, 933.

had been burning some 15 or 20 minutes when the witness got there. Any statement made after that interval by persons unknown to the witness could not be a part of the *res gestæ*, and was not otherwise competent. The exception cannot be sustained.

Jesse Patton was asked, "How long, judging from the condition of the warehouse when the fire company got there, had the fire been burning?" Upon the defendant's objection, the question was ruled out, and the plaintiff excepted. The question was not competent. The fire did not originate in the warehouse, and its condition at the time the witness reached there was no evidence as to the time the fire begun. The witness proceeded without objection to describe the condition of the warehouse when he got there. The ruling of his honor was correct.

The plaintiff proposed to ask the same witness in regard to declarations of Clark, the defendant's agent, made a few days after the fire. This was, upon objection, excluded. It is well settled that the declarations of an agent made after the transaction are not admissible. *Southerland v. R. Co.*, 108 N. C. 105, 11 S. E. 189.

It is conceded that the defendant held the goods destroyed as warehouseman. Ever since the case of *Coggs v. Bernard*, *Ld. Raym.* 909, *Smith's L. C.* 354, which Mr. Smith says "is one of the most celebrated cases ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well-ordered exposition of the English law of bailments," the measure of duty owing by bailees in regard to the several kinds of bailment has been settled. The only duty devolving upon the courts has been to apply the principles announced by Lord Holt to the facts in the cases as they arise. "As to the responsibility of the present bailee [warehouseman], ordinary or average diligence is required. This is such care and diligence as prudent persons of the same class are wont to exercise towards such property, or in the management of their own property under like circumstances. For failure to exercise this degree of care and diligence, the bailee must respond." *Smith, L. C.* vol. 1 (9th Ed.) 414; *Jones on Bailments*, 97; *Hale on Bailments & Carriers*, 238. "The burden of proof is on the plaintiff to show negligence." *Id.* 239. The fact that the goods are destroyed by fire raises no presumption of negligence on the part of the bailee. This court, in *Neal v. Railroad*, 53 N. C. 482, by Manly, J., says, "Ordinary care is what is required, and this is defined by a recent elementary treatise [*Story on Bailments*, § 41] to be 'that which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" *Turrentine v. Railroad*, 106 N. C. 375, 6 S. E. 116, 6 Am. St. Rep. 602; *Daniel v. Railroad*, 117 N. C. 603, 23 S. E. 327.

Applying these principles to the facts in

this case, we concur in the ruling of his honor. The only suggestion of negligence is that there was in the warehouse, or in some cars near by, some explosives, which rendered it dangerous for the firemen to go into or near enough to the warehouse to stop the fire. It does not appear what the explosives were, where they were, or how long they had been in or near the warehouse. One of the plaintiff's witnesses says that they would have saved the warehouse but for the strong wind; another, that the "fire company was efficient." There is no testimony tending to show that the explosives caused the fire. The nearest approach to evidence as to the location of the explosives was that there was an "explosion in one car soon after the fire company got there, but it did not deter the firemen." There was a hydrant within 200 feet of the fire. Another witness said there were two hydrants near the warehouse. The firemen put two streams of water on the fire.

Without pursuing the discussion, we are of the opinion that the judgment was correct, and must be affirmed.

DOUGLAS, J., dissents.

(132 N. C. 714)

#### FLEMING v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 26, 1903.)

#### SERVANT—INJURIES—MISLEADING INSTRUCTIONS.

1. In an action by an employé against a railroad for injuries due to a defective coupler, defendant introduced in evidence a writing marked "Exhibit A," being a release of all right of action on account of the injury; also a contract, marked "Exhibit B," and signed by plaintiff on entering defendant's service, wherein he agreed to obey its rules in respect to the coupling of cars, etc., and to assume all risks. Plaintiff replied that the release was obtained by fraud. On the original record there appeared an instruction that, if the jury found that plaintiff signed the paper "B"; and, further, that defendant's conductor ordered him to make the coupling, then the conductor had power to waive the said contract (here was inserted: "The above instruction was given and defendant excepted"); and that the Legislature had enacted that any contract made by an employé to waive the benefit of an action he might have against the company should be null and void (here was repeated: "The above instruction was given, and defendant excepted"). Other instructions, entirely distinct and separate from the above, had been given in regard to the release "A," pleaded by defendant. The petition to rehear stated that the instruction above set out was single and connected, and related to but one subject. *Held* that, when so read, the instruction, being expressly directed to "B," could not have reasonably been understood to refer to the release, "A," and was not misleading.

Montgomery, J., dissenting.

On petition to rehear. Granted.

For former opinion, see 42 S. E. 905.

L. C. Caldwell, for appellant. G. B. Nicholson, for appellee.

CONNOR, J. This was a petition to rehear. But one question is presented by the petition. In the trial below, the plaintiff having alleged that he was injured by reason of the use of a defective coupler on the defendant's train, the defendant, among other defenses, set up and introduced in evidence a paper writing marked "Exhibit A," being a release of all actions and right of actions which accrued to him by reason of the alleged injury. The plaintiff, replying by way of avoidance of the effect of this release, alleged that it had been obtained by fraud and deceit, and was therefore void. The defendant also introduced a paper writing marked "Exhibit B," being a contract signed by the plaintiff upon his entrance into the service of the defendant, by which he bound himself to observe the rules of the company in respect to the coupling of the cars, etc., and contracted to assume all risks incident to his employment, etc. Appropriate issues were submitted to the jury in regard to the alleged negligence, contributory negligence, execution of the release, and its validity. The issues were found in favor of the plaintiff, and on appeal to this court the ruling of the court below on the various matters in controversy was affirmed, except his honor's charge in response to certain special instructions hereinafter set out, asked by the plaintiff.

An examination of the original record shows instructions asked numbered from 1 to 7, inclusive. After instruction marked "7" is the following: "(6) A rule of the railroad company, agreed to by the plaintiff, may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order. If you find by the greater weight of evidence in this case that the plaintiff signed the paper B, and agreed not to couple cars except with a stick, if you further find that the conductor on the plaintiff's train ordered him to make the coupling, you are instructed that the conductor had the power to waive or abrogate the said contract. (The above instruction was given, and the defendant excepted.) The Legislature has enacted that any contract or agreement, express or implied, made by any employé of said company to waive the benefit of an action which he may have against the company for injuries, shall be null and void. 'And it seems,' says the Supreme Court, 'that the Legislature intended to put an end to all such intentions [contentions] by saying in the first section of the act [Priv. Laws 1897, p. 83, c. 56] that he shall have a right of action for injury caused by such defective machinery, and providing in the second section that he cannot waive that right by contract express or implied.' (The above instruction was given, and the defendant excepted.)" The court in the opinion 131 N. C. 485, 42 S. E. 905, treated this instruction as two separate and distinct propositions. We can readily understand how this impression was made

upon the court by the fact that his honor separated the prayer by inserting about the center the words, "The above instruction given, and the defendant excepted," and, at the end of the prayer, repeated this language. The petition to rehear states that the prayer was single and connected, and that it was a mistake to treat it as two prayers for separate instructions. Upon a careful examination of the record, we concur with the petitioner. We think that it was, as given, but one instruction, and related to but one subject. The plaintiff's counsel, by an oversight, numbered the prayer 6, when it should have been numbered 8. The court, in its opinion, speaks of it as "8 and 9." His honor had in a series of instructions directed the attention of the jury to the controversy in regard to the execution of the release and the allegation of fraud therein made by the plaintiff. Exhibit B related to the subject of rules of the company, the contract of the plaintiff to obey them, and the assumption of risk, etc. It was entirely separate and distinct from the instructions given in regard to Exhibit A, the release. The court was of the opinion that "the language was too broad, and was calculated (not to say intended) to and may have misled the jury, and directed their minds to the release and discharge set up by the defendant in its answer." The instruction read as relating to a single subject, we think, upon a careful consideration, being expressly directed to "B," and it could not have reasonably been understood to refer to the release "A." The language, "If you find by the greater weight of evidence in this case that the plaintiff signed the paper B, and agreed not to couple the cars except with a stick," etc., and the express and direct reference to the act of the Legislature in regard to such contracts, which the jury must have understood had no reference whatever to the release, directed their attention to the contract called "Exhibit B," and not to the release called "Exhibit A." His honor, with his accustomed care, instructed the jury upon every issue and phase of the testimony. The entire charge, when considered as a whole, could not have misled the jury in regard to Exhibits A and B. The court, in concluding its opinion, said: "As we have said, we do not discuss in this opinion the matters relating to the release and discharge and the alleged fraudulent character of the paper writing."

We think that the petition should be allowed, for the reasons given, but, as the court ordered a new trial without passing upon several exceptions of the defendant, we have concluded that upon the questions raised by these exceptions not passed upon the defendant is entitled to have the ruling of this court. As the personnel of the court has been partially changed since the argument and decision, we direct a reargument of the exceptions not passed upon. The rule of the court in regard to rehearings requires

a petition to rehear to be filed by either of the parties desiring such rehearing, but the peculiar status of this case entitles the defendant to be heard by the court as now constituted. The petition is allowed, and the cause is set down for argument upon such exceptions as were not passed upon at the regular call of the docket at the next term of this court. The clerk will direct a copy of this order to counsel for plaintiff and defendant. The petitioner will recover the costs.

Petition allowed.

MONTGOMERY, J. (dissenting). I find myself embarrassed in expressing my ideas in this matter for the reason that in the opinion of the court all of the members except myself concur in a view of a part of the record and of the treatment of it by the plaintiff's counsel which I think is not the correct view, and one which I cannot adopt. The case on appeal and the brief of the plaintiff's attorneys are now before me on my table. The plaintiff requested the court to give a number of prayers for special instructions to the jury. Down to and including the seventh, there is no confusion. The next one of the prayers was numbered "sixth," and was in these words: "A rule of the railroad company agreed to by the plaintiff may be waived or abrogated for the company by the conductor making an order contrary to such rule when it was the duty of the plaintiff to obey such order. If you find by the greater weight of evidence in this case that the plaintiff signed the paper B, and agreed not to couple cars except with a stick, if you find further that the conductor on plaintiff's train ordered him to make the coupling, you are instructed that the conductor had the power to waive or abrogate the said contract." Then follow these words in parentheses: "The above instruction was given, and defendant excepted." That instruction, though numbered "sixth," as we have said, in the case made out by his honor, followed number 7, and ought to have been numbered 8 in the original record. The plaintiff's counsel did not make the mistake in numbering the special prayers for instruction asked by the plaintiff. They saw the mistake made by the judge in making up the case in numbering the plaintiff's special prayers, and treated the second one, numbered "sixth," as the eighth; for in their brief they say: "In support of the eighth instruction, and to show that it was proper, and that the exception to it [by the defendant] is without foundation, we invite the attention of the court to the following authorities: *Mason v. Railroad*, 111 N. C. 494 [16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814]; *Railroad v. Ross*, 112 U. S. 377 [5 Sup. Ct. 184, 28 L. Ed. 787]; *Chambers v. Railroad*, 91 N. C. 475." And those authorities cited show that the instruction which I quoted above was referred to in what the plaintiff's attorneys in their brief called the

"eighth" instruction, but which was numbered "sixth" by his honor in making up the case. In the case on appeal the next of the plaintiff's special prayers is in these words: "The Legislature has enacted that any contract or agreement, express or implied, made by any employé of said company to waive the benefit of an action which he may have against the company for injuries, shall be null and void, 'and it seems,' says the Supreme Court, 'that the Legislature intended to put an end to such intentions [contentions] by saying in the first section of the act that he shall have a right of action for injuries caused by such defective machinery, and providing in the second section that he cannot waive this right by contract expressed or implied.'" At the end of that request for instructions these words appear in parentheses: "The above instruction was given, and defendant excepted." The plaintiff's attorneys, in their brief, treat that as the ninth special prayer of the plaintiff in these words: "The ninth instruction is a summary of the fellow-servant act and of the decision of this court in *Coley's Case*, 128 N. C. [534, 39 S. E. 43, 57 L. R. A. 817], and was entirely proper, and his honor committed no error in giving it." It can be seen by an inspection of the record now before me that his honor below, and not the plaintiff's counsel, in making up the case, numbered the prayer following 7 "sixth." His honor made the error, and should have numbered it 8, and the next succeeding one 9. The plaintiff's counsel, in their brief, as we have said, saw the judge's error, and in their brief treated these two exceptions as 8 and 9. They were not one instruction, but were clearly two, and about two entirely different matters, involving different questions of law. The eighth concerned the power of a conductor to waive a rule of the company when it was the duty of the plaintiff to obey the order, as in *Mason's Case*, referred to in the brief of the plaintiff's counsel; and the ninth concerned the effect of the fellow-servant law, passed in 1897 (*Priv. Laws* 1897, p. 83, c. 56), five years after the decision in *Mason's Case*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814. My views on the merits of the case are to be found in volume 131, p. 476, of our Reports, and 42 S. E. 905, embodied in the opinion written by myself for a unanimous court.

I think the petition should be dismissed.

(123 N. C. 1094)

STATE v. HALL et al.

(Supreme Court of North Carolina. June 2, 1903.)

HOMICIDE—EVIDENCE—INTENT—TESTIMONY BY DEFENDANTS—IMPEACHMENT—CREDIBILITY—TRIAL—INSTRUCTIONS—OBJECTIONS—GENERALITY—ARGUMENT OF COUNSEL.

1. In a prosecution for homicide, where the court in instructing the jury made the guilt of defendants in part, at least, to depend on their purpose in going to the house of deceased, and

where the state introduced evidence of an unlawful intent, it was error to exclude testimony of defendant tending to disprove such intent.

2. The credibility of testimony is solely for the consideration of the jury.

3. In a prosecution for homicide, a question asked by defendant's counsel of a witness for the state, "A good many things are slipping from your memory in reference to this transaction, are they not?" was competent in impeachment.

4. In a prosecution for homicide it was error to refuse to permit defendant's counsel, in closing to the jury, to comment on the fact that the state's case rested entirely on the testimony of witnesses who had also accused other persons of the crime, and that such others were discharged, one by the coroner's jury and the other by the consent of the state to a verdict of acquittal.

5. In a prosecution for homicide, a charge that defendants would not be guilty even though engaged in an assault or some other unlawful act, if the gun was discharged by another than defendants from whom they were attempting to wrest the same, or accidentally discharged while in such other person's hands thereby killing deceased, was properly refused.

6. An error in a charge, not specifically pointed out, cannot be taken advantage of by a general objection to the entire charge or to any part of the same containing several distinct propositions, some of which are correct, at least as to one or more of defendants.

Appeal from Superior Court, Robeson County; Charles M. Cooke, Judge.

John Hall and others were convicted of manslaughter, and appeal. Reversed.

The defendants, with Peck Locklear, were indicted in the court below for the murder of Phillip Barton. At the trial, and after the evidence was concluded, the state consented to a verdict of not guilty as to Peck Locklear, the court having intimated that there was no evidence against him, and the other defendants were convicted of manslaughter. It appears from the case that on Christmas Day, 1902, the defendants John Hall, Pink Woods, and Peck Locklear went to the house of Elizabeth Barton, where Nep Barton, her son, lived. No one was there at the time but Kitty Barton and a small boy named Porter Barton. They left the house after a short stay, and the defendants John Hall and Peck Locklear returned later in the day, John Hall having with him a gun, and found Rual Barton and Nep Barton at the house. They remained at the house a short while, and then left, and late in the afternoon of the same day the defendants and Peck Locklear were again at the Barton place. While they were there, Phillip Barton was killed. There was some discrepancy in the evidence as to whether the defendant Pink Woods was with Hall and Locklear when they went to the house the second time, but, in the view we take of the case, it is immaterial whether he was with them or not. The evidence is very conflicting as to the material facts of the case, and the exceptions of the defendants, we think, can be best understood by stating the contentions of the state and defendants, there having been evidence to support each of said contentions.

The state insisted that upon the evidence the defendants John Hall and Pink Woods and Peck Locklear had gone to the Barton house twice before the homicide occurred, and that on the occasion of the second visit John Hall had an altercation with Rual and Nep Barton; that John Hall jumped into the door of the house with a gun in his hands, and said to Rual Barton, "I hear you accuse me of selling your dog, and anybody who said so is a liar;" that during this visit Rual Barton snatched the gun from the defendant John Hall, and the said defendants left the premises, threatening at the time to get a crowd, and come back and retake the gun by force. Shortly afterwards, but late in the afternoon, the defendants Hall and Woods and Peck Locklear, accompanied by Ned Chavis and Enoch Chavis and one Utley Locklear, returned, and made an assault upon Rual Barton, who was trying to drive the defendants away. In the fight which ensued the defendant Hall snatched the gun from Rual Barton, all of the defendants taking part in the fight, and, immediately upon Hall's gaining possession of the gun, he fired the same, and shot the deceased, Phillip Barton, who was standing about five or six feet behind Nep Barton and Rual Barton, and who had not engaged in the fight.

The defendants contended: That on the said day John Hall and Pink Woods and Peck Locklear, being intimate with and on friendly terms with the Barton family, visited the home of the Bartons for the purpose of paying attention to two of the Barton girls, who were granddaughters of Elizabeth Barton, and who at the time made their home with her. That just prior to their first visit the defendants Hall and Woods and Peck Locklear met Rhoda Barton near her home, and the defendant Hall made an engagement to meet her later in the day, after which they went on to the home of Elizabeth Barton, and there saw Kitty Barton alone, when the defendant Woods made an engagement to meet her later in the day. That, having been disappointed in seeing the girls in accordance with their engagements, the defendant Hall and Peck Locklear went to the home of Elizabeth Barton on the occasion of the second visit, expecting to see the girls, and find out the cause of the failure to keep the engagements, when they met Rual and Nep Barton, both of whom were drinking and boisterous. Nep Barton cursed the defendant Hall, and Rual Barton took from the defendant Hall his gun, and, rather than have any difficulty, the defendant Hall and Peck Locklear left—all this taking place prior to the visit during which the homicide occurred. That, being joined by defendant Woods, who was waiting for them, they all went home. That at the home of their father the defendants Hall and Woods met the two Chavis boys, who were their cousins, and, after having eaten dinner, were joined by them, and all started to the home of one John Archie Lock-

lear, On the way they were joined by Peck Locklear. In going to John Archie Locklear's they took the nearest road, which leads by the house of Elizabeth Barton, the road and her yard adjoining, and there being no fence between them. Just before getting to the Barton's they were met and joined by Utley Locklear, who went along with them on the way to John Archie Locklear's, and just as they approached the house of Elizabeth Barton, Rual Barton and Nep Barton, Rual armed with a gun and Nep with a knife, rushed out to meet the defendants; Philip Barton, the deceased, following them. Rual Barton, when the defendants were only a step or so from him, raised the gun, and began threatening to shoot. Nep rushed at the defendants, and Rual, telling him to get out of the way, started to shoot, when the defendants advanced upon him to prevent his shooting, and to protect themselves. Rual Barton tried to strike with the gun, and as he struck the defendant Chavis the gun fired, killing the deceased, who was at the time about five or six steps behind him. While Rual was scuffling and trying to get the gun in position to shoot, Nep Barton was using his knife, and one of the defendants (Chavis) exhibited at the trial long gashes across his back, which he claimed were made by Nep Barton during the scuffle. Nep, who was a witness for the state, denied having the knife, and all of the Bartons testified that Nep did not cut the defendant. The defendants further contended that they did not succeed in getting the gun away from Rual Barton until after it had been fired and broken while Rual was striking at the defendants with it. The gun, according to all the testimony, had but one barrel.

The state insisted that the defendants were guilty of murder in the first degree, and the defendants, on the other hand, contended that no one of them discharged the gun, but that it was discharged in the hands of Rual Barton, while he was assaulting the defendants; that the Bartons were the aggressors, and the defendants acted strictly in self-defense.

At the trial the defendants proposed to ask Peck Locklear, one of the defendants, who was introduced as a witness, what was the purpose of the defendants in going to the Barton house, which was excluded on objection by the state. They also proposed to ask a defendant's witness—Oakley McMillan—the following question: "What was said between Kitty and Nep Barton as to why the boys were there?" which was also excluded by the court. The defendants proposed to ask Rual Barton, a witness for the state, the following question: "A good many things are slipping from your memory to-day in reference to this transaction, are they not?" This was stated at the time the question was asked to be for the purpose of testing the witness' recollection, and ascertaining whether or not he claimed to recollect all about what

took place at the time the homicide occurred, and as to what took place at the coroner's inquest. The witness was the uncle of the deceased, and, according to the contention of the defendants, it was he who had the gun in his possession at the time it was discharged. The defendants further claimed, and several witnesses testified, that the witness was very much intoxicated on the day of the homicide. In addition to this, to a number of questions previously asked him, the witness had replied, "I don't recollect," "Has slipped my recollection," etc. Further, a number of witnesses testified during the trial to contradictory statements made to them by this witness, to a great many of whom both he and Nep Barton had stated that the deceased was killed by Ned Chavis with a pistol, in consequence of which it was shown that Ned Chavis was arrested first by the sheriff. It was further shown by the coroner that this witness had stated to him that the gun was not loaded when the difficulty took place; that he had taken the shell out of the gun (which was breech-loading); and it was further shown by the coroner that this witness gave to him some shells, one of which he said he had taken out of the gun just prior to the difficulty, and yet none of the shells would fit the gun.

In addressing the jury, and while discussing the evidence of the Bartons, who had been introduced as witnesses for the state, counsel for defendants used the following language: "If you convict these defendants, you must do it on the testimony of the Bartons; and these people—the Bartons—have charged two other men with being guilty, along with these defendants, of the murder of Philip Barton, namely, Utley Locklear and Peck Locklear. Utley Locklear was discharged by the coroner's jury, and the state has, by consenting to a verdict of not guilty as to Peck Locklear, admitted that the Bartons were wrong as to Peck." These remarks were not objected to by the solicitor, so far as the record shows, but the court of its own motion interrupted counsel, and refused to permit him to make this argument, and told the jury not to consider it. Defendants excepted.

The state had endeavored to impeach Utley Locklear, who was a witness for the defendants, by asking him if he had not been charged with being a party to the homicide. It was in evidence that Utley Locklear had been charged with the homicide, and was discharged after investigation by the coroner's jury; and it was also in evidence that the Bartons had made the charge against him. The Bartons were the only witnesses for the state as to the occurrence at the Barton house, except Bemus Blue, who was a member of the Barton family.

The same counsel, in addressing the jury, used this language: "The Bartons have charged Peck Locklear with being responsible for this crime. The bill against him was re-

turned by the grand jury, and the Bartons were the people who brought the charge against Peck, as well as being the main witnesses." The court again interrupted counsel, and refused to permit him to make this argument, and also instructed the jury not to consider it. Defendants excepted.

At the close of the evidence the defendants requested the court to give the following instructions, among others, to the jury: "Even though the jury shall find that the defendants were engaged in an assault, or some other unlawful act, if the jury shall find that the gun was discharged by Rual Barton, or that the gun was accidentally discharged while in the hands of Rual Barton, resulting in the death of Philip Barton, still the defendants cannot be held criminally responsible for the homicide, and in this case the defendants cannot be found guilty of either murder in the first degree or murder in the second degree or manslaughter." This instruction was refused, and the defendants excepted.

The only part of the judge's charge which it is necessary to set forth is as follows: "If you shall further find that John Hall went upon the premises of the Bartons, and that Pink Woods and the other defendants accompanied him, after he and they had been forbidden so to do, with the purpose and intent on Hall's part to kill the Bartons, or to do them or either one of them serious bodily harm, or with the purpose of forcibly taking the gun away from Rual Barton at all hazards, although it might involve the killing of, or the doing of great bodily harm to, the Bartons, or some one of them; and if the said Pink Woods knew the said purpose of John Hall, and if, with the intent to aid and abet the said John Hall in this purpose, he assaulted Rual Barton, and aided John Hall to wrench the gun from Rual Barton's hands, and that John Hall then willfully and because of such malice and in pursuance of such purpose shot Philip Barton—then Pink Woods would be guilty of murder in the second degree." To this charge the defendants excepted.

The court further instructed the jury as follows: "If you shall find that John Hall had express malice against the Bartons, and went there with the purpose of killing the Bartons, or either one of them, or doing them or either one of them serious bodily harm, or with the purpose of forcibly taking the gun away from the Bartons at all hazards, although it might involve the killing of them or some one of them, or of doing serious bodily harm to them or some one of them, and that the other defendants, Pink Woods, Ed. Chavis, and Enoch Chavis, knew of this purpose, and accompanied Hall to aid him in such purpose, and if he entered upon the premises after being forbidden so to do, and in furtherance of that purpose assaulted Rual Barton, and threw him to the ground for the purpose of wrenching the gun forcibly from him, and if, in the effort to wrench the gun

from Rual Barton's hands the gun was discharged, killing Philip Barton—then all the defendants, or such of them as you shall find knew of this purpose, and in pursuance thereof aided and abetted as stated above, would be guilty of manslaughter." Defendants excepted.

Verdict for manslaughter. Defendants appealed from the judgment pronounced.

John H. Cook, for appellants. The Attorney General, for the State.

WALKER, J. (after stating the case). We do not see why the question proposed to be put to the witness Peck Locklear was not competent, especially in view of the particular instruction given to the jury in regard to manslaughter, of which crime the defendants were convicted. The guilt of the defendants was by that charge made to depend, at least in some measure, upon their purpose in going to the house of the Bartons, for the court told the jury that if John Hall had express malice against the Bartons, and went to their house for the purpose of killing them or any one of them, or to do them or any one of them serious bodily harm, or with the purpose of forcibly taking the gun from them at all hazards or without regard to consequences, and if the jury also found that the other defendants knew of this purpose, and accompanied John Hall in order to aid and abet him in executing his unlawful design, and if, in furtherance of that design, Rual Barton was assaulted, and in the effort to wrest the gun from him it was discharged, and Philip Barton was killed, the defendants, or such of the defendants as knew of this purpose of John Hall, and were present aiding and abetting him, would be guilty of manslaughter. It appears most clearly, therefore, that the purpose of the defendants in going to the house of the Bartons was made one of the essential facts of the case to be established by the state, and, evidence having been introduced which tended to prove this fact, the defendants were entitled to be heard in contradiction of it. How could the absence of an unlawful intent or the existence of a lawful one be better shown than by the testimony of one of the parties charged with having entertained that purpose? Whether the witness should be believed is a question solely for the consideration of the jury. This court has often ruled that when a person is charged with a fraudulent intent it is competent for him to show by his own testimony that at the time of the transaction he had no such intent, and so may any person charged with an unlawful intent in a criminal case be heard by his own testimony in order to disprove or rebut the charge made against him, at least when the intent becomes essential in determining his guilt. We are not informed upon what ground or for what reason the question was objected to by the state. There may have been some good reason for the objection and the ruling, but it does not appear



in the record, by which, of course, we are bound. There is nothing, therefore, to take the ruling out of the general, if not universal, principle that both parties must always be heard, provided they offer competent and relevant testimony.

It was suggested by the Attorney General that the guilt of the defendants depended not so much upon their purpose in going to the Barton house as upon their acts and conduct after they entered upon the premises, as they were convicted of manslaughter, and not of a higher felony. If the only evidence in the case had been that of the state, there might be some force in this suggestion; but it was not by any means all the evidence, as the defendants introduced testimony tending to show that they were walking in the public road, which passed the house of the Bartons, in a peaceful manner, and for a lawful purpose, they being at that time on their way to John Archie Locklear's, and as they were passing the Barton house they were violently set upon by the Bartons, one of whom at least was armed; that the Bartons were the aggressors, and the defendants acted strictly in self-defense. But, even if the consideration of this part of the case should, as a matter of law, have been confined to what occurred at the house, it does not follow that the excluded question was incompetent, because the court did not in fact so confine and limit the inquiry, but, on the contrary, made the guilt of the defendants, as we have said, turn in part upon the intent with which they accompanied John Hall to the Barton house. But there is another reason why the evidence should have been admitted. The theory of the state was that the defendants went to the house of the Bartons to attack them, and the defendants contended that they had no such purpose, but were on their way to John Archie Locklear's, when they were violently assaulted by the Bartons, and that all they did at the house was strictly in self-defense; and, as we have said, whether the contention of the state or that of the defendants was the right one was a matter solely for the jury to decide. The defendants were certainly entitled to show, as one of the facts tending to sustain their contention, that they went to the house for a lawful purpose; for, if they went there for an unlawful purpose, as the state insisted they did, it would tend in some degree, at least, to weaken, if it would not destroy, their plea of self-defense. It was competent also to prove the fact, as some evidence tending to show how the fight began, whether the Bartons or the defendants were the aggressors, or whether or not the defendants entered into the fight willingly. If defendants were on their way to Locklear's, and when they reached the house of the Bartons they were attacked without having done anything to bring on the fight, and they afterwards acted strictly in self-

defense, they were entitled to an acquittal. Would not the jury be more apt to conclude that a man with a hostile purpose was the aggressor in a fight than that one with a peaceful purpose was? The particular error in the ruling was that the court deprived the defendants of an opportunity to show that their purpose was a lawful one, and in charging the jury that in passing upon the guilt of the defendants they should consider and find what that purpose was, as if it bore directly upon the issue joined between the state and the defendants. The impression made on the jury by the ruling of the court upon the evidence, when considered in connection with the charge, cannot well be determined, and the prisoner may have been seriously prejudiced thereby.

The error of the court in excluding this question is sufficient to entitle the defendants to a new trial, but we deem it best, under the facts and circumstances of this case, to make some comment upon the other exceptions, as the same questions thereby presented, or at least some of them, may be raised at the next trial.

The exception to the ruling of the court in excluding the question put to the witness Owen McMillan is not very clearly stated in the record. It appears only that the defendants were not permitted to prove what was said between Kitty and Nep Barton "as to why the boys were there"; that is, at the house. It is not shown what the witness would have said in answer to the question, but we take it that he would have testified that Kitty and Nep Barton said in that conversation that they were there for some lawful purpose. It is best always, and in order to a perfect understanding of an exception based upon the rejection of evidence, that the particular nature of the evidence to be elicited should clearly appear. If we are correct in our inference as to what the witness would have said, it seems that the question was competent for the purpose of contradicting the witness Nep Barton. It could not have been competent as substantive testimony.

We can see no valid objection to the question proposed to be asked the witness Rual Barton, who testified in behalf of the state. It did not tend, perhaps, to prove very much in the case one way or the other, but from the manner in which the exception is stated in the record we have been able to discover no sufficient reason for excluding the question, as it was some evidence, though very slight, tending to impair the witness' credibility. It is competent to prove that a witness' memory has been weakened, and it can make no difference whether the impairment of memory is proved by the witness himself or by some one else, or how slight the evidence may be. It would be competent to ask a witness if he recollected all of the facts and circumstances connected with a particu-

lar transaction, or whether he had forgotten some of them, and we can perceive no substantial difference between that kind of evidence and that which was proposed to be elicited in this case.

Passing to the next exception, we have said at this term that it is the duty of the court to stop counsel when they discuss matters of which there is no evidence, or which are not proper subjects of comment; but, within the proper limits of debate, counsel should be permitted to discuss any fact of which there is evidence, and which is relevant to the issue. We are of the opinion, therefore, that the discharge of Utley Locklear, or the failure of the state to prosecute him, when he had been charged by the Bartons as being one of the guilty parties, and the other fact that the state, after a full investigation at the trial of this case, had consented to a verdict of not guilty as to Peck Locklear, though he had been similarly accused by the Bartons, were not improper subjects of comment.

The court was clearly right in refusing the defendants' prayer for instruction. It did not state a correct principle of law, and especially is it erroneous when considered with reference to the facts of the case. If the defendants went to the house of the Bartons for the purpose of recovering the gun "at all hazards," and to kill, if necessary to accomplish their purpose, they were guilty at least of manslaughter. This is the way in which the able and learned judge who presided at the trial submitted the case to the jury in his charge, and the instruction, we think, was clearly right. A case directly in point is *Reg. v. Skeed*, 4 F. & F. 931. In the case of *Reg. v. Archer*, 1 F. & F. 351, it appeared that the defendant pursued the deceased for the purpose of regaining possession of a loaded gun which the deceased had theretofore taken from the defendant's house and carried away with him, and during the struggle for the gun between the defendant and deceased it was discharged, and the deceased was killed. The court held that the defendant was guilty of manslaughter. 1 McLain's Cr. § 347. The same doctrine is laid down in *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 406. It is the unlawful purpose in the prosecution of which the homicide is committed that makes the killing manslaughter.

The defendants' exception to the charge of the court cannot be sustained. We have examined the charge very carefully, and can find no error in it; but, if there had been error it should have been specifically pointed out, and the defendants will not be allowed to take advantage of it by a general objection to the entire charge, or to any part of the charge which contains several distinct propositions, some of which are correct, or at least correct as to one or more of the defendants, although one or more of the principles laid down may be erroneous.

There must be a new trial because of the errors committed by the court in the respects pointed out. New trial.

(123 N. C. 726)

# HIGDON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. June 2, 1903.)

## TELEGRAM—DELAY IN DELIVERY—DAMAGES—PROXIMATE CAUSE—INSTRUCTIONS.

1. Where plaintiff, on receiving a delayed message announcing the death of his mother at a time when the only train by which he could have reached his mother's residence and attended the funeral was scheduled to leave immediately, telephoned to the railroad station, and, on being erroneously informed that the train was on time, made no effort to take it, which he could have done if he had been correctly informed that it was two hours and a half late, the telegraph company, in an action for negligence in delivering the message, was entitled to an instruction that, if plaintiff was misinformed as to the time when the train left, then defendant's negligence, if any, was not the proximate cause of plaintiff's injury, and no damage could be assessed on account of plaintiff's failure to reach the funeral.

Douglas, J., dissenting.

Appeal from Superior Court, Mecklenburg County; Coble, Judge.

Action by W. R. Higdon against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jones & Tillett and F. H. Busbee & Son, for appellant. Burwell & Cansler, for appellee.

MONTGOMERY, J. The telegram, in which the death of the plaintiff's mother and the time and place of her burial were announced was delivered to the plaintiff in Charlotte, N. C., at 8:30 a. m. The only train which could have taken him to the place of interment at the hour appointed left Charlotte, by schedule time, at 8:30 a. m.—the same hour of the receipt of the telegram. The plaintiff testified that the trains were frequently late, and that one could not rely on trains being on time. He further said that he asked his partner in business (Pierce) to inquire by telephone at the Southern Station, if the train to Atlanta was on time, and on being informed by his partner that he had received an answer that the train was on time he abandoned any purpose to attend the funeral. There was evidence, uncontradicted, that the train was two hours and a half late on that morning. Under all the evidence, it seems clear that it was the plaintiff's duty to have inquired as to the hours of the running of that train. He felt that it was incumbent on him to do so. He did not make inquiry himself, but got another to do so for him. The evidence does not disclose of whom the inquiry was made by Pierce, and the answer to it, if the uncontradicted evidence was to be believed, conveyed incor-

rect information. That was evidence of negligence on the part of the plaintiff's agent, and, in law, of his own. On this point the defendant asked the following instruction: "If the jury find from the evidence that the only train upon which the plaintiff could have gone to attend his mother's funeral left Charlotte more than two hours after the receipt of the telegram announcing her death, and if the jury further find that the plaintiff, in order to ascertain whether he could take the train, relied upon telephone communication, and if, by the negligence of any other person, either his partner, who telephoned, or the person to whom he telephoned, the plaintiff was misinformed as to the time when the train left, then the jury are instructed that the negligence of the defendant, if any there was, was not the proximate cause of the plaintiff's injury, and the jury, in answering the sixth issue, are directed not to assess any damages on account of plaintiff's failure to reach the funeral." His honor gave, in substance, an instruction like that requested by plaintiff, but it contained also a statement that "any negligence of the defendant might be also considered in connection with the information received by Pierce as to the movement of the train." We think the defendant was entitled to the instruction in the form in which it was requested. The defendant's negligence in its failure to deliver the telegram was not connected with the train service and the duty of the plaintiff to make proper inquiry concerning the same. In analogy to our ruling here, the case of *Meadows v. W. U. Tel. Co.* (at this term) 43 S. E. 512, may be referred to. The court there said, "Had the message been delivered after negligent delay by defendant, but still in time for plaintiff to have caught the train, and he failed to do so, this would have been contributory negligence." In the present case there was evidence, undisputed, tending to show that the defendant's negligence in not delivering the telegram was not the proximate cause of the plaintiff's failure to attend his mother's funeral, and the defendant was entitled to an instruction disconnected with its own negligence on that evidence.

New trial.

WALKER, J., did not sit.

DOUGLAS, J. (dissenting). The opinion of the court seems to be based entirely upon the contributory negligence of the plaintiff, with the burden of proof as to that issue resting, of course, upon the defendant. The plaintiff received the telegram at exactly the time when his train was scheduled to leave, and at once asked his partner to inquire by telephone at the Southern Station if the train to Atlanta was on time. He was answered that it was on time. What more would a man of reasonable prudence have done? Was it contributory negligence per se to de-

pend upon a railroad schedule or upon an answer from a railroad office? Surely, railroad negligence has not gone so far as to raise such a legal presumption.

The defendant asked for an instruction which practically charged the plaintiff out of court, and which I think was too favorable to the defendant even with the qualification added by his honor, to the effect that "any negligence of the defendant [plaintiff] might be also considered in connection with the information received by Pierce as to the movement of the train" (quoting from opinion). I think the qualification was entirely correct. In applying the rule of "the prudent man" we must consider the condition of the plaintiff, with his knowledge and sources of information. In his distress, and having perhaps some necessary arrangements to make, he asked his partner to telephone to the Southern Station. Although not stated in the record, it is evident that Pierce did as requested, and that the answer came from the station. What more would ordinary prudence have dictated? It is practically admitted in the opinion that the defendant was negligent. In view of its own negligence, and the obvious nature of the telegram, how easy and reasonable it would have been for the defendant to have sent one of its messenger boys to find out whether the train was on time, and to have notified the plaintiff. In *Hollowell v. Ins. Co.*, 126 N. C. 398, 35 S. E. 616, the plaintiff had been in the habit of paying his premium by sending a check to the defendant by mail. One of these checks did not reach the defendant before the day of forfeiture. This court held that the defendant could not cancel the policy upon proof that the plaintiff deposited the letter containing the check in the post office in time to reach the defendant in due course of mail before the hour of forfeiture. The court says, on page 404, 126 N. C., page 617, 35 S. E.: "A remittance by mail or other method is at the risk of the debtor. \* \* \* But the regularity of the mail, a public agency, is such that it is not negligence to rely upon it, especially when such method of transmission has been previously the course of dealings between the parties, and there was no express revocation of it." It would seem difficult to entirely separate the regularity of the mails from the regularity of the trains that carry the mails.

(65 S. C. 135)

#### LATIMER v. YORK COTTON MILLS.

(Supreme Court of South Carolina. April 20, 1903.)

#### CONTRACT OF EMPLOYMENT — ACTION FOR BREACH—MITIGATION OF DAMAGES—PLEADING.

1. In an action for damages for an alleged breach of contract of employment, the measure of damages is the salary for the contract time,

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 50, 54.

less what the servant earned or could have earned in the meantime.

2. In an action for breach of contract of employment, that servant earned or could have earned a certain amount in the meantime should be pleaded in answer in mitigation of damages.

3. Where complaint in an action for breach of contract of employment alleged that plaintiff, since the dismissal, has been unable to obtain steady or profitable employment, evidence as to earnings in the meantime may be shown by defendant under a general denial.

Appeal from Common Pleas Circuit Court of York County; Watts, Judge.

Action by W. C. Latimer against the York Cotton Mills. From judgment for plaintiff, defendant appeals. Reversed.

J. S. Brice and W. W. Lewis, for appellant. W. B. McCaw, for respondent.

JONES, J. This was an action for damages for the alleged breach of contract of employment, and resulted in a verdict and judgment in favor of plaintiff. The complaint alleged a contract of employment between plaintiff and defendant for one year from 14th February, 1901, at \$900, payable \$75 monthly; that plaintiff, after serving defendant thereunder for one month, was unlawfully discharged, for which \$900 damages were claimed. The answer admitted that defendant had employed plaintiff at a salary of \$50 per month, with the right reserved to discharge at defendant's option at the end of the month; that such option had been exercised; that defendant admitted liability to extent of \$50 for one month's service, but denied all other allegations of the complaint. The verdict of the jury was for \$450 in favor of plaintiff, which the trial court refused to disturb on defendant's motion for a new trial.

The main question in this appeal is whether the court correctly instructed the jury as to the measure of damages. The court refused to instruct the jury, as requested by defendant's counsel, in these words: "If the jury find from the preponderance of the testimony that the plaintiff did make such a contract as alleged with the defendant, and if, during the continuation of that contract, the plaintiff obtained profitable employment elsewhere, then the defendant is entitled to a credit for the amount received by defendant." The instruction given the jury on this subject was as follows: "Now, I charge you further, if you believe the defendant and plaintiff here entered into a contract and the defendant employed the plaintiff by the year, as he alleged in his complaint, and the plaintiff was ready and willing to carry out all his part of the contract, and he was ordered to go ahead, and he reported to the factory to carry out his part of the contract, they refused to let him do it, breached that contract, then the plaintiff had right to hire out to anybody he pleased, provided he kept himself in a position whereby at any time he was called on, at any time during the year, by the defendant, to carry out his contract,

that he could do it. And he would be entitled, under circumstances of that sort, to recover whatever was due on this contract, if he was hired by the year." In the refusal to charge and the charge did the court err in not stating the correct rule governing in actions of this kind? In the case of *Atkinson v. Fraser*, 5 Rich. Law, 519, quoting from the syllabus of the case, it was decided that "where an overseer, employed for a year, is dismissed without cause, and obtains employment for the rest of the year, in an action against the first employer for the amount agreed to be paid for the whole year's service, the jury should deduct the amount received from the second employer," etc. The case of *Union Bank v. Heyward*, 15 S. C. 300, approving *Watts v. Todd*, 1 McMul. 26, states the general rule on the subject of damages in cases of entire contracts thus: "If a party be dismissed without cause, he becomes entitled to the full amount of the wages agreed upon; but in such case he should treat the contract as subsisting to the end of the year, and he could not recover upon it until the expiration of the term for which he was employed." This undoubtedly is *prima facie* the measure of the employer's liability, there being nothing more in the case. In neither of the cases last cited did the court consider the measure of liability when the employé during the term of service received compensation for his services rendered to others. The rule is thus stated in 20 Ency. Law (2d Ed.) 37: "Where the action is brought subsequent to the expiration of the term of employment, the decisions are practically unanimous to the effect that the measure of damages is *prima facie* the wages for the unexpired portion of the term; this amount to be diminished by such sums as the servant has earned or might have earned by a reasonable effort to obtain other employment in the same line of business. A recovery, of course, cannot be entirely defeated by showing that the servant obtained, or could have obtained, other employment; but it is always competent for the master to show these facts in mitigation of damages, the burden of proof in all cases being upon him." The foregoing statement we think correctly sets forth the rule, and it is supported by the following cases examined: *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609, 43 Am. Dec. 758; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *King v. Stelren*, 44 Pa. 99, 84 Am. Dec. 419; *Emery v. Steckel*, 126 Pa. 171, 17 Atl. 601, 12 Am. St. Rep. 857; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403; *Cox, etc., v. Bearden*, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359; *Baltimore Co. v. Pickett (Md.)* 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. The same rule as to the measure of damages prevails also in Kentucky, but the burden of proving that he has not been able to obtain other em-

ployment is placed upon the plaintiff. *Lewis Co. v. Scott*, 95 Ky. 484, 26 S. W. 192, 44 Am. St. Rep. 251.

The ruling and charge of the learned trial judge, however, was based upon his views of the law with reference to the pleadings. He considered that defendant could not avail itself of this matter, not having pleaded such in his answer. This necessitates an examination whether such matter is available in mitigation of damages unless pleaded. In 5 Ency. Pl. & Pr. 773, it is stated that: "As a general rule, facts in justification and mitigation of damages should be pleaded if the defendant wishes to prove them at the trial. Matters relied upon in mitigation of damages are usually set up in the answer. \* \* \* In certain cases, however, where the general issue has not been abolished, they may be given in evidence under the same." The cases cited to sustain the general rule are from the state of New York, and they probably rest upon the construction given to the New York Code, which requires that defendant shall set forth in his answer the facts tending to mitigate or otherwise reduce the plaintiff's damages. The South Carolina Code does not in terms require matter in mitigation of damages to be pleaded, except in actions for libel or slander. Section 186. But by section 170 it is required that the answer must contain (1) a general or specific denial of the controverted allegations of the complaint; (2) a statement of any new matter constituting a defense or counterclaim. As a denial merely controverts the allegation denied, under such a plea the defendant is only permitted to show such facts as tend directly to disprove the fact disputed. The material facts disputed by the evidence in this case were the employment of plaintiff by defendant for one year at \$900, and the discharge without cause at the end of the first month. These facts established, the law implied a prima facie liability to the extent of \$900. Matter intended to reduce the amount of such liability would, generally speaking, be in the nature of confession and avoidance, involving, for the purpose of the plea, an implied admission of the liability and an avoidance thereof in part by new matter. Such implied admission of the plaintiff's case is not consistent with a denial thereof, and cannot be said to be embraced within a general denial. Besides, it is a fundamental principle of code pleadings that he must allege who holds the burden of proof, and it has been already shown that the burden of proof rests upon the employer to show that the employé during the term has received other employment, the proceeds of which should go in reduction of defendant's liability.

It is contended, however, that the particular allegations in the complaint and answer in this case raised said issue. The complaint alleged that "plaintiff has been unable to

obtain other steady or profitable employment," and the answer, besides a general denial of all matters not specifically admitted in the answer, avers that "plaintiff was during the term of said alleged employment engaged in other trades, occupations, and business." While these allegations in complaint and answer were rather indefinite, we think they must be construed, when taken together, as raising the issue in mitigation of damages. The plaintiff was not required to make the allegations above in his complaint, as it was not necessary in stating his cause of action; but, having chosen to do so, he thereby broadened the effect of the denial in the answer. While such allegation was not necessary, and did not require plaintiff to offer evidence to sustain it, it became material upon a denial thereof, in making an issue in behalf of the defendant. As shown in *Pomeroy on Code Remedies*, § 672: "The plaintiff may so frame his complaint or petition—may insert in it allegations of such sort—that a general denial will admit proof of facts which would be strictly matter by way of confession and avoidance under the former procedure." The principle is illustrated in *McElwee v. Hutchinson*, 10 S. C. 438, where, in an action for a specified balance due upon a note after allowing certain credits, defendant was allowed to show other payments under a general denial; and also in the case of *Long v. Railway Co.*, 50 S. C. 49, 27 S. E. 531, where the complaint alleged damages to stock by the negligence of defendant "without fault" of plaintiff, the question of contributory negligence could be submitted to the jury under a general denial. We are bound, therefore, to hold that the instructions to the jury were erroneous. We cannot say that the defendant was permitted to introduce evidence as to the amount received by plaintiff from other employment during the term, and it may be that the jury, in awarding a verdict for \$450, considered such evidence, and made allowance therefor; but we cannot conclude that such was the fact. On the contrary, the presumption would be that the jury followed the instructions of the court, and did not consider this matter. This conclusion rendered it necessary to consider further.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

GARY, A. J., concurs.

POPE, C. J. I concur in the result. My mind has long been convinced that in actions based upon a breach of contract for employment the employer is entitled to have the amount due to the employé reduced by the actual earnings of the employé during the period of employment contracted for, which time was spent out of employer's service.

(66 S. C. 77)

**GRIFFIN v. SOUTHERN RY.**

(Supreme Court of South Carolina. April 20, 1903.)

**CARRIERS—INJURIES TO PASSENGER—EVIDENCE—RELEASE—FRAUD—QUESTION FOR JURY.**

1. In an action by a passenger against a railroad company for damages for injuries received, where defendant pleads a release, and plaintiff claims that the same was obtained by fraud, it raises a question of fact for the jury.

2. Where a person is absent for seven years, and no tidings from him are received, his death is presumed.

3. In an action by a passenger for personal injuries, evidence that a train was run down a grade and around a curve at a rapid rate over rotten cross-ties is evidence of recklessness.

4. Where there was some evidence tending to show recklessness in the management of a passenger train, it was proper to refuse to charge that there was no evidence of recklessness, as such instruction would have been on the facts.

Appeal from Common Pleas Circuit Court of Edgefield County; Buchanan, Judge.

Action by Jose Griffin against the Southern Railway. From judgment for plaintiff, defendant appeals. Affirmed.

B. L. Abney and E. M. Thomson, for appellant. J. Wm. Thurmond and S. McG. Simkins, for respondent.

**POPE, C. J.** This is an action for damages alleged by the plaintiff that she sustained by the wreck of the defendant's railway train on the 8th day of May, 1901, at a point a few miles from Trenton, Edgefield county, S. C. The answer denied all the allegations of facts set up in the complaint except the corporate character of the defendant, the accident to its train No. 135, on May 8, 1901, and that the plaintiff was a passenger for hire on said train at the time of the accident; but the answer insists that the plaintiff is a married woman, and that her said husband should have been united with her as a coplaintiff; and it goes on to allege that, even if plaintiff, as a passenger on its train, was injured through such accident, she has, for a valuable consideration, under her hand and seal, before this suit was brought, released the defendant from all liability on account of all damages and liabilities for said injuries. The defendant demanded of the court before the trial before a jury was commenced that the court would order the cause to calendar No. 2 for a trial of the equity issue, the legal issues awaiting a trial on calendar No. 1 until the court should dispose of the equity issue. This motion was denied by the court. The trial before the circuit judge and a jury then began. Much testimony was offered by each party to the action, relating to the alleged death of plaintiff's husband; to the alleged speed of the train around the curve of its roadbed; to the bad condition of the roadbed by reason of rotten cross-ties at the place of accident;

to the injuries received by the plaintiff in said wreck; to the fact that Mr. Thomas McOraney was the engineer running the train, and that he had managed the throttle for 38 years, etc. At the close of plaintiff's testimony defendant moved for a nonsuit, which was refused by the circuit judge. The trial judge charged the jury. A verdict for \$375 was rendered. A motion was then made for a new trial, which motion was refused. After entry of judgment, the defendant duly appealed to this court on the following grounds:

"(1) Excepts because the presiding judge erred in refusing the motion of the defendant, made upon the trial of the cause, after the pleadings had been read, to hear and decide without a jury the equitable issues arising upon the pleadings, to wit, the validity of the release set up in the third defense of the answer, which release was admitted by the reply; whereas it is submitted that the issue thus raised, being purely equitable in its nature, should have been determined by the court before proceeding further in the case.

"(2) Excepts because the presiding judge erred in refusing defendant's motion for nonsuit, which was based upon the grounds: First. That plaintiff had failed to offer any competent evidence to go to the jury that she had no husband living at the time of the commencement of this suit, or at the time of the alleged accident to plaintiff, but that, on the contrary, the evidence showed conclusively that plaintiff was married prior to said 8th day of May, 1901, her husband having disappeared. It being submitted that, the evidence showing that seven years had not elapsed since the disappearance of the husband, and there being no competent evidence to go to the jury as to his death, the case should have been nonsuited or declared abated on account of the nonjoinder of the husband. Second. That there was no evidence showing or tending to show any wantonness, willfulness, recklessness, or malice on the part of the defendant, and that so much of the complaint as charged wantonness, willfulness, recklessness, or malice be nonsuited, restricting plaintiff to compensatory damages alone. Third. That the presiding judge should himself have passed upon the validity of the release set up in the answer, and should have held said release valid, and a bar to the suit; because, it is submitted, this was a purely equitable issue, and for the court, and not for the jury, to pass upon.

"(3) Excepts because the presiding judge erred in refusing to charge the jury, as requested by defendant as follows: 'There having been no evidence offered showing or tending to show any wantonness, willfulness, recklessness, or malice on the part of the defendant, the jury cannot award any punitive damages in this case, but must confine their verdict to actual damages only.' Said re-

¶ 2. See Death, vol. 15, Cent. Dig. § 2.

quest, it is submitted, contained a correct proposition of law applicable to the case, and should have been charged, its refusal being to defendant's prejudice.

"(4) Excepts because the presiding judge erred in charging the jury as follows: 'But if, in addition to that injury which she had received, it was done recklessly, wantonly, and willfully, then you are not confined to that, but you may go further, and give such an amount over and above the injury she had actually received as will be a lesson, not for her benefit necessarily, but for the benefit of all mankind.' The error consisting in authorizing the jury to award punitive damages, when there was no evidence whatsoever to support the same; the entire evidence being capable of but one inference, to wit, that defendant was guilty of no wantonness, willfulness, recklessness, or malice."

We will now pass upon these questions in their order.

1. We think that, although the reply to that part of the answer setting up the release, admitting that it was signed, but denying any consideration therefor, and alleging that it was procured by fraud, and that notice had been served by the plaintiff before suit was brought, did not warrant the court to grant defendant's motion. The reply raised an issue or issues which would have been much more satisfactorily passed upon by a jury. Besides, the circuit judge did all he ought to have done when he charged the jury as he did as to the effect of the release: "Now, when a person signs a written instrument, and it is proven that he signed it, the presumption is that he signed it knowingly. When one signs an instrument under seal, it is presumed that he did it for valuable consideration, or sufficient consideration. If a person does do so—if you sign a release without any consideration at all—if one is entitled to receive anything, they have the right to dispose of it freely, and without getting anything for it in exchange, if they desire to do it. If you have a horse or a plantation, etc., there is nothing on earth to keep you from giving this property to any person you may see fit, if you desire to do so, owing no man anything, saving your creditors. He can give it to whom he pleases, and he can do it in the same way with damages from a railroad company or any one else. So, therefore, one need not, to sustain a sealed instrument releasing his right to damages, show necessarily there was any consideration; but, having introduced a release, which upon its face purports to be a release of his rights, then the person who takes it must show if there is anything wrong with it. Well, if one, however, enters into a sealed instrument, which indicates that a payment of money was contemplated before the release was to be effected, then that payment of money should be made, or accounted for in some way excusing the payment. When one owes or desires to pay money to another under an agreement, the

money must be tendered. That means, 'I bring the money here, and offer it to you,' offering it to the person who is entitled to receive it; but if that person says, 'You need not offer me that money; I won't take it,' then the necessity of actually tendering it has passed, because he has waived it. If, however, Mr. Foreman, one man comes to you, and, showing you a paper which you cannot read, or in language you do not understand, telling you it is one thing when another, and by fraudulent representations gets you to sign it when you think it is something else, then the law says that the fraud will invalidate everything. There is a maxim which says that fraud is odious, and is never to be presumed. If you conclude that she signed this paper knowing what she was doing, with her eyes open; that she signed it under no misapprehension, no fraudulent representations, was not overreached, but did it for the consideration mentioned in the release, and that she was tendered with the money—then you may stop, and write your verdict for the defendant. But if you find that she was overreached, or that that instrument was obtained from her under fraud, by fraudulent representations, that she did not consent to it, then you will go one step further, and find out whether the plaintiff has proven her case here as charged in the complaint." It seems to us that substantial justice was done here. Besides, *Price v. R. R. Co.*, 38 S. C. 199, 17 S. E. 732, is very significant just on this point.

2. (a) There is no fixed way of proving death. An absence of seven years will enable you to presume death. Very frequently, though it is a rule the law has adopted that a man may be presumed to be dead in case of an absence of seven years with no tidings of him, yet a man is alive after the seven years have expired. Still experience proves that it is a wise rule. To recur to proof of death. We have said there is no fixed rule. The evidence must satisfy the jury of the husband's death. It seemed to have done so in this case.

(b) Now, in all candor, we must say there was some testimony as to recklessness. The defendant allowed this train to be run downgrade around a curve with cross-ties which were rotten, and so appeared to the eye of ordinary people not experts. Such an engineer as Mr. McCraney, who is known far and wide as one of the best engineers on the railroad, had to take the word of the railway officers that the track was sound. So that we cannot say there was no testimony as to wantonness, etc., by the railway. The jury had to weigh this testimony. They have done so. The judge made no mistake here.

(c) We have already held that the circuit judge was justified in giving the testimony to the jury as to the release. He charged the law correctly to the jury.

3. We have already held that there was some testimony as to recklessness by the

railway in keeping such a track as they did at the point of the accident. The court could not have charged as requested, in view of this testimony. The proposition of law in the form it was presented to be charged would have made the trial judge invade the constitutional restriction by charging upon the facts. There was no error here.

4. The judge left it to the jury to apply the facts as found by them to the law which he gave them. He did not err herein.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J. (concurring). While concurring in the conclusion announced in the opinion of Mr. Chief Justice POPE, we prefer to express, in our own language, our views upon the question raised by the first exception—whether the court in the exercise of its chancery powers should have decided whether the release was fraudulent. It is erroneous to suppose that the court in all cases has jurisdiction of fraud, only when exercising its equitable powers. Mr. Pomeroy, in section 911, vol. 2, of his philosophical work on Equity Jurisprudence, thus states the fundamental principles concerning the equitable jurisdiction: "(1) Where the primary right or interest of the plaintiff is equitable only, the jurisdiction is necessarily exclusive, and will always be exercised without regard to the nature of the relief; otherwise the party would be without remedy, since courts of law could not take cognizance of the case. (2) Where the primary right is legal, and the remedy sought is purely equitable, the jurisdiction is also exclusive, and always exists, but will not generally be exercised if the legal remedy which the party might obtain is adequate, complete, and certain. (3) Where the primary right is legal, and the remedy is also legal, a recovery of money simply, or of the possession of chattels, the jurisdiction is concurrent, and only exists where the remedy which the party might obtain at law is not adequate." The case of *Moore v. Edwards' Ex'rs*, 1 Bailey, 23, involved the question whether a court of chancery alone could relieve a party from mistake. The court thus states the rule: "Accidents and mistakes certainly constitute one branch of equity jurisdiction; but it is not peculiar except when a discovery is indispensable, or the nature of the relief such as to require the extraordinary aid of chancery. Actions at law to recover back money paid by mistake constitute in all the books of practice a conspicuous class of causes for which the action of assumpsit may be maintained at law, and there is no question that in general, when the facts can be proved according to the rule of the common law, and the remedy is such as a court of law can administer, consistently with the prescribed modes of proceeding, mistakes may be inquired into in a court of law. In the case

under consideration, the plaintiff sued out a sci. fa. to revive a judgment against the defendant, and, as evidence of payment the defendant produces an execution on which is indorsed the word 'Satisfied,' the plaintiff replies it was so indorsed by mistake. There is nothing magical in the term itself. The evidence offered was admissible according to the rules of the common law, the relief was such as a court of common law was competent to give, and the court therefore clearly had jurisdiction." The rule here stated is equally applicable to cases of fraud, as is shown by the case of *Maddox v. Williamson*, 1 Strob. 23, in which the court says: "An assignment, no more than a deed, can in a court of law be set aside and canceled; but when either deed or assignment comes into question in an issue here it will, if fraudulent and void, be, for the purposes of that issue, regarded as a nullity." The last-mentioned case is cited with approval in *McKenzie v. Sifford*, 45 S. C. 496, 23 S. E. 622.

These authorities clearly show that there was no error in submitting the question of fraud to the jury.

(66 S. C. 155)

#### RUTLEDGE v. FISHBURNE.

(Supreme Court of South Carolina. April 21, 1903.)

#### WILL—CONSTRUCTION—EXECUTORY DEVISE—FORECLOSURE—PARTIES.

1. Where testator devised certain real estate to A. for life, with remainder to her children, share and share alike, the children of a deceased child to take the parent's share, a vested transmissible interest in remainder to the child of the life tenant is created, and all her children born to her take by way of executory devise.

2. In a proceeding to sell lands on foreclosure, where the parties holding the lands are before the court, executory devisees not in esse are not necessary parties.

Appeal from Common Pleas Circuit Court of Charleston County; Benet, Judge.

Proceeding by B. H. Rutledge, trustee, against S. H. M. Fishburne, to require F. Heinz to comply with his bid for property sold in this case. From circuit order, purchaser, Heinz, appeals. Affirmed.

Wm. Henry Parker, Jr., for appellant. T. M. Mordecai, for respondent.

GARY, A. J. The following facts are stated in the record: "Appeal in this case is from an order and decree of his honor Judge Benet, holding to be good and valid the title to certain premises in the city of Charleston, bid in by the purchaser, F. Heinz, at master's sale under foreclosure in above case, and requiring the purchaser to comply with his bid. The original action was for foreclosure of a mortgage from defendant, Mrs. S. H. M. Fishburne, to the plaintiff, trustee, commenced in the county of Charleston by the service of a summons the 27th day of January, 1900, the complaint alleging the mak-



ing and delivery to the plaintiff, trustee, by the defendant, of a bond of \$3,100, secured by the mortgage of defendant, Mrs. Fishburne, covering six pieces of property in the city of Charleston; amongst others, a lot in St. Philip street, in said city, the title of which is in question in this appeal. The defendant filed no answer to the complaint, and proceedings resulted in a decree of foreclosure and sale. Under this decree the master was directed to sell, *inter alia*, the lot of land on St. Philip street, in the city of Charleston aforesaid. This lot was bid in at master's sale (under advertisement) for the sum of \$3,125 by F. Heinz, appellant herein. The master's deed was tendered in the usual form, and the purchaser refused to accept the same, or to comply with his bid, alleging defect in the title. Thereupon a rule was issued requiring the purchaser to show cause why he does not comply with the terms of the sale. To this rule the purchaser made his return, which set up the following reasons why he should not be required to comply with his bid: First. That the interest of Mrs. Sophia H. W. Fishburne in the premises is either a contingent remainder only, such that neither her deed nor the deed of the master under foreclosure of her mortgage can make good title to a purchaser, or, at best, that her interest is a vested remainder in fee defeasible, subject to be divested by her having issue and dying in the lifetime of the life tenant, leaving issue surviving her, in which case such issue would represent her, and take by substitution under the limitation in the said will, and the purchaser would have no title. Second. That the words, 'the child or children of a deceased child to represent and take the parent's share' in the following clause of the will: 'Unto my said daughter, Sophia Sheppard Marion, for life, not subject to the debts of her husband, with remainder to her children, share and share alike, the child or children of a deceased child to represent and take the parent's share,' created an executory devise. It was referred to the master to inquire into the facts as to the title tendered, and to take testimony, and report the same to the court. Upon hearing the master's report, his honor, the circuit judge, overruled the foregoing objections to the title, and ordered the appellant to comply with his bid."

The record contains also the following agreement as to facts: "The S. Sheppard Marion mentioned in the said will as Sophia Sheppard, daughter of testatrix, conveyed all her interest in said premises by deed of conveyance in the usual form to her daughter, Helen M. Fishburne, born Marion, the said deed being dated the 23d day of May, 1896, and recorded in the register of mesne conveyances' office. Helen M. Fishburne, born Marion, also known as Sophia H. M. Fishburne, is the only child ever born to Sophia S. Marion, mentioned in said will as Sophia Sheppard; said Mrs. Marion being now alive,

aged near seventy-seven years. Helen Fishburne, born Marion, only child of Sophia Sheppard Marion, mentioned in said will as Sophia Sheppard, now is forty-five years of age, has been married twenty-one years, has never had any children; her husband, Julian Fishburne, now living."

We will first state in a general way (without reference to the effect of the judicial proceedings, which will hereinafter be discussed) our conclusion of the provision of the will by which the property is devised "unto my said daughter, Sophia Sheppard Marion, for life, not subject to the debts of her husband, with remainder to her children, share and share alike, the child or children of a deceased child to represent and take the parent's share." It must be remembered that Mrs. Fishburne was in esse when Mrs. S. F. S. Wilson, the testatrix, departed this life, in 1873. Under the foregoing clause of the will, Mrs. Fishburne took a vested transmissible interest in remainder. If other children should be born unto Mrs. Marion, the remainder now vested in Mrs. Fishburne would open so as to embrace such children. If Mrs. Fishburne should die leaving no children, her vested interest would not revert to the estate of Mrs. Wilson (testatrix), but would descend to her (Mrs. Fishburne's) heirs generally, and be subject to distribution under the statute, just as any other property of which she might die seised and possessed. If, however, she should die leaving children at the time of her death, they would take, by substitution or executory devise, the interest which she otherwise would have taken.

We proceed to consider in what manner such children would take under the will—whether as contingent remaindermen or executory devisees. In the note to page 922, 20 Ency. of Law, it is said: "The characteristics of alternative or substitutional limitations is that both are contingent until the event occurs which is to determine which of them is to take effect. \* \* \* This is well illustrated by the case of Luddington v. King, 9 Ld. Raynor, 203, in which the limitation was to A. for life, remainder to his male issue in fee simple, remainder over to T. B. if A. should die without male issue. These remainders are alternate, one of which alone can vest, and the vesting of one and the defeat of the other are to take place at the same time, viz., at the death of A. If the remainder to T. B. had been limited on another contingency, and its vesting was to take place at some other time, or if the limitation to A.'s issue was vested, instead of being contingent, the remainder to T. B. would be a remainder limited after a fee." In Mangum v. Piester, 16 S. C. 325, the court says: "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for con-

tingent remainders, it is in that case a contingent remainder, and not an executory devise. 4 Kent, 265. For instance, among the rules governing contingent remainders is one which forbids an estate to be limited over to another after a fee already granted. In such case there can be no such thing as defeating the fee already granted, and transferring it to another, by way of remainder, because a remainder implies something left, which cannot be the case after the whole has been disposed of. Yet while this cannot be done by way of contingent remainder, it may be done by an executory devise, which, according to the definition above, allows a departure from the rules of law governing contingent remainders. And this, being an effort to create a fee after a fee, is a case of departure denied by contingent remainders but allowed by executory devises." The following authorities throw light upon this question: 20 Ency. of Law, 835, 874, 921 and note, 922 and note; Fearne on Remainders, 373, 418. In commenting on the case of Loddington v. Kine, hereinbefore mentioned, Mr. Fearne, at page 373, uses this language: "For if A. had issue male, the remainder was to vest in that issue in fee; but, if A. had no issue male, then it was to vest in B. in fee; and these were limitations of which the one was not expectant upon and to take effect after the other, but were contemporary; to commence from the same period; not, indeed, together, but the one to take effect in lieu of the other, if that failed." Much of the confusion upon the question whether the language of a will creates an executory devise or contingent remainder has arisen from the failure to keep clearly in mind the marked and well-defined differences in the characteristics of the two estates. If the words of the will out of which the contingency arises are relied upon for the purposes of defeating an estate which has already become vested, then this can only be done by construing them as an executory devise. But, if the question is, which of two estates shall become vested, then such estates will be construed as remainders, alternative or substitutional in their nature; and such remainders are always contingent. Our conclusion is that such children would take by way of executory devise, and not as contingent remaindermen.

Having reached this conclusion, the next question that will be considered is whether the fact that the executory devisees were not made parties to the action for foreclosure of the mortgage presents a sufficient reason for the refusal of the purchaser to comply with his bid. This question is settled by the case of Moseley v. Hankinson, 22 S. C. 323, in which Mr. Chief Justice McIver, in behalf of the court, uses this language: "The general rule in equity undoubtedly is that all persons who are materially interested in the subject of the suit must be made parties, but it is equally true that this rule is sub-

ject to some exceptions; and the practical inquiry is, does this case fall within any of the exceptions? Without undertaking anything like a review of the cases, we think the authorities show that the contingent remaindermen, who were in esse and within the jurisdiction of the court, were necessary parties. In Mitford's Equity Pleadings, \*174, it is said: 'Contingent limitations and executory devises to persons not in being may, in like manner, be bound by a decree against a person claiming a vested estate of inheritance; but a person in being, claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights'—citing numerous authorities. These authorities establish the doctrine that while, as a general rule, the contingent remaindermen are necessary parties, yet where they are not in esse at the time, and there is before the court a person entitled to a prior vested estate of inheritance, and perhaps, if there is no prior vested estate of inheritance, then, if the person entitled to the prior life estate and the trustees are parties, the court may make a decree that will conclude the rights of such contingent remaindermen; but they do not warrant the idea that the contingent remaindermen who are in esse and can be made parties can be safely dispensed with. \* \* \* The very object of applying to the court is to obtain authority for disposing of the interests of others, and those really entitled to such interests must, if practicable, be made parties to any proceeding by which it is proposed to dispose of their interests." In the case under consideration the executory devisees are not in esse. Therefore they could not be made parties, and the purchaser of the property under judicial proceedings gets a title stripped of the rights of those persons having merely contingent interests in the property. The court, however, having charge of the fund arising from the sale of the property, always has the power, in the exercise of its chancery jurisdiction, to pass such an order as will protect the rights of those who cannot be made parties to the action by reason of the fact that they are not in esse when the sale takes place. These views dispose of all the questions that can be considered in this proceeding.

It is the judgment of this court that the order of the circuit court be affirmed.

(66 S. C. 100)

KLUGH et al. v. CORONACA MILLING CO. et al.

(Supreme Court of South Carolina. April 20, 1903.)

CORPORATIONS—SUIT TO DISSOLVE—COMPLAINT.

1. A complaint by minority stockholders of a corporation, seeking to wind up its business be-

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2439.

cause of negligence and mismanagement on the part of the directors, charging fraud on their part, and acts unauthorized by the charter of the corporation, and that the corporation had been requested to correct the alleged wrongs, and had refused so to do, *held* good on demurrer.

Appeal from Common Pleas Circuit Court of Greenwood County; McCullough, Special Judge.

Action by J. S. Klugh and others, minority stockholders of the Coronaca Milling Company, against the Coronaca Milling Company and Percy Lumley, president. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

The following is the circuit decree:

"This was a motion to dismiss the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. As will appear from an inspection of the complaint, it is an action brought by certain stockholders in the Coronaca Milling Company against the said company and Percy Lumley, as president, for the appointment of a receiver, for an accounting by the said Percy Lumley, and for the liquidation of the affairs of the said corporation.

"In order to sustain a complaint of this character, it is necessary that it should charge on the part of the board of directors or a majority of stockholders (1) fraudulent acts; (2) ultra vires acts; (3) negligence of corporate directors; (4) that the corporation has been requested to correct the alleged wrongs, and refused to do so, or facts which would excuse such application. See *Cook on Stock & Stockholders & Corporation Law*, §§ 644, 646; *Latimer v. Railroad Company*, 39 S. C. 52, 17 S. E. 258; *Wenzel v. Brewing Company*, 48 S. C. 83, 26 S. E. 1; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498; *Matthews v. Bank*, 60 S. C. 183, 38 S. E. 437.

"Does this complaint, then, allege such facts? The complaint alleges, among other things, that the defendant Percy Lumley has for the past three years been the president and manager of the said corporation; that the said mill has been run at a loss of from \$2,500 to \$3,000 in the past twelve months; that said loss was caused mainly by the gross neglect and mismanagement of the said Percy Lumley as president and manager of the same, in that he has not given it his time and attention, as he was in duty bound to do, but, on the contrary, has been absent almost the whole time for more than a year, having accepted a position in the service of the Southern Railway Company at Salisbury, N. C.; that he has not called the directors of the said corporation together in meeting since September, 1900; that he has failed to pay any attention to the suggestions and recommendations made by the directors, but, on the contrary, has carried on the business in his own way, without regard to the wishes of the directors and the interests of the stockholders; that, by his conduct in the ginning department of said corporation, he has driven

off about one-half of its old customers. The complaint further alleges that the said Percy Lumley has shown partiality in the management of the affairs of the said corporation, in that at the close of the season of 1899 and 1900 he declared a dividend of fifteen per cent. on the capital stock of the same, which amount he paid to himself and other stockholders represented by him, and paid to the minority of the stockholders only ten per cent. on their stock. Paragraph 9 alleges that at the meeting of the stockholders held on the 22d day of July, 1902, the said Percy Lumley represented in person and by proxy a clear majority of the said stock, and, in spite of the earnest protests of the plaintiffs, who put the meeting in full possession of the facts above stated, the said Percy Lumley proceeded to re-elect himself as president and manager and director of the said corporation, and thereafter proceeded to elect a board of directors named by himself, of which board of directors two are nonresidents, and one is a brother-in-law and another the mother-in-law of the said Percy Lumley. It is further alleged that the plaintiffs have not applied to the board of directors, or the said majority of stockholders, who, from the allegations of the complaint, in person and by proxy, is none other than the said Percy Lumley himself, for a redress of their wrongs, because, as charged in the complaint, the said stockholders and directors are the wrongdoers, and have full control of the said corporation, and such an application would be useless and unavailing.

"Now, if these allegations be true—and they must be so taken for the purposes of this motion, to say the least of it—they charged gross negligence on the part of the corporate directors, as well as a majority of the stockholders, in that they continue in office a man who had been giving no attention to the affairs of the concern, but, on the contrary, has accepted another position, outside of the state, and whose neglect and mismanagement are wrecking the affairs of the corporation, to the injury of the plaintiffs; a man, also, who has shown partiality, and a disposition to oppress the minority stockholders, in that he has paid to himself and a majority of the stockholders represented by him fifteen per cent. dividend at the close of the seasons 1899 and 1900, and has withheld from the plaintiffs and minority stockholders a part of what is justly due them. If the allegations of the complaint be true, it will be useless for the plaintiffs to apply to the board of directors or a majority of the stockholders, since the said board of directors were selected, as charged in the complaint, by the said Percy Lumley alone for his purposes, and are under his domination and control. If the allegations of the complaint be true, I am of the opinion that it was gross negligence on the part of the board of directors to permit the said Percy Lumley, under these circumstances, to continue in charge of the

affairs of the corporation, and this is one ground for equitable interference. It was not argued on the circuit, and I have not had time to thoroughly investigate the question, but I have grave doubts as to whether or not the said Percy Lumley, representing a majority of the stockholders, had the right to elect the officers of this corporation. The law, as I understand it, requires the board of directors to elect the officers of a corporation. But be this as it may, the board of directors are certainly chargeable with the management of the affairs of the corporation; and if they knowingly permit an incompetent man to remain in office, or one guilty of acts of negligence and mismanagement charged in the complaint to Percy Lumley, with full knowledge of the facts, as alleged in the complaint, in my opinion they themselves thereby participate in the wrong, and should be held equally responsible with the wrongdoer. I think, under the allegations of the complaint, that it may be inferred that the application to the board of directors elected by the said Percy Lumley, who are under his control, and also wrongdoers with him, for a redress of these wrongs, would be entirely futile.

"These being my views, under the authorities above quoted, and especially the case of *Matthews v. Bank*, supra, I overrule the demurrer."

From this decree the defendants appeal on the following exceptions:

"First. Because his honor erred in not holding that the decree or order rendered by his honor Judge Townsend in this case, not appealed from, is the law of this case on all questions therein passed upon.

"Second. By his decree in this case, Judge Townsend declared that the complaint did not show that the defendant Coronaca Milling Company was insolvent, but clearly showed that the same was entirely solvent. His honor Judge McCullough therefore erred in not holding that this finding was final and binding upon him in the determination of that question.

"Third. By his decree in this case, Judge Townsend, in effect, declared that the complaint does not state facts sufficient to constitute a cause of action, in that the acts complained of are not fraudulent, ultra vires, oppressive, or illegal, and the plaintiffs have not endeavored to obtain redress within the corporation. His honor Judge McCullough therefore erred in not holding that this finding was final and binding upon him in the determination of these questions.

"Fourth. It was error in his honor to hold that the complaint states facts sufficient to constitute a cause of action: (a) Because it shows on its face that the Coronaca Milling Company is entirely solvent. (b) It fails to allege that the directors or managing board have done or threatened to do any act ultra vires, or any act of fraud, illegality, or oppression, injurious to the corporation, or in

violation of the rights of its stockholders. (c) It fails to allege that the plaintiffs have endeavored to obtain relief of their alleged grievances within the corporation. (d) It fails to allege any facts which would justify the conclusion that an effort to obtain redress within the corporation would be unavailing. (e) It fails to allege that the board of directors or majority stockholders upon demand have refused to apply for the relief asked by the plaintiffs. (f) All the acts complained of are intra vires of the corporation.

"Fifth. It was error for his honor to hold that a stockholder can maintain an action for negligence of corporate directors, for the reason that the action cannot be maintained unless the negligence is such that the majority stockholders do not nor cannot condone.

"Sixth. It was error for his honor to hold that the complaint states such facts as would justify a court in concluding that an application to the board of directors or majority stockholders for the relief demanded would be unavailing: (a) Because the complaint shows on its face that the board of directors had only been elected a few days prior to the commencement of this suit. (b) It shows that two of the plaintiffs were elected members of said board, and, without an effort to obtain relief from the board of which they were members, resigned their positions upon said board. (c) There is no allegation of facts to justify the conclusion that the other members of the board would uphold the president and manager of the corporation in the commission of fraudulent acts, ultra vires acts, or illegal or oppressive acts. (d) There is no allegation of facts to justify the conclusion that the directors would uphold the president and managers in the neglect of the affairs of the corporation. (e) There is no allegation of facts to show that, after the election of the present board of directors, they have ever been asked or had an opportunity to remedy the acts complained of. On the other hand, the complaint shows that the present board of directors, of which two of the plaintiffs were elected members, had no opportunity prior to the commencement of this action, had they desired to have done so, to remedy the acts of which the plaintiffs complain.

"Seventh. His honor erred in not holding that all of the acts of which the plaintiffs complain are such as should be laid before the board of directors, and their action thereon, in the absence of fraud, would be binding upon the corporation.

"Eighth. The acts complained of are at most only matters of internal management of the corporation, of which the board of directors are the final arbiters, and his honor was in error in not so holding and dismissing the complaint."

Sheppards & Grier and Caldwell & Park, for appellants. Ellis G. Graydon, for respondents.

JONES, J. The only question on this appeal is whether the circuit court erred in overruling a demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The decree of the circuit court, which is officially reported herewith, together with the exceptions thereto, is quite satisfactory, and is affirmed upon the authorities and for the reasons therein stated. The complaint states a case showing gross negligence and mismanagement of the corporate property, resulting in loss to the stockholders, and that an effort for redress within the corporation would be useless. *Stahn v. Catawba Mills*, 53 S. C. 528, 31 S. E. 498; *Matthews v. Bank*, 60 S. C. 183, 38 S. E. 437.

The judgment of the circuit court is affirmed.

(66 S. C. 140)

STATE ex rel. BURGESS et al. v. BOWMAN.

(Supreme Court of South Carolina. April 20, 1908.)

MANDAMUS TO COUNTY TREASURER.

1. Mandamus will not lie to compel a county treasurer to replace in the county treasury the amount of a voidable school warrant which he paid to an assignee thereof after notice from the school trustees not to pay.

Pope, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Clarendon County; Aldrich, Judge.

Application by the state, on the relation of J. H. Burgess and others, trustees of School District No. 5, for writ of mandamus against Samuel J. Bowman, county treasurer. From an order denying the writ, plaintiffs appeal. Affirmed.

The circuit decree is as follows:

"This is an application by the relators for a writ of mandamus to compel Samuel J. Bowman, as treasurer of Clarendon county, to replace upon his books as cash, and subject to the orders of the board of school trustees of School District No. 5 in Clarendon county, \$198, which, as treasurer, he has paid out upon a warrant alleged to be illegal and void. The pleadings and testimony herein must be read as a part of this decree. To understand the issues it is necessary to say: That the relators are the trustees of said School District No. 5, and respondent is and was the treasurer of Clarendon county. R. C. Plowden and John W. Clark, two of the relators, then and now trustees of said school district, were, as they allege, induced by the false statements and promises of one Perry D. Crager, who represented himself to be the agent of W. W. Tutwiler, to sign their names to a blank school warrant. That said warrant was afterwards, without their consent or knowledge, falsely and fraudulently filled out so as to appear regular and legal. That the treasurer paid said warrant after being notified that it was illegal and fraudulent, and warned not to pay the same; and there-

fore it is his plain ministerial duty to replace the money so paid out by him in the treasury, and hold it subject to the orders of the relators. The warrant in question is upon a blank, by which is meant a printed form of a warrant, on which appears in print everything essential that can be printed, as common to such warrants, with blanks left in which to insert figures, names, supplies purchased, etc. In the copy of the warrant set out below I have inclosed in brackets the words and figures inserted in the blanks, which it is alleged were illegal and falsely inserted therein. The signatures of Messrs. Plowden and Clark are genuine, and I have not inclosed them in brackets. The warrant is as follows: '\$[198.00] State of South Carolina, [Clarendon] County. To the County Treasurer. Sir: Pay to [W. W. Tutwiler] or bearer, [one hundred and ninety-eight & no 100] dollars said sum being allowed for [three] copies of "Evans' Arithmetical Study" Edition No. [156] [and three copies Edition No. 120] approved and adopted by State Board of Education, May 15, 1897, and charge the same to the account of the Free School Funds of this school district. R. C. Plowden, John W. Clark, Board of School Trustees, School District No. [5] Date, [Feb. 16] 189[8]. Upon the back of the warrant the following writings appear: 'State of South Carolina, [Clarendon] County. Personally came before me the undersigned, who, being duly sworn, made oath that the within account is just, true, and unpaid, and that the supplies therein referred to have been actually delivered. [Signed] W. W. Tutwiler. Sworn to and subscribed before me this [16] day of [Feby.] 189[8]. [Signed] R. C. Plowden, School Trustee.' 'Approved and ordered to be paid. [Signed] W. S. Richbourg, County School Commissioner.' Dated Feb. 18, 1898. 'W. W. Tutwiler.' 'Received of the County Treasurer one hundred and ninety-eight dollars in full payment of this claim. Date Dec. 12, 1898. [Signed] [A. Levi].'

"Mr. J. H. Burgess is the chairman of the board of school trustees, and it seems that the other members of the board intrusted to him the selection and purchase of school supplies. When Mr. Crager went to Mr. Plowden on February 16, 1898, Mr. Plowden was not prepared to answer Crager, or to act. He was not willing to select or purchase any of the charts, but he told Mr. Crager that he would consent to what Mr. Burgess would do in the premises; that if Mr. Burgess would agree to buy any of the charts, select what he considered proper, agree upon the price, fill in the blanks with the numbers and supplies desired, and sign the warrant, he would approve such purchase. As it was some distance to the houses of the other trustees, and as a convenience to Mr. Crager, Mr. Plowden signed the warrant in blank, with the understanding and agreement with Mr. Crager that, if Mr. Burgess did not consent to the purchase of any charts, and did not sign the

warrant, the matter was ended, his offer refused, and his signature to the blank warrant withdrawn, and the warrant would be worthless—'void,' as Mr. Plowden expressed it. At the request of Mr. Crager, Mr. Plowden also signed the blank for the affidavit under the circumstances above stated. Mr. Plowden turned over the warrant signed by him in blank to Crager, and with it he went to Mr. J. W. Clark. As the result of an interview, Mr. Clark signed the warrant in blank upon the terms and stipulations imposed by Mr. Plowden, and turned warrant over to Mr. Crager. Mr. Crager then visited Mr. J. H. Burgess, the chairman, who refused to buy any of his charts. He was not informed of what the other trustees had said and done, knew nothing of the blank warrant or the stipulations thereon, and was surprised when he afterwards heard of the warrant. The next we hear of the warrant is after it has been filled out and was in its present form, and when it was presented to the county school commissioner and approved and ordered paid by him. About that time, or very soon afterwards, Mr. A. Levi, for value, and without notice of fraud or defect, purchased this warrant from W. W. Tutwiler after he had indorsed his name on the back thereof. Mr. Levi took the warrant to the treasurer, and demanded payment thereof. The treasurer was not in funds then, the taxes had not been collected, and for that reason did not then pay the warrant. Afterwards, on December 12, 1898, when in funds, the treasurer paid warrant to Mr. Levi. The warrant is dated February 16, 1898, and on October 24, 1898, or thereabouts, the following letter was sent to the treasurer: 'Mr. S. J. Bowman, Treasurer Clarendon County—Dear Sir: We, the undersigned trustees for Santee Township, School District No. 5, forbid you paying claim for chart in the hands of Mr. A. Levi, in favor of W. W. Tutwiler, which is a fraud against our school district. [Signed] J. H. Burgess. [Signed] R. C. Plowden.' Mr. Plowden carried this note to the treasurer, and says, 'I think I told him the circumstances when I gave him the note.' Mr. Burgess also talked with the treasurer about the warrant, warned him not to pay it, and adds: 'Mr. Bowman wrote me to take steps to enjoin him from paying it. I never took such steps, nor did the board do so.' When the taxes came in, and the funds were in the treasury, Mr. Levi demanded payment of the warrant, and told the treasurer if he did not pay it, he would take legal steps to force him to do so. The trustees, beyond sending notice above set out and warning the treasurer not to pay warrant, took no step to stop the payment thereof, or to protect the treasurer against the threatened suit of Mr. Levi. The treasurer sought legal advice, and was advised that he should pay the warrant. Mr. Levi secured the treasurer against loss, if any should result to him, and the treasurer paid the money over to him. The learn-

ed counsel for the relators contended, and with much force, that the warrant was not only void for fraud, but also void because it was not made by the board sitting in session as a board. Also that the treasurer, after notice of these facts, had no legal right to pay the warrant, and the payment was illegal, and it was his duty to undo the wrong he had done and refund the money. The learned counsel for the respondent contended that, as the warrant was payable to 'bearer,' and as Mr. Levi was an innocent, bona fide subsequent purchaser for value, before maturity, and without notice of any illegality in the warrant, it was the ministerial duty of the treasurer to do what he had done—pay the warrant. He contended also that the relators could not, under the pleadings and facts, maintain their proceedings, and that the application herein should be dismissed. If this position is well taken, it would be improper for me to undertake to decide the other issues. 'To be entitled to a writ of mandamus, the relator must show that the respondent is bound to the performance of some certain, specific duty of ministerial character, imposed by law. It is certain when it must be absolutely performed, and the officer has no discretion. It is ministerial where an individual has such legal interest in the performance that neglect becomes a wrong to him.' *Morton, Bliss & Co. v. Comptroller General*, 4 S. C. 431; cited with approval, and followed in *Ex parte Lynch, Trustee*, 16 S. C. 39, and later cases. It was not the 'certain specific duty' of the treasurer 'imposed by law' to refuse to pay said warrant, and certainly it is not his 'certain specific duty imposed by law' to undo his act, repair an alleged past wrong, and replace the money in the treasury. Mandamus lies to compel action, not to redress injuries resulting from acts already done. If we consider that the execution of the warrant herein was illegal, and that it was falsely, fraudulently, and corruptly filled out, as above stated, such warrant was not void. For the inquiry now under consideration, it may be conceded that the warrant is voidable; but it is not, legally speaking, void. The school district trustees constitute a board clothed with various powers, and, inter alia, powers of a quasi judicial nature. The authority and power to purchase supplies for the use of the school district, and to issue warrants upon the treasurer in payment thereof, necessarily involves discretion, and is judicial in its nature. It is the 'specific duty' of the treasurer 'imposed by law' to pay these warrants. Assuming that the powers of the board are limited, derived entirely from statute law, and that any act of the board not warranted by law cannot stand; and apply the law to the facts here. It is conceded, and properly so, that the warrant, upon its face, is regular and legal. It complies with the general rule that facts necessary to confer jurisdiction upon an inferior judicial or quasi judicial tri-

bunal must appear upon the face of the record. When such facts do appear upon the face of the record, the final determination of that tribunal stands as valid and legal until it is reversed or modified in some manner provided by law. There is no law which requires a county treasurer to refuse to pay a warrant, regular and legal upon its face, because it may be voidable for reasons dehors the record. This calls for legal discretion and judicial authority. The law makes it the duty of the treasurer to pay the warrants of school trustees, and confers upon him no discretionary powers in the premises. The office of the writ of mandamus is to compel action, and does not apply to cases like this, where the object sought is to require the treasurer to undo his acts; because this proceeding is based upon the idea that the treasurer has committed a breach of duty for which he is liable, and to enforce that liability.

"If the warrant under discussion is voidable for fraud, it would seem that Perry D. Crager and W. W. Tutwiler, one or both, could be forced to repay the money; and justly so under the evidence. It may require an action to decide whether or not Messrs. Plowden and Clark, whose act in signing the warrant in blank enabled Crager or Tutwiler to fill up the same so as to appear legal upon its face, and to assign the same to an innocent purchaser, shall be liable to the school district for any loss sustained, or whether or not such an innocent purchaser, or the treasurer, shall make good such loss. It is to be regretted that the relators neglected the requests of the treasurer to have him enjoined, and failed to take any steps in the premises, except to warn the treasurer not to do a 'specific duty' imposed upon him by law, and by the unlawful act of two of the relators (if these acts are unlawful), when the treasurer has no official authority to justify his refusal to pay the warrant. The real ground of the relators is that the treasurer should have refused payment of the warrant, subjected himself to a suit or other proceedings, upon the grounds of defense lying within their knowledge. I am aware of no law which required the treasurer to test the legality of a warrant by a legal action. It was the legal duty of the relators, more than any one else, to have instituted proceedings to avoid the payment of the warrant. If a refusal by the treasurer to pay the warrant had to be excused or justified by the judgment of the court, it was not his 'specific duty' to refuse such payment.

"Again, if the school district has an action against the treasurer, an ordinary action will afford ample and easy redress. An action against the treasurer, or the treasurer and his bond, is all that is necessary. Counsel for relators urged that such an action would be futile because the treasurer, to whom the judgment, if any should be recovered, had to be paid, could mark it satisfied without ac-

tually paying the money, and could continue to do so indefinitely. This view cannot be sustained. It is difficult to imagine such conduct on the part of a treasurer, and certainly no court can assume that any treasurer would ever attempt such acts. If he did, he would soon be an ex-treasurer, or pleading to an indictment in the criminal courts of this state.

"Wherefore it is ordered, adjudged, and decreed that the application for the writ of mandamus herein be and hereby is dismissed, that the rules herein be and are revoked and vacated, and that the respondent be and hereby is discharged and dismissed."

Wilson & Du Rant, for appellant. Joseph F. Rhame, for respondent.

GARY, A. J. The facts of this case are fully set out in the judgment of his honor, the circuit judge, which will be reported. The practical question presented by the exceptions is whether the proceeding by mandamus is the proper remedy in this case. The reasoning and authorities cited by his honor the circuit judge so conclusively show that the mandamus is not the appropriate remedy in this case that we deem it unnecessary to add anything to what is said by him.

It is the judgment of this court that the judgment of the circuit court be affirmed.

POPE, C. J. (dissenting). On the 16th February, 1898, the petitioners, R. C. Plowden and John W. Clark, as board of school trustees of School District No. 5, issued a school certificate, wherein they directed the county treasurer, the respondent, Samuel J. Bowman, to pay to W. W. Tutwiler or bearer \$198, said sum being allowed for three copies of Evans' Arithmetical Study, edition No. 150, and three copies edition No. 120, approved and adopted by state board of education May 15, 1897, and charge the same to the account of the free-school funds of this school district. This school certificate was supported by the affidavit of W. W. Tutwiler that the account for school supplies was just, true, and unpaid; that such school supplies had been actually delivered. Such affidavit was made before said Robert C. Plowden in his official character as school trustee, and being a part of said school pay certificate, on the 16th day of February, 1898. W. S. Richbourg, as county school commissioner for Clarendon county, S. C., on the 18th day of February, 1898, indorsed his approval on said school pay certificate, and on the same last day the payer of said school pay certificate transferred the same for value to A. Levi, a citizen of Clarendon county, S. C., who presented the same for payment to the respondent, Samuel J. Bowman, as treasurer of Clarendon county, S. C., who declined to pay the same on account of lack of funds in his hands at that time payable to School District No. 5, but subsequently, to wit, on the 12th day of December, 1898, the said treasurer, Samuel J. Bowman, paid the said school certificate in full

to the said A. Levi. Before the payment was made, however, all three members of the board of trustees of said School District No. 5 gave verbal and written notice to said Samuel J. Bowman, as treasurer, not to pay said school certificate, on the ground that the same had been issued to W. W. Tutwiler on the condition that the same, before being effectual, should be agreed to and approved by the petitioner J. H. Burgess, and that said W. W. Tutwiler, in disregard of his agreement, and in fraud, had presented the same for the approval of W. S. Richbourg, as county school commissioner of Clarendon county, and obtained his approval thereof, and thereafter transferred the same for value to A. Levi. When the board of trustees for School District No. 5 served their notices upon the treasurer, Samuel J. Bowman, he requested and insisted that they should take some proceedings in law to enjoin his payment of said school certificate. This they neglected to do. Thereafter, under the advice of his counsel, learned in the law, the said county treasurer paid the claim. On the 17th May, 1900, the said board of trustees for School District No. 5 presented their petition in the court of common pleas for Clarendon county, wherein they alleged all of the foregoing facts against the said county treasurer, Samuel J. Bowman, as defendant, and prayed that the writ of mandamus might issue, requiring said county treasurer, in effect, to "change his books that his school district might have credit therein for the said sum of \$198, which was improperly paid to W. W. Tutwiler's transferee, A. Levi." The said Samuel J. Bowman answered the rule. The proceeding came on to be heard by Judge Aldrich, who denied the petitioners any relief whatever, and dismissed their petition. From this decree of Judge Aldrich, the petitioners now appeal to this court upon the following grounds:

"(1) Because his honor erred, it is respectfully submitted, in deciding that: 'It was not the "specific duty" of the treasurer "imposed by law" to refuse to pay said warrant: (a) Because the warrant, having been procured by fraud and breach of trust, was void, and after he had notice of such fraud it was his specific duty to refuse payment. (b) Because the said warrant was void ab initio, because it was not made by the board sitting in session as a board, and, being a void warrant, could impose no duty and convey no rights. (c) Because the respondent had no right or discretion to refuse the plain positive instructions of the board of school trustees contained in the prohibitory notice served on him by two members of the board.'

"(2) Because his honor erred, it is respectfully submitted, in deciding that mandamus is not the proper remedy in this case; whereas, it is respectfully submitted: (a) There is no adequate remedy at law which can be pursued by any one against the said treasurer until such time as he goes out of office.

(b) The pleadings and evidence show that the remedy desired is a change made in the books of the said treasurer, as they at present are incorrect, and further show how they are incorrect.

"(3) Because his honor erred, it is respectfully submitted, in deciding (a) that it is the duty of the county treasurer to pay the warrants of the school trustees, even if the same are void; (b) that it was the duty of the respondent to disregard the positive instructions of the board of school trustees prohibiting his paying said warrant.

"(4) Because his honor erred, it is respectfully submitted, in deciding that the county treasurer is bound to accept as correct the facts appearing upon the face of a warrant, after actual knowledge that said statement is untrue, and that said warrant is a forgery, and is void.

"(5) Because his honor erred, it is respectfully submitted, in deciding that it was the legal duty of the relators to have instituted proceedings to avoid the payment of the said warrant; whereas, if the said warrant was void, the said Samuel J. Bowman should not have paid same, as no rights could be claimed under it; and, even if the said warrant was voidable, only then the notice signed by J. H. Burgess and R. C. Plowden in their official capacity as trustees was sufficient to avoid same, and to hold said Samuel J. Bowman, as county treasurer, harmless.

"(6) Because his honor erred, it is respectfully submitted, in deciding that the said warrant was legal on its face, when the pleadings and testimony showed that it was drawn when there was no money then actually to the credit of the said board on that account in the hands of the county treasurer.

"(7) Because his honor erred, it is respectfully submitted, in deciding—if his decree herein can be construed as so deciding—that the county warrant, a copy of which he sets out in his decree, is a negotiable instrument, and that an innocent purchaser for valuable consideration is protected by the application of the rules of law applicable to negotiable instruments; whereas it is submitted that a county warrant of the nature of this one is nothing but an order for the payment of money, which is revocable by the officers drawing same; is transferable, but not negotiable; and the purchaser of one takes it subject to all the defects and all the equities which could be set up against the original payee.

"(8) Because his honor erred, it is respectfully submitted, in discharging the respondent, and refusing the peremptory writ of mandamus prayed for, because (a) the pleadings and evidence show that the respondent failed and refused to perform a plain ministerial duty as county treasurer after the proper demand had been made upon him to do so; (b) because by mandamus was the only remedy which the relators had, and is the proper remedy."



We will now briefly express our views upon the questions presented by the grounds of appeal as presented for our consideration. The true nature of mandamus is very correctly set forth in volume 13, of the *Encyclopædia of Pleading and Practice*, 487: "A writ of mandamus is a command issuing from a court of law of competent jurisdiction in the name of the state or sovereign, directed to some inferior court, or to some officer, corporation, or person, and requiring the performance of a particular act or thing therein specified, which pertains to the duty of such court or person." Or as the law governing mandamus, as laid down in *Morton, Bliss & Co. v. Hoge*, Comptroller General, 4 S. C. 472: "To be entitled to the writ, the relators must show that the respondent is bound to the performance of some specified duty imposed by law of a ministerial character, and in the performance of which the relators have a legal interest." Is the court of common pleas possessed of jurisdiction to hear and determine applications for writs of mandamus? The Constitution of this state (section 15 of article 5), provides: "The court of common pleas shall have original jurisdiction, subject to appeal to the Supreme Court, to issue writs or orders for injunction, mandamus, habeas corpus and such other writs as may be necessary to carry their powers into full effect. \* \* \*"

We will now determine if the writ should issue. We are inclined to take a different view of this proceeding from that taken by the circuit judge, for it seems to us that there was a duty owed by the respondent, as county treasurer, to School District No. 5. He was the custodian of the funds belonging to the school district. He was bound to know the law governing the disbursement of the funds of that school district. He was bound to know that there were no funds in his hands as treasurer belonging to that school district on the 18th February, 1898, and that any order drawn on him as treasurer by the trustees of School District No. 5 when there were no funds belonging to that school district in his hands was void under the law. Therefore when he afterwards, to wit, 12th December, 1898, paid this claim under the protest and the notice of its illegality by said board of trustees of School District No. 5 not to pay said void order, he violated his duty to such School District No. 5, which violation consisted in reducing the fund belonging to such school district to the extent of \$198, so improperly paid. Therefore he was bound to replace that exact sum of \$198 to the credit of said school district. Such act was a plain, ministerial duty, for which mandamus would lie to compel performance thereof. As was well said by Mr. Justice Eugene B. Gary in the opinion delivered by him in the case of *Loan & Exchange Bank of S. C. against Shealey*, county treasurer of Lexington County, 62 S. C. 345, 40 S. E. 674: "It was evidently the intention of the Legislature that

all those having a duty to perform with reference to school districts should be fully informed with reference to the fund apportioned to the school districts. Realizing the great danger of conferring upon the boards of trustees unlimited power to enter into contracts within the scope of their agency, the Legislature enacted the provision 'that all contracts which boards of trustees may make in excess of the funds apportioned to their districts shall be void.' Section 53, Act 1896, 22 St. at Large, p. 170. It likewise limited the power of the boards of trustees by providing that they should only be 'capable of contracting and being contracted with to the extent of their school fund.' Section 31, Act 1896," 22 St. at Large, p. 162. The respondent, as county treasurer, was bound to know these provisions of the law. He could not pay this claim on the 18th day of February, 1898, because of the want of school funds. He did not have the funds to pay this claim on the 30th June, 1898, which date ended the scholastic year. He did not have the funds on the 12th December, 1898, which was in a new school year, and presumably arising from the taxes which commenced to be paid 1st October, 1898. It will not embarrass the county treasurer to pay back this sum of \$198. There is nothing in the law to forbid his correction of this error. All that will happen will be that School District No. 5 of Clarendon county will have \$198 to its credit on the books of the county treasurer, which sum, in the eyes of the law, should have been there on the 12th day of December, 1898. Under the decision of *Morton, Bliss & Co. against Hoge*, as Comptroller General, *supra*, the relators have shown that the respondent is bound to the performance of some specified duty imposed by the law of a ministerial character, and in the performance of which the relators have a legal interest, for it was the specific duty of the respondent to keep the funds belonging to School District No. 5 in his hands until paid out on claims, as required by law. The correction of an error in dollars on the books of the county treasurer is a ministerial duty. In the performance of this duty by the county treasurer, the relators have a legal interest, for by law they control the management of the finances of the school district.

It is suggested, however, that a majority of this board of trustees put it into the power of Tutwiler to practice this imposition upon the holder of the claims of Tutwiler. That cannot prevail here, because Tutwiler and A. Levi were bound by all the safeguards thrown by the law upon the issuance of any such order. This is no evasion of the law merchant. The specific character of the whole transaction showed that this attempted exercise of power by this board of trustees had to be grounded upon the school law of this state. When the agents of a state government seek to issue bonds, even innocent holders for value without notice are bound,

If such bonds were issued without the agents of the government having legal power to do so. *Bond Debt Cases*, 12 S. C. 200. Such being our views, we are led to sustain all the exceptions which correspond to the principles of law herein announced, and overrule any others. But we wish it distinctly understood that we do not pass upon any questions as to A. Levi's right against School District No. 5, or these two appellants, Robert C. Plowden and John W. Clark, if any such questions can be raised.

For these reasons, I think the judgment of this court should be, that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court, with directions to issue a writ of mandamus as prayed for.

(68 S. C. 91)

**ROSEMAND v. SOUTHERN RY.**

(Supreme Court of South Carolina. April 30, 1903.)

**INJURY TO EMPLOYE—PRESUMPTIONS—LAWS OF ANOTHER STATE—FELLOW SERVANTS.**

1. In an action for damages sustained by a railroad employé in another state, where there are no allegations as to the rule of law applicable to such facts in such state, it will be presumed that the common law prevails.

2. The fellow-servant doctrine is a common-law doctrine.

3. Where fellow servants are exercising the ordinary duties of their employment, each assumes the risks incident to the employment.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by J. C. Rosemand against the Southern Railway. From order of nonsuit, plaintiff appeals. **Affirmed.**

H. K. Townes and Blythe & Blythe, for appellant.

T. P. Cothran, for respondent.

Plaintiff and engineer are fellow servants at common law. *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Stephani v. Railroad Co. (Utah)* 57 Pac. 34; 3 Wood, R. R. 1775; *Jenkins v. Railroad Co.*, 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750; *Wilson v. Railroad Co.*, 51 S. C. 96, 28 S. E. 91; *Boatwright v. Railroad Co.*, 25 S. C. 135; *Evans v. Chamberlain*, 40 S. C. 106, 18 S. E. 218.

GARY, A. J. The appeal herein is from an order of nonsuit. The action is for damages alleged to have been sustained by the plaintiff, at a point on defendant's railroad near Toccoa, in the state of Georgia, while engaged in the occupation of flagging, through the negligence of the defendant. The complaint alleges substantially that on

June 1, 1900, the plaintiff was, and for three weeks preceding had been, in the employ of defendant, and engaged in the repair of a trestle near Toccoa, Ga., under the orders and direction of B. O. Worley, bridge foreman; that it was the duty of Worley, and it had been his custom, to send out flagmen to warn approaching trains of the dangerous condition of the trestle, and it was the duty and custom of those in charge of the trains so warned to stop their trains, and this had been done for three weeks during all of the time repairs were being made on the trestle; that upon the occasion in question the plaintiff was ordered by Worley to proceed about a mile in the direction of Toccoa for the purpose of flagging approaching trains; that he had been previously ordered to do similar work on the south side of the trestle, and, when he came back to the trestle from such previous work, he was not allowed time to rest before going out again, as he was directed, and, after placing the flag and torpedoes in proper position, he became so overpowered by the heat and exertion that he fell exhausted and unconscious upon the track; that while lying in this unconscious condition he was struck by a south-bound train and seriously injured; that his injuries were caused by the negligence of the servant of the defendant in not exercising due care in approaching a known dangerous place, and a place where he had been accustomed to have trains flagged, and in failing to keep a proper lookout along the stretch of track. The answer denied negligence, and pleaded plaintiff's contributory negligence.

At the close of plaintiff's testimony, the defendant moved for a nonsuit on two grounds: (1) That there is no testimony tending to show the negligence alleged in the complaint; (2) that the accident occurred in Georgia, and that, in the absence of proof, it will be presumed that the common law prevails there.

His honor the presiding judge granted the following order:

"The first ground is overruled. The second ground is sustained. It appears from the evidence that the accident occurred in the state of Georgia. The law of that state must govern. In the absence of proof as to that law, the presumption is that the common law prevails there. At common law a master is not responsible in damages to one servant injured by the negligence of a fellow servant. If there were any negligence at all in this case, it was that of the engineer of the train which struck the plaintiff. As it appears that the plaintiff and the engineer were engaged in the duties, respectively, of their employment, I hold that they were fellow servants. It is therefore ordered that the motion be granted, and that the complaint be dismissed, with costs."

The plaintiff appealed upon the following exceptions:

"(1) The circuit judge, having held that, in

<sup>1</sup> See *Master and Servant*, vol. 24, Cent. Dig. § 567.

the absence of proof as to the law of the state of Georgia, the common law prevails there, erred in not holding further that the presumption existed that the common law of the state of Georgia is the common law as declared by the Supreme Court of the state of South Carolina.

"(2) The circuit judge erred in holding that at 'common law a master is not responsible in damages to one servant injured by the negligence of a fellow servant,' whereas he should have held that, under the common law as established by the courts of this state, the master is responsible in damages to one servant injured by the negligence of a servant of the same master engaged in a different department of labor, and for the further reason that the doctrine of fellow service is not a common-law doctrine.

"(3) Because the circuit judge erred in holding that the engineer of defendant's train, and the plaintiff, a laborer on one of defendant's bridge gangs, were fellow servants, whereas he should have held that the said employes, being engaged in different departments of labor, and not being associated in the work which each was employed to do, were not fellow servants.

"(4) Because, inasmuch as the fellow-servant doctrine is based upon the doctrine of assumption of risk, the circuit judge erred in not submitting to the jury the question as to whether the plaintiff had assumed the risk of injury from the negligence of the servants of defendant.

"(5) Because the circuit judge erred in holding that, 'if there were any negligence at all in this case, it was that of the engineer of the train which struck plaintiff,' whereas he should have held that the complaint alleged and the testimony tended to show that the vice principal of the defendant, to wit, the bridge-gang foreman, was negligent in ordering plaintiff to perform an extrahazardous work without notifying him of the increased danger to which he was subjected, and that plaintiff's injuries resulted from such negligence on the part of the said bridge foreman, or from the concurrent negligence of the said bridge foreman and of the engineer of train which struck plaintiff.

"(6) Because the testimony showed that the plaintiff had been employed by the defendant as a laborer on a bridge gang on defendant's road, but that he had been ordered by the foreman of the bridge gang, on occasions, to flag trains in the absence of the regular flagman of the bridge gang, and, on the occasion alleged in the complaint, had been ordered to flag a train under particularly dangerous circumstances. The circuit judge, therefore, should have left it to the jury to say whether or not plaintiff had assumed the increased risk by flagging under the circumstances alleged, to which he was subjected by the orders of the said foreman.

"(7) Because the foreman in charge of the

bridge gang had authority to order the plaintiff's actions, the said foreman representing his master in the said work. The circuit judge should have left it to the jury to say whether the plaintiff's injuries resulted from the risks that he had contracted to assume, or were such as resulted from an increased risk that he was compelled to assume by reason of the order of the servant having authority to make the same.

"(8) Because, the plaintiff having been ordered to perform work other than that he had contracted to perform when he entered defendant's employment, the circuit judge erred in not submitting the following questions to the jury: (a) Whether the plaintiff was acting within the scope of his employment at the time he was injured, or whether he was ordered to perform work outside the scope of his employment by one who had authority to direct his actions; (b) whether the work he was ordered to perform was more hazardous than the work he had contracted to perform; (c) whether the danger of the work plaintiff was ordered to perform was so manifest that a person of ordinary prudence, situated as plaintiff was, would have realized the danger, and not have undertaken it."

The defendant gave notice that it would ask this court, in case it became necessary, to sustain the order of nonsuit upon the additional ground that the presiding judge erred in overruling the first ground of defendant's motion.

Before proceeding to consider the questions presented by the exceptions, it may be well to state some general principles affecting this case. The second ground of the motion for nonsuit was, in effect, a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that, under the common law, which, it must be presumed, prevails in Georgia, a master is not responsible to a servant injured through the negligence of a fellow servant. For it was not based upon the failure of the testimony to sustain the allegation of the complaint, but upon the fact that the allegation of the complaint did not show actionable negligence, or such as the law recognizes. The circuit court practically decided that, although there was testimony tending to support the allegations of the complaint, nevertheless it was not actionable, for the reasons stated in the order of nonsuit. The right of the plaintiff to maintain this action must be determined by the laws of Georgia. In *Bridger v. R. Co.*, 27 S. C. 458, 3 S. E. 860, 13 Am. St. Rep. 653, the court says: "The cause of action arose in North Carolina. The injury was inflicted there, and if the parties had remained in that state, and brought action there, they would have been compelled to stand or fall by the law there. And we cannot see, upon principle, how stepping over the line could give the plaintiff a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before,

and therefore could not have enforced in the tribunals having jurisdiction of the matter at its origin." *Sawyer v. Macauley*, 18 S. C. 543; *Thornton v. Dean*, 19 S. C. 583, 45 Am. Rep. 796. The remedies, however, for determining the rights of the litigants, pertain to the *lex fori*. The rule is thus stated in *Thornton v. Dean*, supra: "As for all matters relating to remedies, each state insists upon enforcing its own laws—the *lex fori*—but in the interpretation of a contract it has been established by usage that the *lex loci contractus* must govern. The rule is clearly stated by Chancellor Kent, with its qualifications: 'Then it may be laid down as the settled doctrine of public law that personal contracts are to have the same validity, interpretation, and obligatory force in any other country which they have in the country where they are made. \* \* \* It is, however, a necessary exception to the universality of the rule that no people are bound or ought to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law.'"

The complaint is silent as to the laws of Georgia. We will therefore proceed to consider what allegations must be alleged by the plaintiff, so as to show that he has a cause of action, when it arose in another state. In *Pom. Code Rem.* § 519, it is said: "Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken; and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy, which is obtained through means of the action, and which is its object." In section 520 the author uses this language: "The first of these branches must always, from the nature of the case, be a conclusion of law. The law, by its commands, creates a rule applicable to certain facts and circumstances, by the operation of which, when these facts and circumstances exist, a right arises, and is held by the plaintiff, and a corresponding duty arises and devolves upon the defendant. \* \* \* This first factor of the cause of action is therefore always a conclusion or a proposition of law, and results from the command of the supreme power in the state as its cause." Italics ours. In section 524 we find the following: "The reformed system, following in this respect the common-law method, dispenses with several of these elements which make up the plaintiff's entire ground of relief. It wholly rejects all the subdivisions which are mere legal rules or conclusions, and admits only those that consist of the facts to which the legal rules ap-

ply, and which are the occasion whence the conclusions arise. It assumes that the courts and the parties are familiar with all the doctrines and requirements of the law applicable to every conceivable condition of facts and circumstances, so that, when a certain condition of facts and circumstances is presented to them, they will at once perceive and know what are the primary and the remedial rights and duties of both the litigants; and, this knowledge being complete and perfect, it is useless incumbrance of the record to spread out upon it the legal propositions and inferences with which every one is assumed to be acquainted. A complaint or petition, therefore, drawn in accordance with this theory, must omit (1) the legal rule which is the direct cause of the primary right and duty; (2) the primary right and duty themselves, which are the results of this rule acting upon the given facts; and (3) the remedial right and duty which accrue to the plaintiff," etc.

When a cause of action arises in another state, it cannot be said that the courts and parties are familiar with the doctrines and requirements of the law applicable to the case, and that "they will at once perceive and know what are the primary and remedial rights and duties of both the litigants." The complaint must therefore set forth the rule of law applicable to the facts from which the plaintiff's primary right and the defendant's primary duty arise, if they are founded upon statute; otherwise he will be forced to rely upon the common law as the foundation of these rights and duties. In the absence of allegations as to the laws of another state, the courts will presume that the common law prevails in that state. 6 *Ency. of Law* (2d Ed.) 284; *Gooch v. Fancette* (N. C.) 29 S. E. 362, 39 L. R. A. 835; *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314; *Watson on Pers. Inj.* § 554.

We proceed to consider the exceptions in their regular order.

**First Exception.** Even if the appellant is correct in his contention in this exception, he was not thereby prejudiced, unless the common law, as declared by the courts of this state, entitled the plaintiff to recover damages for the alleged injury, and this question will be considered later.

**Second and Third Exceptions.** These exceptions will be considered together. The appellant's attorneys, in their argument, do not cite any authorities to sustain the proposition that the doctrine of fellow servant is not a common-law doctrine. If there was any doubt upon this question, it would only be necessary to refer to the authorities cited in the argument of respondent's attorneys to show that the doctrine of fellow servant does exist at common law. In the case of *Wilson v. Ry. Co.*, 51 S. C. 96, 28 S. E. 91, the court says: "When persons are employed in a common undertaking, all sustain towards each other the relation of fellow servants when exercising only the ordinary duties of their

employment, even when they cannot see each other, and are working apart, and not in conjunction. But if an employé sustains an injury through the negligence of a co-employé while such employé is performing the duties of the master, the master cannot defeat his recovery on the ground that they are fellow servants." The case of *Jenkins v. R. Co.*, 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750, fully sustains this doctrine. The syllabus of the case states correctly the principle decided, as follows: "The conductor of a preceding freight train and the assistant fireman of a following freight train are fellow servants, to the extent that the fireman on train No. 2 cannot recover from the master for damages received by him in jumping from his engine to avoid a collision with cars on the track detached from train No. 1, of whose presence proper signals, by torpedoes or otherwise, had not been given. Whether persons in the same employment are fellow servants does not depend upon the respective rank, grade, or authority of the servants." The respondent's attorney, in his argument, has cited numerous other cases sustaining the doctrine announced in *Jenkins v. R. Co.*, supra, which will be noted by the reporter. These exceptions are overruled.

Fourth Exception. It appears from the allegations of the complaint that the plaintiff and the engineer were exercising at the time of the injury the ordinary duties of their respective employments. One of the risks, therefore, which the plaintiff assumed, was the negligence of his fellow servant, the engineer. When the fellow servants are exercising the ordinary duties of their employment, the law says that each assumes the risks incident to the employment. Under such circumstances, no question of fact is presented for the consideration of the jury. *Gallman v. U. H. Co.*, 65 S. C. 192, 43 S. E. 524.

Fifth, Sixth, Seventh, and Eighth Exceptions. These exceptions will be considered together. They must be overruled for the reason that the only acts of negligence alleged in the complaint are those relating to the conduct of the engineer. While the conduct of others is mentioned in the complaint, they are not alleged to have been negligent.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(66 S. C. 162)

#### MATTHEWS v. HIPP.

(Supreme Court of South Carolina. May 21, 1903.)

##### TENANT—HOLDING OVER—LIABILITIES.

1. Where payments were made under a parol lease of the premises for a year, and the tenant continued in possession after the termination in law of the lease, he was a mere tenant at will, and there was, therefore, no valid lease for the ensuing year.

2. Where a tenant remains in possession of the premises after the expiration of one year

from the time he entered thereon under a void parol lease, and while a tenant at will paid the rent that accrued after the year from the time he first entered, and continued in possession of the premises, the tenancy at will was changed into a tenancy from year to year.

Appeal from Common Pleas Circuit Court of Newberry County; Klugh, Judge.

Action by Clara B. Matthews against Edward R. Hipp. From judgment of nonsuit, plaintiff appeals. Reversed.

Mower & Bynum, for appellant. Johnstone & Walsh, for respondent.

##### Statement of Facts.

GARY, A. J. This is an action to recover rent for the use of a house. In order to understand clearly the issues involved, it will be necessary to refer to the pleadings. The allegations of the complaint are:

"The plaintiff, complaining, alleges:

"(1) That the defendant is indebted unto the plaintiff in the sum of \$600 for the rent of her storehouse for the period of one year beginning on the 1st day of January, 1899, and ending on the 31st day of December, 1899, which storehouse is situated in the town of Newberry, in the county of Newberry, in the state of South Carolina, fronting on Main or Pratt streets, and bounded by a lot belonging to the estate of R. L. McCaughrin, deceased, by another storehouse belonging to this plaintiff, now occupied by D. C. Flynn, and by Boyce street, and which was used and occupied by the defendant for said period.

"(2) That no part of said sum of \$600 has been paid, all of which is past due, and payment has been demanded.

"(3) That the relation of landlord and tenant between the plaintiff and defendant arose as follows: The defendant, shortly before the 1st day of January, 1894, entered into an agreement with the plaintiff's agent to rent said storehouse for one year for its use and occupation by Hipp & Swygert, of which firm he was a member, at a rental of \$29.16 $\frac{2}{3}$  per month, payable monthly, from January 1, 1894, to September 1, 1894, and thereafter at \$33.33 $\frac{1}{3}$  per month, payable monthly; and it was further agreed that, if either party desired to terminate the tenancy at the end of any year, said party was to give the other party three months' notice prior to the 1st day of January of each year; that thereupon said Hipp & Swygert entered said premises on January 1, 1894, and paid her said stipulated rental during the year 1894; that the said Hipp & Swygert and the defendant, who succeeded to the business of Hipp & Swygert on the dissolution of said firm on November 1, 1895, continued in the use and occupation of said premises, and paid her rent at the rate of \$400 per annum until the 1st day of January, 1896; that the defendant continued the use and occupation of said premises during the years 1896 and 1897 and up to February 1, 1898, paying to her said rent and an in-

crease of rental of \$50 per annum on account of certain changes and improvements made by her under an agreement between her and the defendant; that in the fall of 1898 the defendant agreed with plaintiff, through her agent, that in consideration of the plaintiff's building an additional story on said storehouse, and putting in an elevator of a special size, and putting up awnings to front door and windows for his use, he (the defendant) would pay an additional rental of \$240 per annum, or \$20 additional per month, and that he would do so for a period of at least five years; that thereupon the plaintiff built and completed said additional story on said storehouse in the month of January, 1898, and put in said elevator, at an aggregate cost of about \$2,000; that at the first settlement of rent after February 1, 1898, the plaintiff and defendant, at defendant's request, agreed that the awnings should not be put up, and that the increase of rent should be reduced to \$210 per annum, or \$17.50 per month; that the defendant continued to use and occupy said premises and addition thereto, and paid her said rental at the rate of \$450 per annum, or \$37.50 per month, and said increase of \$210 per annum, or \$17.50 per month, by reason of said additions and improvements to said building, from February 1, 1898, up to January 1, 1899; that on the 27th day of December, 1898, the defendant gave this plaintiff, through her agent, notice for the first time that he would vacate said storehouse on the 1st day of January, 1899; that this plaintiff denied the right of the defendant to terminate his tenancy of the premises by such unreasonably short notice, and declined to recognize said notice as sufficient to terminate said tenancy; that the defendant did not vacate the premises on January 1, 1899, but continued to use and occupy them with the consent and acquiescence of the plaintiff for the year 1899, but refuses to pay the said stipulated rental therefor; that, relying in good faith upon the defendant's promises to perform them, the plaintiff did not have any of the agreements herein mentioned reduced to writing, except in so far as the same may be embodied in the receipts passed and settlements had between the defendant and plaintiff's agent, when said rentals were paid and adjusted between them from time to time.

"Wherefore plaintiff prays judgment against the defendant for the sum of \$660."

The respondent's attorneys thus state the substance of the defendant's answer:

"(1) The defendant answered, first, with a general denial. Second. He set out his statement as to the way the tenancy arose, which is as follows: (a) He admits that Hipp & Swygert rented this storehouse of Mrs. Matthews, and that they agreed to pay \$350, which was about September 1st changed to \$400, to satisfy some fear that the adjoining tenants of Mr. R. L. McCaughrin would become dissatisfied and he denies any agree-

ment to pay \$29.16% to November 1st and \$33.33% thereafter. He also denies that any agreement was made to give three months' or any other notice whatever, should he desire to quit at the end of 1894. (b) He admits the occupancy and use by Hipp & Swygert, and himself as their successor, for the year 1895. (c) He admits his occupancy and use of the storehouse during 1896 and 1897, but denies that it was a continuation of the former tenancy, but alleges that it was under a separate and distinct agreement for each of said years. (d) He admits his occupancy and use of the storehouse for 1897, and alleges that after and from April he paid an increased rental of \$50 for some changes and improvements which Mrs. Matthews made. (e) He admits his agreement to pay \$600 for the store if Mrs. Matthews would erect thereon a second story, and do certain other things, among them put in an elevator, which was to work satisfactorily. He admits that the store, with the second story thereon and the elevator therein, was turned over to him on or about the 1st of February, 1898, and that he paid the rental at the rate of \$660 for the remainder of the year. He alleges that the elevator was never satisfactory; that this was repeatedly called to Mrs. Matthews' knowledge, and that she repeatedly promised to properly fix and adjust it, as per the original agreement that it should work satisfactorily; that this unsatisfactory condition went on until about the 1st of May, 1898, when he complained so much and pointedly, and the justness of his complaint being recognized, Mrs. Matthews agreed to get an estimate upon erecting a stairway to the second story, for up to that time, and thereafter, too, Mr. Hipp only had the cumbersome and defective elevator to get up to the second story; that the plaintiff, although repeatedly promising to have this stairway built, refused, neglected, and utterly failed to do so; that this state of affairs, with a constant protest of the defendant, continued until about the middle of December, 1898, when the defendant, learning of another storeroom in said town that would become vacant in a few days, he forthwith notified the plaintiff that, unless the stairway was fixed, or the elevator made to work according to the original contract, that he would vacate said storehouse on the 1st of January, or as soon thereafter as he could do so; that the plaintiff came to see said defendant on the 24th of December, and promised him that the work would begin on the said stairway on the 26th, which was Monday; that on said 24th of December the plaintiff expressly agreed that she would meet said defendant on the 26th of December, and finally adjust the trouble between them that had arisen out of the failure of the elevator to work as originally agreed upon, and also the failure to erect the stairway; that the defendant waited during the entire day of the 26th of December for her to meet

him according to the said agreement, but the plaintiff failed to meet the defendant, and, after waiting until 12 o'clock the next succeeding day, the defendant then gave notice to the plaintiff that he would vacate the premises; that said notice was not given by reason of any former agreement whatever, and was only given in order that the plaintiff might see that, having failed to meet her appointment on the 26th of December, that further negotiations were ended; and the plaintiff then came to the defendant's place of business, after having received said notice, and asked the defendant if nothing could be done to make matters satisfactory, whereupon the defendant replied that he had already rented, which he would not have done had the plaintiff met the defendant according to said agreement on the 26th of December, but, having waited all the 26th and half of the 27th, he rented the other store, for to wait longer would have, no doubt, caused him to fail to get said other store; that thereafter the plaintiff made an effort to erect the stairway in said building running from the first floor to the second floor; that the defendant did not consent to this, and did not have anything whatever to do with it; that the plaintiff, so long as the defendant had been unable to rent elsewhere, had steadily declined and refused to either fix the elevator according to agreement or erect the stairway, but when the plaintiff learned that the defendant could go elsewhere, and had, indeed, rented elsewhere, she was diligent to do that which she had long before promised, but, relying upon defendant's inability to rent elsewhere, had constantly refused and failed to carry out. The defendant emphatically denied that at the time the second story was placed upon said building and the elevator placed therein, or at any other time whatever, that he ever entered into any agreement or contract whatever to rent said building for five years, or for any longer time than the year 1898. The defendant further denied that he used and occupied the said storehouse during the year 1899, but, to the contrary, he alleges that on or about the 6th of January he vacated said premises, and delivered the keys to the plaintiff, in whose possession they have since then been, and the defendant has had nothing whatever to do with said premises. The defendant further alleged that there was no contract in writing between the plaintiff and himself, nor is the same evidenced by any writing; and he further alleged that all rental agreements and contracts were in parol, and that a separate and distinct contract was made by him and the plaintiff for each year that he occupied the said building."

At the close of plaintiff's testimony, the defendant made a motion for a nonsuit on the grounds: "(1) That the plaintiff has failed to show any valid lease for the year 1899 of the property described in the complaint; (2) that the plaintiff has failed to show any

use and occupancy of the premises in question for the year 1899 by the defendant."

His honor the presiding judge, in granting the order of nonsuit, said: "After hearing argument thereon pro and con, it is my opinion that the first of these grounds is well taken, but that, there being no issue raised by the pleadings as to the use and occupation of these premises by the defendant for the year 1899, I am of the opinion that the second ground is not well taken for that reason." The plaintiff appealed from this order.

#### Opinion.

While the exceptions are numerous, the sole question for consideration is whether the presiding judge erred in ruling that the plaintiff had failed to offer testimony showing a valid lease of the property for the year 1899. Sections 2416, 2650, and 2652 of the Code of Laws are as follows:

"2416. No parol lease shall give a tenant a right of possession for a longer term than twelve months from the time of entering on the premises; and all such leases shall be understood to be for one year, unless it is stipulated to be for a shorter term."

"2650. All estates, interests of freehold or terms of years, or any uncertain interest of, in, to or out of any lands, tenements or hereditaments, made or created by delivery and seizin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized, by writing, shall have the force and effect of estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making such parol leases or estates or any former law or usage to the contrary notwithstanding, except leases not exceeding the term of one year from the time of entry, whereupon the rent reserved to the landlord during such term shall amount to two-thirds parts, at the least, of the full improved value of the thing demised."

"2652. No action shall be brought whereby to charge \* \* \* any person \* \* \* upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them \* \* \* unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing," etc.

In the case of *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596, the court, in construing these statutes, uses the following language: "From the statutes and the decisions interpreting them the following principle may be declared: (1) A parol lease gives a tenant a right of possession for a term of twelve months from the time of entering on the premises. If the lease is for a term less than twelve months, of course the tenant would only be entitled to hold possession for the time stipulated after entering into possession of the premises. (2) A parol lease

undertaking to give a tenant a right of possession for a longer term than twelve months is within the statute of frauds. Nevertheless, if the tenant is permitted to enter on the premises by virtue of such agreement, he shall have a right of possession for twelve months from the time of such entry, but no longer. (3) A parol lease under which the tenant enters upon the premises shall, after the term of twelve months from the time of entering on the premises, have the effect of an estate at will only. (4) If a landlord refuses a tenant to enter on the premises under a parol lease, no action shall be brought to charge him upon such contract, even if the lease is not for a term exceeding twelve months." These views in no wise conflict with the doctrine announced in *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608, in which the court says: "But because the lease itself creates an estate at will only, it does not necessarily follow that such an estate may not be converted into a tenancy from year to year by other circumstances. While this point has not, so far as we are informed, been distinctly decided in this state, yet it has been elsewhere, as may be seen by reference to the case of *Talamo v. Spitzmiller*, 120 N. Y. 87 [23 N. E. 980, 8 L. R. A. 221], also to be found in 17 Am. St. Rep. 607, where it is said: 'The mere fact that a person goes into possession under a lease void because for a longer term than one year does not create a yearly tenancy. If he remains in possession, with the consent of the landlord, for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year;' or, as it is considered in this state, to the end of the calendar year. *Floyd v. Floyd*, 4 Rich. Law, 23; *Wilson v. Rodeman*, 30 S. C. 210 [8 S. E. 855]. See, also, extended note by Mr. Freeman to the case of *Wallace v. Scoggins*, 17 Am. St. Rep. 752, where, at page 755, in speaking of a parol lease, that distinguished writer says: 'The better opinion is that such lease is itself void, and creates no tenancy whatever; and that, if the lessee enters under it, the tenancy is at will, unless from the payment and receipt of rent computed by the year or from the circumstances the inference may be legitimately drawn that the parties, notwithstanding the void lease, intend a tenancy from year to year.' See, also, *Reeder v. Sayre*, 70 N. Y. 180, reported also in 26 Am. Rep. 567. This doctrine is impliedly, at least, recognized in *Wilson v. Rodeman*, supra. See, also, *Godard's Ex'rs v. Railroad Co.*, 2 Rich. Law, 346."

The facts of the case under consideration were in dispute, the plaintiff contending that the payments of rent were made under one contract, and the defendant insisting that they were made under another and entirely distinct contract. If the payments were

shown to have been made under a parol lease of the premises for a year, and the defendant simply continued in possession after the termination in law of the lease, then the jury might very properly have contended that he was a mere tenant at will, and that there was, therefore, no valid lease for the year 1890; while, on the other hand, if the defendant remained in possession of the premises after the expiration of one year from the time he entered thereon under a void lease, and while a tenant at will, paid the rent that accrued after the year from the time he first entered and continued in possession of the premises, the jury might very correctly have inferred that the tenancy at will had been changed into a tenancy from year to year. When the presiding judge undertook to draw the inference from the disputed testimony, he invaded the province of the jury.

It is the judgment of the court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(86 S. C. 124)

#### DU PRE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 20, 1903.)

#### ACTION EX DELICTO—PLEADING—COMPLAINT.

1. Under 22 St. at Large, pp. 693, 694, regulating the practice in actions *ex delicto*, and providing that no person need make separate statements in the complaint in such an action, nor elect whether he shall go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court, plaintiff may allege an act as negligent, and also as willful, and set forth all facts going to make up the history of his alleged wrong.

Appeal from Common Pleas Circuit Court of Greenwood County; Townsend, Judge.

Action by Daniel C. Du Pre against the Southern Railway Company. From circuit order on motion to make pleading more definite and certain, both parties appeal. Reversed.

Sheppards & Grier and Caldwell & Parks, for plaintiff. T. P. Cothran, for defendant.

POPE, C. J. The questions presented by this appeal arise from an order made by his honor Judge Townsend on an application to him for an order to make the complaint more definite and certain. He refused, in his order, to allow any of the amendments sought by the defendant, except one. The plaintiff appeals from his allowance as to the fifteenth article of the complaint. The defendant appeals from his whole order. It will be necessary now to make the foregoing more definite, by setting out the complaint, the order appealed from, the order made, and the exceptions to the order as made. The following is the complaint:

Daniel C. Du Pre, the plaintiff above named, complaining of the Southern Railway Company, the defendant above named, alleges:



"(1) That the said defendant is now, and was at the times hereinafter mentioned, a body corporate and politic under its charter and the laws of the state of Virginia, and liable to be sued in this court.

"(2) That the said defendant owns and controls property, carries on business, and has its agents in the said county of Greenwood, in the said state of South Carolina.

"(3) That on the 28th day of February, 1901, or shortly after midnight of that day, the plaintiff, his wife, Mrs. A. B. Du Pre, and his wife's mother, Mrs. L. H. Parrish, left the town of Greenwood, in the said state of South Carolina, to accompany the dead body of Miss Emma G. Parrish, sister of the plaintiff's wife, and daughter of the said Mrs. L. H. Parrish, to Versailles, in the state of Kentucky, where the said dead body was to be buried on the second day following; the plaintiff intending to accompany his said wife and her mother and the said dead body only as far as the city of Atlanta, in the state of Georgia, and there to assist his said wife and her mother to take passage on the defendant's train running toward the said destination, and to have the said dead body properly transferred to the defendant's train for transportation.

"(4) That, for the purposes above set forth, the plaintiff, just before midnight on the said 28th day of February, 1902, purchased from the Seaboard Air Line Railway Company, at the said town of Greenwood, four first-class passenger tickets, one of them being for the transportation of his said wife, one of them being for the transportation of his said wife's mother, and one of them for the transportation of the said dead body, over the lines of the said Seaboard Air Line Railway Company from Greenwood aforesaid to Atlanta, in the state of Georgia, and thence over the lines and on the trains of the defendant to Lexington, in the state of Kentucky; that being the terminus of defendant's line toward Versailles aforesaid; the fourth ticket being for his own transportation from Greenwood aforesaid to the city of Atlanta aforesaid over the line of the said Seaboard Air Line Railway.

"(5) That the three tickets first above described consisted each of a principal ticket good for transportation from Greenwood aforesaid to Atlanta aforesaid, and a coupon providing for additional transportation from Atlanta aforesaid to Lexington aforesaid, which coupon also provided that the selling company, to wit, the Seaboard Air Line Railway Company, would not be responsible for the connecting line, the defendant company, but sold such ticket as the agent of the latter.

"(6) All the said tickets were sold to the said plaintiff by the regular ticket agent of the Seaboard Air Line Railway Company, acting also as the agent for the defendant company.

"(7) That for the sale of the three tickets

first above described, to wit, the tickets embracing coupons for transportation from Atlanta aforesaid to Lexington aforesaid over the line of the defendant railway company, the said Seaboard Air Line Railway Company and its agent at Greenwood aforesaid were the agents of the defendant, and, as such, sold the plaintiff those three tickets, and received his money in purchase thereof.

"(8) That upon the arrival of the plaintiff, his said wife, her said mother, and the said dead body at the city of Atlanta, about thirty minutes before the departure of the defendant's next passenger train going to Lexington, in the state of Kentucky, the plaintiff was informed by the agent of the defendant there that the tickets first above described would not be accepted for the transportation of his said wife and her mother over the defendant's line, because, such agent stated, the same had not been properly stamped at Greenwood aforesaid. Thereupon the plaintiff went to the office of the defendant's passenger agent, and, not finding him there, went to the defendant's ticket agent, and offered to pay all expenses of ascertaining by telegraph whether the said tickets were genuine and duly issued at the place of their purchase above described, upon which offer that agent, without just cause, and in utter disregard of the plaintiff's rights, refused to act.

"(9) That thereafter, and about ten minutes before the departure of the train mentioned in paragraph 8 of this complaint, the plaintiff went to the conductor of that train and made the offer described in said paragraph 8, which was positively refused.

"(10) That at the times mentioned in paragraphs 8 and 9 of this complaint, the ticket for the transportation of the said dead body was in the possession of the defendant's agents, to wit, its baggage master on the train of the Seaboard Air Line Railway Company, who took it on the passage between the said town of Greenwood and the said city of Atlanta.

"(11) That the plaintiff was also informed by an agent of the defendant in the said city of Atlanta, at or about the times mentioned in paragraphs 8 and 9 of this complaint that the said dead body would not be transported by the defendant unless some person in charge of it accompanied it; yet, notwithstanding this announcement, and notwithstanding the facts and announcements set forth in paragraphs 8 and 9 of this complaint, the said dead body was very soon thereafter carried away from that city and station by the defendant on one of its trains, without the knowledge of the plaintiff, who and his said wife and her said mother were left waiting in the city of Atlanta.

"(12) That by reason of the facts hereinabove set forth the plaintiff, his said wife, and her mother, already grief-stricken by the death of their said near relative, became greatly distressed, fearing that some unhappy

accident might happen to the said dead body (as, that it might, perhaps, be put off the train and left at some station short of the said station of Lexington, Kentucky), and the plaintiff, now almost exhausted and greatly worried by the misconduct of the defendant's agents, and their mistreatment of himself, his wife, and his wife's mother, was forced to accompany the two last named persons from the said city of Atlanta to the said station of Versailles, in the state of Kentucky, and for that purpose, the agents of the defendant having refused to accept the tickets of the plaintiff's said wife and his said mother-in-law, paid the defendant, for the second time, for the transportation of those two persons from the city of Atlanta to the city of Lexington about the sum of \$24, and for the transportation of himself between the last two named places the sum of about \$12; paying thus under compulsion, arising from the misconduct of the defendant's agents and servants, the aggregate sum of \$36, which he ought not to have been forced to pay out.

"(13) That in order to rest and recuperate as far as possible from the worry, excitement, and anxiety caused by the occurrences herein above set forth, and to secure comfort, convenience, and rest for his wife and her mother, and for himself also, the plaintiff took for them and himself passage in a sleeping car or parlor car on the passenger train of the defendant from the said city of Atlanta to the said city of Lexington, departing next after the occurrences above described, for which places in the said sleeping or parlor car he paid the sum of \$7.50 additional to the regular railroad fare mentioned in paragraph 12 of this complaint.

"(14) That when the plaintiff entered the said sleeping car on the defendant's said train from the said city of Atlanta to the said city of Lexington, above described, the same was heated to a high degree of temperature, the weather being quite cold; but some hours later, during the night, the servants and agents of the defendant carelessly, negligently, and without regard to the comfort, health, and rights of the plaintiff, detached the said cars from the rest, or at least from other portions, of the said train, and from connection with the engine which supplied heat to the said car, and attached to it a freight engine without heating pipes, for a space of four or five hours, and, although there was a heating stove in the said car, negligently failed to use it for heating the said car, whereby the said car rapidly became cold, which caused the plaintiff to contract a severe cold, which cold gradually grew worse, and finally developed into a serious case of pneumonia, which endangered his life, caused him great and protracted bodily suffering and mental anguish, and forced him to pay out large sums of money for medical attention, for appliances requisite in such sickness, and also to lose much valuable time from his business.

"(15) That, by reason of the carelessness, negligence, and willful misconduct of the servants and agents of the defendant herein set forth and described, the plaintiff has been damaged in the sum of \$1,999.99. Wherefore the plaintiff demands judgment against the defendant for the sum of \$1,999.99, and for the cost of disbursements of this action."

On the 20th January, 1902, the defendant gave notice of a motion before Judge Townsend for the following relief, as indicated by several grounds, as follows:

"(1) For an order striking out paragraphs 8, 4, 5, 6, 7, 8, 9, 10, 11 of the complaint, as irrelevant matter; for the same reason, striking out all of paragraph 12 of the complaint, except the statement that the plaintiff purchased from the defendant a ticket entitling him to transportation from Atlanta, Georgia, to Lexington, Kentucky, for the sum of \$12; for the same reason, striking out all of paragraph 13 of the complaint, except the statement that the plaintiff took for himself passage in a sleeping or parlor car on the passenger train of the defendant from the city of Atlanta to Lexington, Kentucky, for which he paid the sum of \$2.50.

"(2) For an order striking out paragraph 15 of the complaint, upon the ground that it contains inconsistent allegations—negligence and willful tort.

"(3) For an order requiring the plaintiff to elect which cause of action he will proceed upon—ordinary negligence or willful tort.

"(4) For an order requiring the plaintiff to make his complaint more definite and certain, by alleging the acts constituting willful tort, in the event he elects to stand upon that cause of action."

The circuit judge passed the following order:

"This is a motion to strike out parts of the complaint, and to make the same more definite and certain in some respects, and to compel plaintiff to elect which cause of action he will stand upon. I refuse the motion, except that the plaintiff must make his complaint more definite and certain by alleging what acts are negligent and what acts are willful, as one act cannot be alleged as negligent and also as willful. For instance, the plaintiff states his entire cause of action in the fifteenth paragraph of the complaint as due to carelessness, negligence, and willful misconduct of the agents and servants of the defendant, without stating which acts are negligent and which are willful. The same act cannot be alleged as negligent and also willful, because they are opposite terms in their meaning; yet willful acts and also negligent acts may be contained in the same complaint, if they are separate and distinct acts contributing to the injury complained of. All of which is ordered and adjudged."

From this order, as before remarked, both sides appeal.

The plaintiff urged the following grounds:

"First. Because his honor erred, in that he

requires the plaintiff to make his complaint more definite and certain by alleging what acts are negligent and what acts are willful. (a) The plaintiff has a right to allege that a specific act is both negligent and willful, and shall be entitled to submit his whole case to the jury, under the instruction of the court. (b) The plaintiff could not be expected to know what motive induced the agents of the defendant to commit the particular acts, and he should be entitled to state the facts and circumstances surrounding the particular act, and have the jury determine whether the act complained of was the result of negligence or willful tort. (c) A willful act may also be a negligent act. (d) The complaint states the facts. The conclusions to be drawn therefrom are within the peculiar province of the jury."

We will now pass upon exceptions of plaintiff:

It seems to us that the circuit judge, for the moment, overlooked the broad terms embodied in the act of the General Assembly of this state found in the twenty-second volume of Statutes at Large of this state, at pages 693 and 694. Before this act was passed, several decisions had been rendered by this court which required parties to state definitely the cause of action as to damages, so that the defendant might see exactly what he was required to answer. Since the act (1898) we have before recited, that is no longer the rule in this state. The title of the act in question shows that it is "to regulate the practice in the courts of this state in actions ex delicto for damages." By the terms in the body of the act, a man who sues for exemplary may recover his actual damages, and no party is "required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he shall go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court." Now, the words of the act, "under the instructions of the court," were necessary in order that the act might be constitutional, for our Constitution, adopted in 1895, in a mandatory manner requires that circuit judges shall declare the law to the jury. It does seem from the first section of the act from which we have just quoted that a party plaintiff has the right to go to trial for actual or other damages, without any power in the circuit judge to require him to elect whether he will go to trial for actual or other damages. The second section of the act of 1898 leaves no room for doubt, for it provides that "*in all cases whether two or more acts of negligence, or other wrongs, are set forth in the complaint, as causing or contributing to the injury, for which suit is brought, the party suing shall not be required to state such acts separately, nor shall such party be required to elect upon which he will be required to go to trial, but shall be entitled to submit his whole case*

to the jury under the instructions of the court and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts and wrongs alleged in the complaint. And all acts or parts of acts inconsistent with this act are repealed." *Italics ours.* From this statement of the act of 1898, it seems to us the circuit judge was in error when he required the plaintiff to reconstruct his complaint by stating what acts are negligent and what are willful, and it is so adjudged.

Now we will consider the defendant's exceptions, which are as follows:

"First. His honor erred in refusing defendant's motion to strike out, as irrelevant, paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, all of paragraph 12, except the statements that the plaintiff purchased from the defendant a ticket entitling him to transportation from Atlanta Ga., to Lexington, Ky., for the sum of \$12, and all of paragraph 13, except the statement that the plaintiff took for himself passage in a sleeping or parlor car on the passenger train of the defendant from the city of Atlanta to Lexington, Ky., for which he paid the sum of \$2.50, whereas he should have held that the only cause of action alleged in the complaint in favor of the plaintiff against the defendant is that while in Atlanta he purchased from the defendant a ticket entitling him to transportation from Atlanta to Lexington, Ky.; that he also purchased accommodation upon a sleeping or parlor car of defendant's train; that, on account of insufficient heating of said sleeping or parlor car, he contracted pneumonia, from which he suffered as alleged. Nothing else alleged in the complaint is pertinent or relevant to this issue. (1) Paragraph 3 alleges the circumstances under which plaintiff went to Atlanta, which are totally irrelevant to his alleged cause of action. (2) Paragraph 4 alleges the purchase of three tickets for plaintiff's party from Greenwood to Lexington, Ky., over defendant's line from Atlanta to Lexington, and one ticket for himself over another line than defendant's from Greenwood to Atlanta. The purchase of three tickets was for others, and the purchase of the ticket for himself was over another line than the defendant's, and the allegations are totally irrelevant to his alleged cause of action. (3) Paragraph 4 refers only to the purchase of tickets for the others of plaintiff's party, and is totally irrelevant to his alleged cause of action. (4) Paragraph 6 is subject to the same objection as in 3. (5) Paragraph 7 is subject to the same objection as in 3. (6) Paragraph 8 contains allegations of a possible breach of contract between the defendant and the persons for whom the through tickets were purchased, for which they alone would be entitled to sue. It has no relevancy to the plaintiff's alleged cause of action. (7) Paragraph 9 is subject to the same objection as in 6. (8) Paragraph 10 refers to the ticket purchased for the trans-

portation of the corpse, and has no relevancy to the plaintiff's alleged cause of action. (9) Paragraph 11 is objectionable as containing probative instead of substantive facts. It is also objectionable for the reason that at the time plaintiff sustained no contractual relation with defendant, and its disposition of the corpse could make no cause of action in favor of the plaintiff. It is also irrelevant to the plaintiff's alleged cause of action. (10) Paragraph 12 contains simply the inducement for the plaintiff accompanying the party to Lexington, and is irrelevant to his alleged cause of action. The failure of defendant to honor the tickets of plaintiff's companions, even if it could be made the ground of complaint by him, was not the proximate, natural, or direct cause of his trip. The allegation that plaintiff purchased a ticket for himself to Lexington is not objected to. Plaintiff's mental anguish, unaccompanied by physical injury, would constitute no cause of action. (11) Paragraph 13 contains only the inducement for the plaintiff taking a sleeper, which is not relevant to his cause of action. What others of the party did, can add nothing to his cause of action.

"Second. His honor erred in not striking out paragraph 15 upon the ground that it contains inconsistent allegations — negligence and willful tort.

"Third. His honor erred in not requiring plaintiff to elect which cause of action he would proceed to trial upon—that for negligence or that for willful tort; the plaintiff having alleged in his complaint that the several acts of the defendant therein set forth were both negligently and willfully done. A plaintiff may allege that one act was done willfully, and that another act was done negligently, and perhaps claim damages for both in his complaint, but he cannot allege that the same act or acts was or were done both negligently and willfully. He should be required to elect."

The multiplication of words will not tend to make clearer, we fear, the revolution in pleadings in actions *ex delicto* for damages by the act of 1898, already cited, than what we have already said in passing upon the plaintiff's single ground of appeal. To our minds, anything that is connected with the events which constitute the plaintiff's story of his wrongs at the hands of the Southern Railway Company may be included in the allegations of fact set out in the plaintiff's complaint. Whatever corrective force in the law there may be resides in the circuit judge in his charge upon the law to the jury. It does not reside in the circuit judge, as a person, to correct the allegations of fact in the complaint, where those allegations of fact pertain to actual damages or exemplary damages sustained by the plaintiff. But apart from this view of the force of the act of 1898, we must say that we regard the allegations of fact set out in the complaint as nothing but a connected history of plaintiff's

wrongs. We must overrule defendant's exceptions.

It is the judgment of this court that the order of the circuit judge, so far as the plaintiff's grounds of appeal are concerned, is reversed, and, further, that such order of the circuit judge, so far as the defendant's grounds of appeal are concerned, is affirmed.

JONES, J., concurs in the result.

(66 S. C. 85)

#### MILLER v. PRICE.

(Supreme Court of South Carolina. April 20, 1903.)

#### DEED—MORTGAGE—EVIDENCE—BURDEN OF PROOF.

1. Evidence examined, and deed absolute on its face held not a mortgage.

2. Where a deed is absolute on its face, the burden of proof is on one alleging it to be a mortgage to show such fact.

Appeal from Common Pleas Circuit Court of Charleston County; Townsend, Judge.

Action by Sarah Ellen Miller against Thomas J. Price. From decree in favor of plaintiff, defendant appeals. Reversed.

W. M. Fitch, for appellant. Simeon Hyde, for respondent.

GARY, A. J. This is an action to have a deed of conveyance declared to be a mortgage, and intended as a security for certain sums of money borrowed by the plaintiff. The master, in his report, thus states the issues raised by the pleadings:

"The plaintiff alleges that previous to the 31st day of July, 1900, she, being indebted to the defendant in the sum of \$78, applied to him for another loan of \$100, which amount the defendant agreed to lend her upon condition that the plaintiff would secure him by a conveyance of the property; that she agreed to do so, and thereupon the defendant 'loaned and advanced' to the plaintiff the said sum of \$100, and presented to her for her signature a deed of conveyance of the said property, which, in order to carry out on her part the said agreement, she executed and delivered to him. The conveyance covered a lot of land on Kracke street, and two lots on Norman street and Ashton court, described in the second paragraph of the complaint. The consideration named in the deed was \$200. The deed was properly executed and delivered on 30th July, 1900, and was duly executed on 31st July, 1900. That the said deed was executed and delivered to the defendant merely as security for the repayment of the said debt of \$178, with the interest thereon, and the expense of preparing and recording the deed, 'and was to be and become, as was then and there agreed by and between the plaintiff and defendant, void and of no effect whatsoever upon the repayment of the said sum so therein named, of \$200.'

[ 2. See Mortgages, vol. 35, Cent. Dig. § 96.

"The plaintiff further alleges that she is an ignorant woman, and at the time of the execution of the said deed was sick in bed, and that the defendant is a real estate broker in the city of Charleston, and is a man of experience in the said business; that the defendant had been for some time the agent of plaintiff's father, who in his lifetime was the owner of the property, and since her father's death has been the agent of plaintiff, having charge of the said real estate for her, for the purpose of rent or sale, and that, because of those peculiar relations of trust and confidence, she was induced to convey the said property to him as security as aforesaid; that the value of the said real estate is upward of \$1,100, and the debt due by plaintiff to defendant did not at any time exceed \$200; that since the conveyance to him the defendant has sold one of the pieces of property referred to, viz., the lot on Kracke street, to one John O. Beard, trustee, for \$300, and thus the debt of plaintiff has been paid in full, and there is now in the defendant's hands the overplus of \$100, to which plaintiff is entitled. The plaintiff has applied to the defendant for a reconveyance to her of the remainder of the said real estate, which demand defendant has refused.

"The answer of the defendant denies all the allegations of the complaint, except that the conveyance referred to was made and delivered to him, and that he is by profession a real estate broker, and that the said real estate had been in his hands as the agent for the plaintiff, which said allegations he admits. For a further defense, he alleges that on or before the 21st of March, 1900, the plaintiff was indebted to him in various sums, amounting to \$80, and, to secure the said indebtedness, made and delivered to him her bond and mortgage in the penal sum of \$160, dated 21st March, 1900, covering the property described in complaint; that thereafter, to wit, from the 21st March, 1900, to on or about the 30th July, 1900, the plaintiff became indebted to the defendant in various other sums, for various causes, and 'upon her request, and with her consent, she agreed, upon the payment of \$100, in addition to the amount secured by the bond and mortgage, and the various items of indebtedness due by her to the said T. J. Price, to sell and convey the property described in the complaint, in fee simple, to the said T. J. Price, as at that time the property was in very bad repair, yielding no rent, and not self-sustaining, and she did not have the money to repair the same and make it self-sustaining; and, after the negotiations had between the plaintiff and defendant, he accepted the wishes and desires of the said plaintiff, and paid over to her, upon the execution of the deed mentioned in the complaint, the sum of \$100 in cash, and then took a conveyance in fee simple from the plaintiff to himself, dated 30th July, 1900—the consideration in said conveyance being,

for convenience, stated at \$200—which conveyance was duly recorded. And the defendant alleges that there was no agreement whatsoever of any kind made or agreed to between him and the plaintiff, except that the property was to be sold to him without any reservation whatsoever, for the consideration as above stated, and that he holds such of the said property as is now in his possession as a purchaser for valuable consideration, in fee simple."

After stating his findings of fact, the master concludes his report as follows:

"I do not think it necessary to incumber this report by going into a detailed analysis of the testimony. It is sufficient to say that I am satisfied that there was no such agreement between the parties as that set up by the plaintiff, namely, that this conveyance should stand simply as a security for money lent to plaintiff, and should become void—of no effect—upon the repayment to the defendant of the amounts so advanced. The transaction between the parties was, on the side of the defendant, entirely open and above-board. The instrument itself is, in terms, an absolute conveyance. One of the subscribing witnesses to the deed testifies that it was read over to the plaintiff two or three times, and she signed it willingly, and without any compulsion or undue persuasion. The plaintiff is a colored woman, but of fair average intelligence, and it is not even pretended that she thought the paper she signed was anything but an absolute deed. Her contention is that she meant it to be only a security. Possibly so, but there is nothing in the testimony that persuades me that she conveyed that idea or intention to the defendant, or that he received the deed with any such understanding. On the contrary, he at once proceeded to treat the property as his own, and to exercise rights of ownership over it. Persons who do solemn acts must abide the results of those acts, and not expect courts to relieve them from the consequences of their own indiscretion. Undoubtedly there are cases where courts will declare an instrument, on its face an absolute deed, to be in intent and actually a mortgage, just as there are cases where a deed will be set aside for fraud, for glaring inadequacy of price, or for undue advantage taken of one of the parties by a person who bears a fiduciary relation to that party. But I do not find any of these elements in this case. The price given was comparatively small, but property at the time was extremely depressed; and, though a larger price might eventually have been obtained, yet that would have taken time and much effort, and the plaintiff's need for the money was immediate. No fraud nor undue influence nor improper concealment has been proved against the defendant. The cases of *McHall v. Hall*, 41 S. C. 168, 19 S. E. 807, *Petty v. Petty*, 52 S. C. 54, 29 S. E. 406, and *Shiver v. Arthur*, 54 S. C. 184, 32 S. E. 310, relied upon by

defendant's counsel, seem conclusive of this case; but, independently of the authority of decided cases, it is clear to me, under the facts of this case, and the general principles of law, that the relief sought for in the complaint must be denied, and I so find and report as matter of law. I recommend that the complaint be dismissed, with costs."

On hearing the exceptions, this report was reversed by the circuit court, and the defendant has appealed to this court.

The practical question presented by the exceptions is whether his honor the circuit judge erred in his finding that the deed of conveyance, although absolute on its face, was intended as a mortgage. The rule of law applicable to this case is thus stated in *Shiver v. Arthur*, 54 S. C. 184, 32 S. E. 310: "In order to settle the practice as to the burden of proof in such cases, the court takes occasion to state it as follows: (1) An instrument of writing is what upon its face it purports to be. (2) The complaint must contain the necessary allegation that the deed, though absolute on its face, was intended as a mortgage. (3) These allegations must be sustained by testimony *prima facie* showing that they are true. When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports. (4) When this is done, it is incumbent on the mortgagee to remove the inference that may be drawn from such *prima facie* showing. This is sometimes spoken of as a burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made."

The complaint does not allege fraud, undue influence, or concealment of facts on the part of the defendant. Nor was there any testimony showing an agreement by the grantee to reconvey the property to the plaintiff. The master, in his report, finds that "at the time of the transaction between the parties the houses on the lots were in very bad repair, and had been for a long time without tenants. The defendant had endeavored to sell them without success. It may be fairly concluded that in the condition of the premises in July, 1900, these lots were very undesirable property for any one who did not have the money to put the buildings in tenantable order and to keep down the taxes."

When the defendant paid to the plaintiff the balance of the \$100, she executed the following receipt: "Received, Charleston, S. C., July 31st, 1900, from Thomas J. Price, ninety-five  $\frac{95}{100}$  dollars bal—in full of all demands to date for property Ashton and Kracke streets. \$95.00. Sarah Ellen Smith." The plaintiff wanted the \$100 because she was soon to be married. The plaintiff secured the former loans to her by the defendant by a mortgage of the property, and it is but reasonable to suppose that she would have executed another mortgage if the \$100 was intended merely as a loan. The testimony impresses us that the plaintiff intended to

sell the property to the defendant, but afterwards became dissatisfied with the transaction.

It is the judgment of this court that the judgment of the circuit court be reversed.

(66 S. C. 115)

STATE ex rel. FARR et al., Public Works Com'rs, v. YOUNG, Mayor, et al.

(Supreme Court of South Carolina. April 20, 1903.)

APPEAL—MANDAMUS—MUNICIPAL CORPORATIONS—SEWERAGE COMMISSION—RIGHT TO FUNDS.

1. A party obeying a writ of mandamus is not thereby deprived of his right to appeal.

2. Act Feb. 27, 1902 (23 St. at Large, p. 1040), relating to the erection of sewer systems, provides that any municipal corporation may establish a system of sewerage, and elect a sewerage commission, which shall have charge of the system of sewerage. *Held* that, where a town council is about to proceed under such act to elect a sewerage commission, a committee of public works elected by the town council, as provided by Act March 2, 1896 (22 St. at Large, p. 83), has no right to the possession and control of sewerage bonds, or the proceeds thereof, as against the town council.

Appeal from Common Pleas Circuit Court of Union County; Townsend, Judge.

Application by the state, on the relation of F. M. Farr and others, board of commissioners of public works of Union, against Macbeth Young, mayor, and others. From a decree granting the writ, defendants appeal. Reversed.

The facts are thus set out in the decree of his honor the circuit judge:

"This is a petition on the part of the petitioners asking that a writ of mandamus do issue, commanding and requiring the respondents to deliver and turn over to the petitioners certain money which it is alleged is in the hands of the respondents, arising from the assessment, levying, and collecting of taxes in the town of Union for the purpose of creating a sinking fund for the payment of bonds which the town of Union issued for the purpose of erecting, enlarging, and operating its waterworks and electric plants, and also certain money which was received by the respondents from the sale of certain bonds which were issued and sold by the town of Union for the purpose of erecting and constructing a system of sewerage in the said town. It is admitted that the petitioners are the duly elected board of commissioners of public works for the town of Union, and that the respondents are the duly elected intendant, aldermen, and clerk and treasurer of said town. It is further admitted that the respondents did assess, levy, and collect certain taxes, amounting in all to the sum of \$1,950, for the purpose of creating a sinking fund in order to retire and pay the bonds which the town of Union had issued for the purpose of erecting, operating, and enlarging

¶ 1. See *Mandamus*, vol. 33, Cent. Dig. § 427.

its waterworks and electric light plants, and that, under the act of the Legislature of this state, said sinking fund ought to have been turned over and delivered to the petitioners, as board of commissioners of public works. It is also admitted that on the 23d of August, 1900, an election was held for the purpose of authorizing the issuing of \$35,000 in bonds of the town of Union, to be used in constructing a system of sewerage in said town, and that a majority of the qualified electors voted in favor of the issuing of these bonds. It is further admitted that on the 3d of September, 1900, the town council of said town, by an ordinance duly passed, authorized the issuing of these bonds, and that on April 15, 1902, an agreement was made for the sale thereof, and that said bonds were received by the respondents herein on May 9, 1902, and were then signed and deposited in Nicholson's Bank, in said town, and that on May 27, 1902, a credit for the purchase money thereof, amounting to \$35,391.85, was placed to the credit of the respondents herein, as mayor and aldermen of the said town. The respondents, in their return, claim that the writ of mandamus ought not to issue, requiring them to deliver to the petitioners any of the aforesaid moneys, for the reason, as they say, that all sums arising from the levying and collecting of taxes for the purpose of creating a sinking fund has been turned over by them to what is called a 'sinking fund commission,' elected by the town council, and that the same has been invested in building and loan stock, and is not within their control. They further claim that the moneys arising from the sale of the bonds issued for the purpose of constructing a system of sewerage is lawfully in their hands and under their control, and that there is no authority of law for delivering the same to the petitioners herein. I cannot concur in this view. The act of the General Assembly, approved the 2d of March, 1896 (22 St. at Large, p. 83), creates the board of commissioners of public works, and expressly provides that bonds issued under this act shall be turned over to this board of commissioners. By the act of the General Assembly approved the 11th of February, 1897 (22 St. at Large, p. 410), and by an act approved the 2d of March, 1897 (22 St. at Large, p. 453), municipalities were authorized to issue bonds, among other things, for the purpose of establishing or enlarging a sewerage system or plant. Nothing is said in these two last acts as to who is to control and possess these bonds; but by an act of the Legislature of this state approved March 5, 1897 (22 St. at Large, p. 505), amending the first section of the act of the General Assembly approved the 2d of March, 1896, authority is also given to cities and towns to issue bonds, under certain conditions therein expressed, for the purpose of erecting or constructing a sewerage system; and in this act it provides that, when said bonds shall be issued,

they shall be turned over to the board of commissioners of public works of the city or town so issuing them. These three last acts were all passed at the same session of the Legislature, and must be construed together, so as to arrive at what was the intention of the lawmaking power of the state. So construing them, I must hold that when the bonds in question were so voted, ordered to be issued, and issued, it was the legal duty of the authorities of the town or city issuing them to turn them over to the board of commissioners of public works. This being so, I hold, as matter of law, that the petitioners herein are entitled, in their official capacity, to the custody of the funds, which have been created as a sinking fund, and to the bonds issued for the purpose of constructing a sewerage system in the town of Union, or to the proceeds thereof, if said bonds are not in the custody and control of the respondents. It is therefore ordered, adjudged, and decreed that the respondents do forthwith turn over and deliver to the petitioners all moneys in their hands, or in the hands of any of their agents, belonging to the sinking fund created for the purpose of retiring the waterworks and electric light plant bonds which have been issued by this town, and also that they turn over and deliver to the petitioners herein the proceeds arising from the sale of the bonds which have been issued for the purpose of creating a system of sewerage, and that a writ of mandamus do issue from this court, requiring them to comply with the terms of this order."

The defendants appealed from said order on exceptions assigning error as follows:

"(1) In not holding that the act of March 2, 1896, and the amendments thereof, did not provide and require that any bonds voted for and authorized thereunder should be turned over to the board of commissioners of public works created by it, and that any bonds for providing a sewerage system, issued under any subsequent, independent, general act of the General Assembly, dealing fully with the whole subject, should be held and the proceeds disbursed by the persons empowered by it to handle and control said bonds, disburse the proceeds, and construct and maintain the sewerage system, and that under the provisions of the act of February 27, 1902 (23 St. at Large, p. 1040), petitioners were not entitled to the bonds in dispute herein, or the proceeds thereof.

"(2) In not holding that the sewerage bonds in this case were not issued under the act of March 2, 1896, but under the act of February 27, 1902, and that petitioners had no right to the sewerage bonds issued in this case on May 9, 1902, or the proceeds thereof, and had no power, under any of the acts of the General Assembly, to disburse the proceeds, or to contract for, construct, or maintain a system of sewerage.

"(3) In overlooking and not considering

the act of February 27, 1902, or its effect upon the act of March 2, 1896, so far as the same relates to a system of sewerage.

"(4) In not holding that the act of February 27, 1902, repealed necessarily any and all the provisions of the act of March 2, 1896, relating to sewerage, inconsistent therewith, and that if there is any provision in said act giving petitioners control of the bonds issued for sewerage, and the proceeds thereof, the same is inconsistent and irreconcilable with the act of February 27, 1902, and is repealed by necessary implication.

"(5) In not holding that even if the act of March 2, 1896, and amendatory acts, made petitioners the proper depository of bonds for sewerage, when issued, still said act does not give them any power or right to contract for or construct said sewerage system, or disburse the proceeds of said bonds, and that after the sale of said bonds by the town council, as in this case, that petitioners had no right to the proceeds thereof in the hands of the town council.

"(6) In not holding that the act of March 2, 1896, is unconstitutional, in that it authorizes an election upon the petition signed by a majority of the freehold voters, instead of a majority of the freeholders, or at least the section authorizing the issuing of the bonds, and their delivery to petitioners, and that the bonds will be presumed to have been authorized under the act of March 9, 1896 (22 St. at Large, p. 88), and the amendment of February 11, 1897 (22 St. at Large, p. 410), and that under these acts petitioners have no right to the fund arising from the sewerage bonds.

"(7) In not holding that the words 'or sewerage,' wherever they occur in section 1 of the amended act, as declared it shall read after amendment, are an illegal and unwarranted interpolation, and are not a legal amendment of and part of the act of March 2, 1896, and gave petitioners no right to the sewerage bonds, or the proceeds thereof.

"(8) In not holding that the act of February 27, 1902, covered the whole subject-matter of sewerage bonds, their management and control, and the construction and maintenance of sewerage systems in towns and cities, and under said act the petitioners have no right to the proceeds of the sewerage bonds in question.

"(9) In decreeing that the petitioners are entitled to the sewerage bond fund, and ordering the same turned over to them, and in authorizing the issuing of a peremptory writ of mandamus to enforce compliance therewith."

The exception raising the constitutionality of the act of March 5, 1897, was abandoned.

J. Clough Wallace, for appellants. Munro & Sanders, for respondents.

GARY, A. J. (after stating the facts). It is contended by the respondents that all questions raised by this appeal are now pure-

ly speculative, inasmuch as the appellants the town council of the town of Union have complied with the order of the circuit court, and turned over to the respondents the board of commissioners of public works all moneys belonging to the sinking fund or arising from the sale of the sewerage bonds, and that the appeal should therefore be dismissed. The appellants had the right to appeal from the order of the circuit court allowing the writ of mandamus to issue. *Pinckney v. Henegan*, 2 Strob. 250, 49 Am. Dec. 592; *Matthews v. Nance*, 49 S. C. 322, 27 S. E. 100. The appeal, however, did not act as super-sedeas. *Pinckney v. Henegan*, supra. The compliance by the appellants with the writ of mandamus was not voluntary, but compulsory, as they would have subjected themselves to proceedings in contempt if they had refused to obey the writ. To sustain the contention of the respondents would practically deny to the appellants the right of appeal.

The vital question in this case is whether the circuit court erred in its rulings that the sewerage bonds should be turned over to the board of commissioners of public works. In paragraph 12 of the petition it is alleged "that your petitioners are informed and believe that the respondents herein, contrary to the act of the General Assembly of this state, are about to undertake to erect, construct, and operate a system of sewerage in said town, and in so doing are proceeding beyond the authority given them in said act. \* \* \*" In the return to the rule to show cause the defendants say: "Answering paragraph numbered 12 of the petition, these respondents allege that at the next regular meeting of the town council of the town of Union, to be held on Monday night, next, the 14th inst., these respondents intend to take initiatory steps to establish a sewerage system for the town of Union, and to elect a sewerage commission, in accordance with the provisions of the act of the General Assembly of this state approved the 27th day of February, 1902."

Sections 1 and 2 of an act entitled "An act to empower municipal corporations to erect and enlarge their sewer systems by commissions, and to prescribe their powers and duties," approved the 27th day of February, 1902, are as follows (23 St. at Large, pp. 1040, 1041):

"Section 1. That any municipal corporation in this state which is about to enlarge, extend or establish a system of sewerage therein may by its mayor or aldermen, or intendant and wardens, or city or town councils, elect five or seven of its citizens, who shall be freeholders therein, as a sewerage commission, which shall be known and designated as the sewerage commission of such municipal corporation, who shall continue as such for a term of two years and until their successors are elected, or until the enlarging, extending or establishment of its system of



sewerage is fully completed as contemplated under the laws and ordinances providing therefor: provided, that not more than three persons so elected as members of said commission shall be members of the body electing such commission. Any vacancy occurring in said commission shall be filled by election as hereinbefore provided; and any member thereof may be removed for cause by any such city or town council. The members of such commission before entering upon their duties shall take the same oaths required of members of the body electing them.

"Sec. 2. It shall be the duty of such sewerage commission, subject to the approval of such city or town council, to advertise for bids for at least thirty days in two or more newspapers for the work to be done, for material to be used therein, with the right to reject any and all bids, and to enter into contracts with the lowest responsible bidders thereon, and to secure competent persons, if deemed advisable, to superintend the construction thereof, and counsel and advise in matters relating thereto. Such commission shall have the construction of the system of sewerage in charge, and shall organize by electing one of its members as chairman thereof and a secretary, which may be the same person, as a clerk of such city or town council. A permanent record shall be made and kept by the said commission of all its proceedings, contracts and other matters done and performed by it, including an accurate plan of the work done, showing the situation of the sewerage pipes, man-holes, water-flushes and all other things relating thereto that should be shown. And such records shall be open at all times to the inspection of any citizen of such corporation and to the city or town council thereof, and shall be turned over to such city or town council as a permanent record thereof with all convenient speed on the completion of its work. No such sewerage commission shall expend more money in the enlarging, extending or establishing such system of sewerage than has been appropriated therefor according to law; and all payments for material furnished and work performed shall be made by the treasurer of such city or town council on warrants issued by such commission and approved by such city or town council. No member of any such commission shall be permitted to enter into any contract with such commission for furnishing materials or for the construction of any of the work of such sewerage system."

By this act the town council has the power to elect a sewerage commission. The record shows that the town council is desirous of exercising this power. The second section of the act contains the permission that "no such sewerage commission shall expend more money in the enlarging, extending or establishing such system of sewerage than has been appropriated therefor, according to law; and all payments for material furnished and work

performed shall be made by the treasurer of such city or town council on warrants issued by such commission and approved by such city or town council." This and the other provisions of the act are wholly inconsistent with the idea that the board of commissioners of public works should have the control and management of the sewerage bonds.

It is the judgment of this court that the judgment of the circuit court be reversed and the petition dismissed.

(64 S. C. 107)

#### BATTEY v. KNIGHT et al.

(Supreme Court of South Carolina. April 20, 1903.)

#### FRAUDULENT CONVEYANCE—CHATTEL MORTGAGE SALE.

1. A son of a chattel mortgagor, as assignee of the mortgage, advertised the property for sale, and bought the same. The evidence tended to show that the purchase was probably with money furnished the son by the father. After negotiations between the father and one holding a junior mortgage for an extension of time, the property, valued at over \$125, was sold for \$30. *Held*, that the sale would be set aside as fraudulent at the instance of the junior mortgagee.

Appeal from Common Pleas Circuit Court of Laurens County; Gage, J.

Action by George M. Battey against B. E. Knight, A. L. Ballentine, Wm. B. Knight, and Jno. A. Ballentine. From decree in favor of plaintiff, defendants appeal. Modified.

Plaintiff presents the following exceptions:

"(1) Because his honor erred in not sustaining plaintiff's fifth exception to the report of L. W. Simkins, special referee, which exception was as follows: 'Because the referee erred in holding that the tender made by Geo. M. Battey to W. B. Knight and John A. Ballentine did not divest them of title to the property, and in not holding that said tender destroyed the lien of the Sullivan Hardware Company mortgage.'

"(2) Because his honor erred in not holding that the tender made by George M. Battey to W. B. Knight and John A. Ballentine destroyed the lien of the Sullivan Hardware Company mortgage.

"(3) Because his honor erred in directing that the sum of \$33 and interest be paid to W. B. Knight and John A. Ballentine, or their attorneys, out of the proceeds arising from the sale of the said engine and boiler, when it appeared that the lien of the Sullivan Hardware Company mortgage had been discharged by tender of the amount due thereon."

Defendants present the following exceptions:

"(1) Because his honor erred in sustaining plaintiff's exceptions to referee's report declaring the sale of the engine and boiler under the Sullivan Hardware Company null and void, and in ordering a sale of the said property.

"(2) He erred in finding that defendants, W. B. Knight and John A. Ballentine, knew of plaintiff's mortgage, and that the sale that they made under the Sullivan Hardware Company's mortgage was at the instance of B. E. Knight, and said sale was made with intent to defeat plaintiff's mortgage, and was null and void.

"(3) He erred in holding that B. E. Knight had anything to do with said sale, except as an agent of W. B. Knight and J. A. Ballentine in writing out and posting notice of sale; and he erred in not holding that B. E. Knight's connection with said sale was open, and nothing more than he had a right to do.

"(4) Because he erred in not holding that the sale of the engine and boiler under the Sullivan Hardware Company's mortgage by W. B. Knight and J. A. Ballentine was in accord with the terms of said mortgage, after giving public notice as required by the said mortgage, and the property purchased by them thereunder was free from the lien of the plaintiff's mortgage, and that W. B. Knight and J. A. Ballentine were not bound by intent or knowledge of their codefendant, B. E. Knight.

"(5) Because no law required W. B. Knight and J. A. Ballentine to give actual notice to the plaintiff, or his attorney, of their intended sale of the property under the Sullivan Hardware Company's mortgage.

"(6) Because the plaintiff is barred by his laches in now seeking to set aside a sale of the property under a valid mortgage, after legal advertisement, after he had actual and constructive notice of the Sullivan Hardware Company mortgage and its terms.

"(7) Because he should have found that W. B. Knight and J. A. Ballentine were the legal holders for value of the Sullivan Hardware Company's mortgage and note, and had a right to advertise and sell, and purchase, the property contained therein, and that they advertised the property as required by the mortgage, and that they were bona fide purchasers of the same, and that their title could not be affected by plaintiff's claim under his second mortgage."

F. P. McGowan, for appellants. W. R. Richey, for respondent.

POPE, C. J. The questions here presented for consideration are those exceptions presented on the one hand by the plaintiff to the decree pronounced by his honor Judge Gage, and on the other hand by those of the defendants to the same decree. A brief statement of facts may not be amiss. It seems that in the year 1893 the defendants B. E. Knight and A. L. Ballentine, for value, gave a mortgage of certain personal property, to wit, an engine and boiler, to the Sullivan Hardware Company, to secure their indebtedness to the same, which said indebtedness was all paid, except the sum of \$33, on the 5th day of December, 1898, at which date it (the chattel mortgage) was assigned to the

defendants William B. Knight and John A. Ballentine upon the payment of the sum of \$33; that on the 27th of January, 1898, the defendants B. E. Knight and A. L. Ballentine executed four notes, each for \$121.46, unto the plaintiff, George M. Battey, and, to secure said four notes, executed their chattel mortgage to said George M. Battey on the articles of property already mortgaged by them to the Sullivan Hardware Company, along with other personal property not included in Sullivan Hardware Company's mortgage. Both of said chattel mortgages were duly recorded in the office of the register of meane conveyances for Laurens county, wherein all of the defendants resided; that the said B. E. Knight and A. L. Ballentine failed to pay in full their indebtedness to George M. Battey, and the condition of said chattel mortgage was broken. In November, 1899, W. R. Richey, Esq., as the attorney for said George M. Battey, wrote to said B. E. Knight and A. L. Ballentine that the claims of plaintiff, Battey, were in his hands for collection. On the 5th day of December, 1899, the said B. E. Knight came to the law office of W. R. Richey, Esq., and asked 60 days' extension of time in which to pay Battey's debt, and W. R. Richey, Esq., agreed to do so if his client, Battey, would so authorize, which the latter did by letter. On the same 5th December, 1899, the defendant B. E. Knight went with his son and codefendant William B. Knight to the office of George S. McCravey, who was the sheriff of Laurens county, and at their request said McCravey prepared a notice of the foreclosure of the Sullivan Hardware Company's mortgage, of which William B. Knight and John A. Ballentine claimed to be assignees, on the 12th December, 1899, and copies of the notice of said foreclosure were posted at three public places in the upper part of Laurens county, but none of such notices were posted on the courthouse door at Laurens, S. C. On the 12th December, 1899, a sale of said personal property included in the Sullivan Hardware Company's mortgage was made and purchased at the price of \$30 by the said William B. Knight and John A. Ballentine. The property so purchased was left under the ginhouse of B. E. Knight ever since the sale, just as it was before the sale. William R. Richey, Esq., as agent of the plaintiff, Battey, after the expiration of the 60 days immediately following the 5th December, 1899, to wit, in March, 1900, and after due advertisement of the property, tried to sell said engine and boiler, but, to his surprise, was forbidden to make such sale by William R. Knight and John A. Ballentine, upon the ground that they had purchased the same engine and boiler at the price of \$30 at their sale as assignees of Sullivan Hardware Company's mortgage on the 12th December, 1899. An offer was made by the plaintiff to buy their debt under the Sullivan Hardware Company's mortgage, which offer was refused. So the said George M. Battey brought

his action on the equity side of the court of common pleas for Laurens county, in this state, against the defendants, B. E. Knight, A. H. Ballentine, William B. Knight, and John A. Ballentine: (1) To recover judgment on his debt against B. E. Knight and A. L. Ballentine on the four notes they had executed to the plaintiff on the 27th January, 1898. (2) To foreclose the chattel mortgage given by those defendants to Battey to secure their four notes aforesaid. (3) To set aside the sale of the engine and boiler on the 12th December, 1899, by the defendants William B. Knight and John A. Ballentine under the Sullivan Hardware Company's chattel mortgage, on the grounds (a) that there was a fraudulent collusion between the four defendants to make the sale on the 12th December, 1899, in order to defeat plaintiff's mortgage on said property; (b) that the Sullivan mortgage was not a valid debt in the hands of the two defendants W. B. Knight and John A. Ballentine, because the \$33 paid for them was money advanced by B. E. Knight and A. L. Ballentine to their two sons for that purchase, and the debt secured by said Sullivan Hardware Company's mortgage was paid at the time of said sale; (c) that said boiler and engine was liable to be sold to pay Battey's debt and costs; (d) that the defendants William B. Knight and John A. Ballentine be enjoined from selling or disposing of, or in any manner interfering with, the said boiler and engine; and (e) that plaintiff have such other and further relief as may be just and equitable. Judge Buchanan passed an order providing an injunction as prayed for pending the suit. Under an order of reference, testimony was offered by both sides to the controversy before L. W. Simkins, Esq., as referee, who made his report to the court. On exceptions to said report, the case came on to be heard before his honor Judge Gage, which was, in part, as follows: "I agree with the referee as to the amount found by him to be due by the defendants B. E. Knight and A. L. Ballentine to the plaintiff, but I cannot agree with the referee in finding and holding that the sale by William B. Knight and John A. Ballentine under the Sullivan Hardware Company mortgage was valid and should stand. I am satisfied from the testimony that William B. Knight and John A. Ballentine knew of the plaintiff's mortgage, and that the sale made by them was at the time it was, and in the manner it was, at the instance of the defendant B. E. Knight, and was an attempt on the part of the said defendants to defeat the lien of the plaintiff's mortgage, and the said sale should be set aside. The plaintiff is entitled to have his mortgage foreclosed. The property should be sold under the order of this court, and, after payment of the plaintiff's costs of this action, the proceeds should be applied to the payment of the amount due William B. Knight and John A. Ballentine on the Sullivan Hardware Company mortgage, which

amount is \$33, and the balance, or so much as may be necessary, should be applied to the payment of the indebtedness of B. E. Knight and A. L. Ballentine to the plaintiff. The temporary injunction should be made perpetual. It is therefore ordered, adjudged, and decreed that the defendants' exceptions to the referee's report be, and they are hereby, overruled, and the plaintiff's exceptions inconsistent herewith are also overruled, and such exceptions of the plaintiff as are consistent herewith are sustained. It is further ordered, adjudged, and decreed that the plaintiff have judgment against the defendants B. E. Knight and A. L. Ballentine for the sum of \$198.95, and for \$15.89 attorney's fees." Then follow the appropriate orders for sale and injunction.

We will now consider the plaintiff's exceptions, which, together with defendants', will be reported:

(1) We do not think it is material to consider the question as to the tender of money sufficient to pay off the balance due under the mortgage of the Sullivan Hardware Company, since the circuit judge decided that such mortgage was no longer a subsisting incumbrance, we do not see what force there is now in this exception.

(2) And the second exception is without force, in view of the circuit judge's decree.

(3) We think his honor the circuit judge erred when he required that \$33, the amount paid by W. B. Knight and John A. Ballentine for the Sullivan Hardware Company's mortgage, should be paid to them out of the proceeds of sale of the engine and boiler. These young men, as the testimony shows, had rented the engine and boiler from their respective fathers, B. E. Knight and A. L. Ballentine, who owed the \$33 on the Sullivan Hardware Company's debt and mortgage, and were to pay them one-half of the toll they received for ginning cotton. These young men owed their fathers this money on the 5th-12th December, 1899, when they attempted to foreclose this mortgage. A mortgage is nothing but an incident of the debt. It is but a pledge of property to secure a debt. When the debt is paid, the mortgage dies a natural death. It has therefore lost all validity and vitality. These young men saw their dilemma. Hence they said they did not apply what they owed their fathers in payment of what their fathers owed them. It seems to us that the reason they gave for this—the necessitous circumstances of their fathers—would have or might have done very well if the plaintiff, Battey, had not had an equity to force them to apply what they owed B. E. Knight and A. L. Ballentine to the payment of what B. E. Knight and A. L. Ballentine owed them. Besides these considerations, we doubt very seriously if B. E. Knight and A. L. Ballentine did not furnish the money to these young men to take up the Sullivan Hardware Company mortgage. If the other part of the scheme for the sale was

fraudulent, this was also. It was part and parcel of the scheme. This exception is sustained.

Now let us examine the defendants' exceptions:

(1) An examination of the testimony convinces us that the circuit judge made no mistake when he declared that the sale of the engine and boiler under the Sullivan Hardware Company's mortgage was null and void. The trickery of the defendants was too transparent. The parties were too close together when the extension of 60 days was given by Mr. Richey, as the attorney for the plaintiff, Battey. They were too close together while in the sheriff's office, conjuring up the notices of the sale. It was too apparent that the "wicked were fleeing where no man was pursuing." It was Mr. B. E. Knight who wrote out the notices and posted them. There was nothing due on the Sullivan Hardware Company's mortgage. The price paid (\$30) was too small, when property worth certainly \$125, and maybe worth \$350, was sold for that amount. Transactions between persons so closely related by blood, by residence, and by business association are closely scrutinized in a court of equity. This exception is overruled.

(2) The reasons advanced in our notice of the first exception cause us to overrule this exception also.

(3) The circuit judge certainly did not err as to the connection of B. E. Knight with the sale attempted to be made on the 12th December, 1899. It really seems, under the testimony, that he ruled and controlled the whole matter. This exception is overruled.

(4) There is no question that the Sullivan Hardware Company's mortgage was originally superior as a lien over Battey's mortgages. We do not know what the terms of that mortgage were, as to the notice of sale, but certain it is that the notices of sale were not in accordance with the requirements of section 3004 of the Code of Laws of this state (1902). We have not been shown to the contrary, but we do not base our decision upon this matter. The difficulty in this sale lies in the very questionable methods adopted in procuring it. This exception is overruled.

(5) Yes; no law required the defendant to give Mr. Richey or Mr. Battey notice of this intended sale; but no law permits parties to combine and confederate to prevent his receiving notice. This exception is overruled.

(6) We do not understand the plaintiff to be endeavoring to set aside a valid sale. It is just the contrary. He says to the court, "In equity and good conscience, the sale made on the 12th December was an invalid sale," and in this conclusion we agree with him. This exception is overruled.

(7) For the reasons we have already given, we cannot assent to the views embodied in the seventh exception, and it is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed,

except as modified herein, and that the action be remitted to the circuit court to enforce the decree as modified by this court.

(123 N. C. 800)

FEATHERSTONE et ux. v. CARR et al.

(Supreme Court of North Carolina. June 6, 1903.)

INJUNCTION—POWER TO ISSUE—MULTIPLICITY OF ACTIONS.

1. Plaintiffs recovered judgment before a justice of the peace for the possession of leased premises and for the rents thereof, and defendants appealed to the superior court. *Held*, that a motion for an injunction restraining plaintiffs from prosecuting monthly suits for the rent was properly made by defendants in the case then pending in the superior court, and a new action for that purpose could not have been maintained.

2. It clearly appearing from the record that all matters in dispute between the parties could be settled in the pending action, and that plaintiff would not be injured by the issuing of the injunction, defendants having given a bond to secure them for the rents and damages, the injunction was properly granted.

Appeal from Superior Court of Buncombe county; Council, Judge.

Action brought originally in justice court by Patrick Carr and others against A. A. Featherstone and wife. Judgment for plaintiffs, and defendants appealed to the superior court. From an order of such court enjoining plaintiffs from prosecuting monthly suits for rent against defendants during the pendency of the action, plaintiffs appeal. *Affirmed*.

Locke Craig, for appellants. Merrick & Barnard, for appellees.

MONTGOMERY, J. It appears from the proceedings, and especially from the facts found by his honor in his order for the injunction, that the plaintiffs, in a court of a justice of the peace, proceeded to have the defendants dispossessed of a certain storehouse in Asheville, and to recover rents therefor, under section 1766 of the Code of 1883; that the defendants resisted the plaintiffs' demand, setting up an averred unexpired lease of the premises, and disputing the amount of monthly rent as claimed by the plaintiffs; that a judgment was had for the plaintiffs in the justice's court, and an appeal taken by the defendants to the superior court of Buncombe county; that the plaintiffs, since the appeal was taken, have procured 13 judgments for the rent due monthly, from which judgments the defendants appealed to the superior court; that the plaintiffs threatened to continue these monthly suits for the rents, and have issued executions upon some of the judgments. His honor further finds as a fact that all the matters and things in dispute between the parties arose out of the same state of facts, and depend upon the same principles of law, and

¶ 1. See Injunction, vol. 27, Cent. Dig. § 69.

can be fully settled in one action. The defendants, upon affidavits, made a motion in the case on appeal in summary ejectment for an injunction to restrain the plaintiffs from prosecuting any further suits against the defendants for and on account of the rents, and from issuing executions on the judgments, or either one of them, for rent; and his honor granted the injunction. It appears further in the proceedings that upon the taking of the appeal in the proceeding of summary ejectment, under section 1772 of the Code, the defendant executed a bond in the sum of \$1,350 to secure the plaintiffs the rent and damages during the pendency of the appeal, and that afterwards, by an order made in the superior court, an additional bond for the same purpose in the sum of \$1,200 was executed and filed by the defendants. We can see no error in the course pursued by his honor. It was proper for the defendant to have made the motion for the injunction in the case then pending in the superior court, and a new action for that purpose could not have been maintained. *Faison v. McIlwaine*, 72 N. C. 312; *Lord v. Beard*, 79 N. C. 5.

It clearly appears from the record that in the controversy pending between the parties all matters in dispute between them can be settled, and the plan adopted by the plaintiffs of a multiplicity of suits for the monthly payment of rents must be regarded, therefore, as vexatious, and equity will intervene by injunctive process to prevent such litigation. The spirit of our present system of practice favors the adjustment and settlement of all matters in dispute between parties in one action, as far as possible; and it discourages multiplicity of suits, because of the vexatious delays and costs attendant upon them. *Sparger v. Moore*, 117 N. C. 450, 23 S. E. 359. And besides no harm could come to the plaintiffs through the issuing of the injunction, while the defendants would be subjected to inconvenience and probable loss if it were not granted, and in such cases it is proper for the injunction to be issued. *McCorkle v. Brem*, 76 N. C. 407; *Railroad v. Commissioners*, 108 N. C. 56, 12 S. E. 952. The plaintiffs cannot be hurt here. On the trial they can recover the rents due up to the trial, and any damages which they have sustained by the detention of the property; and there are bonds on file in the court in sufficient amount, and approved as to security by the proper officers. Also, if those bonds should become impaired, or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then, under section 1772 of the Code of 1883, the superior courts can require additional security. Not only is it within the jurisdiction and power of the superior courts to have the bonds in such cases increased or strengthened, but under their general powers in equity, outside of that statute or any other stat-

ute, they would have the right to take such action. Or in case of inability on the part of a suitor to give, strengthen, or increase such security, the court would have the power to appoint a receiver to take possession of the property under the direction of the court. *Kron v. Dennis*, 90 N. C. 327; *Lumber Co. v. Wallace*, 93 N. C. 22. We, in deference, will add that as the court docket is always under the control of the presiding judge, and, as a general rule, to be regularly proceeded with, yet we have no doubt that, upon such a case as this being called to his honor's attention, a speedy trial would ensue if there was danger of loss to plaintiff by delay. No error.

(122 N. C. 900)

## DOBSON &amp; WHITLEY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. June 10, 1903.)

RAILROADS—FIRES—VALUE OF PROPERTY DESTROYED—INSTRUCTIONS—INCOMPETENT EVIDENCE—OBJECTIONS—WAIVER.

1. Objections to incompetent questions on cross-examination must be interposed when the questions are asked, and before answer, or they will be waived.

2. In an action against a railroad company for damages caused by fire, plaintiff testified that the property destroyed was worth a specified sum, which included the original cost, with freight charges added. Defendant introduced as a witness the tax lister for the year in which the fire occurred, who testified that plaintiff stated that a much lower valuation was too high for purposes of taxation. *Held*, that instructions that the jury had the uncontradicted evidence of plaintiff as to the value of the property destroyed was erroneous, as withdrawing from the consideration of the jury the testimony of the tax lister.

Appeal from Superior Court, Henderson County; E. B. Jones, Judge.

Action by Dobson & Whitley against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

S. J. Ervin, P. J. Sinclair, and A. B. Andrews, Jr., for appellant. Justice & Pless and Busbee & Busbee, for appellees.

**WALKER, J.** This action was brought to recover damages for the destruction of a flour mill belonging to the plaintiffs, together with the machinery and stock therein, which plaintiff alleged was caused by the negligent emission of sparks from one of defendant's engines. In order to establish the negligence of the defendant, the plaintiffs introduced A. B. Finch, who had been examined as a witness at a former trial, and attempted to prove by him that the netting of the spark arrester was too coarse to prevent the escape of sparks from the engine. The plaintiffs' counsel subjected this witness to a very severe and rigid cross-examination, which we think was calculated to impeach his credibility, and to disparage him before the jury, and thereby prejudice the defend-

ant. The examination was contrary to the rules and practice of the courts which obtain in such cases, and should not have been allowed, if it had been objected to in apt time and in the proper way. A party may waive his right to the exclusion of incompetent testimony, ever so objectionable, if he fails to assert his right in due time; and so, when a witness is being examined in an improper manner, the objection to the character of the examination should be made known in apt time, otherwise the party prejudiced will be deemed to have waived it. A large part of the testimony of the witness Finch was incompetent because it was hearsay, but the defendant, so far as the record discloses, did not enter any objection in the manner required by law. Objections should be interposed when the incompetent questions are asked. It will not do to object after the question has been asked and answered. This would give the objector two chances—one to exclude the testimony if unfavorable to him, and the other to make use of it if favorable; and for this reason the law requires that parties should act promptly or else the right to have testimony excluded, or the examination conducted within proper limits, will be waived.

Defendant introduced as a witness Charles A. Byrd, who testified that he was tax lister for the year in which the fire occurred, and that the machinery which was in the mill was listed by Dobson & Whitley, who told him that it cost \$2,300; that he valued it at \$1,200 for taxation, and they said they thought that was very high. D. J. Dobson, one of the plaintiffs, had testified that the machinery was worth \$2,375.45, which was its original cost, with freight charges added, and the plaintiffs placed that valuation upon it in this action. With reference to the damages, the court charged as follows: "On the point as to the value of the machinery, the loss and value of flour and other personal property, you have the uncontradicted testimony of plaintiffs; but you must pass upon the evidence as to its truthfulness, and as to the value and loss, and say how it is. What is the value of the property lost, the machinery, scales, and tools?" And again: "Upon these items you have the evidence of the plaintiff alone, the defendant offering no evidence to contradict the witness as to the value he places upon these articles." The defendant excepted to each of these instructions, and we think that they were erroneous. The testimony of C. A. Byrd tended to contradict that of the plaintiffs as to the value of the machinery, and the court should not have told the jury, in view of Byrd's testimony, that the defendant had offered no testimony to contradict the plaintiffs upon this point. The charge practically withdrew Byrd's testimony from the consideration of the jury, when it tended directly and strongly to contradict the plaintiff's testimony as to the value of the machinery. It tended to show that, while they had insisted on one

valuation of the property at the trial, they had objected to the tax lister that a lower valuation was too high for the purpose of taxation. In any view of the case, it was some evidence to go to the jury as to the true value of the property, and the defendant was entitled to have it submitted to the jury in the charge of the court. For this error there must be a new trial, and as we think the examination of the witness Finch may, under the facts and circumstances of the case, have prejudiced the defendant, though it was not objected to in the proper manner, we direct, in the exercise of our discretion, that the new trial shall extend to all of the issues.

#### New trial.

DOUGLAS, J. (concurring in result only). I agree with the court that the objection of the plaintiff to the tax valuation was some evidence to go to the jury. The plaintiff Dobson frankly told the tax lister what the machinery had cost, but insisted that it should be listed at a much lower sum. I think this might have been considered by the jury as evidence tending to show deterioration of the property, but not as contradicting the defendant, who presumably meant that it was assessed out of proportion to other manufacturing property. Those who have had anything to do with such enterprises know that there is a great difference between the price secondhand machinery would bring upon the open market and the amount it would take to replace it, and yet the machinery may be as valuable to the owner (that is, may have as great a productive value) as when it was new. This is the only ground on which I can agree in granting a new trial. Here I wish the opinion had stopped, as I, at least, must stop. I cannot agree in granting a new trial, either as a matter of right or of discretion, for the admission of evidence or the method of examination of a witness to which there is no exception. Where such a ruling, in addition to the fact of being made upon matters not before us, is in itself essentially erroneous, I must respectfully dissent. In its opinion the court says: "The plaintiff's counsel subjected this witness to a very severe and rigid cross-examination, which we think was calculated to impeach his credibility, and disparage him before the jury, and thereby prejudice the defendant." Further on the court says: "A large part of the testimony of the witness Finch was incompetent because it was hearsay." There is no suggestion that any part of Finch's testimony was favorable to the defendant. Therefore the defendant could not possibly be hurt by any disparagement of the witness. If the witness' testimony was unfavorable to the defendant, as it must have been, then the disparagement of the witness was a positive benefit to the defendant, and it would have no ground of complaint. The defendant may have so thought, as its able counsel failed to enter

an exception, except in terms too general to be considered. Can we do for them what they failed to do for themselves? Or can we do what is equivalent thereto—pass upon the matter as if it were under exception? This has been done in a few instances, with the consent of the Attorney General, in cases of capital felony, but never, as far as I have any knowledge, in civil cases.

(132 N. C. 1107)

### STATE v. BOONE.

(Supreme Court of North Carolina. June 6, 1903.)

#### CARRYING CONCEALED WEAPONS—UNITED STATES MAIL CARRIERS—CIVIL OFFICERS.

1. A United States mail carrier is not a civil officer of the United States within Code 1883, § 1005, declaring that the prohibition against carrying concealed weapons shall not apply to "civil officers of the United States."

2. Code 1883, § 1005, declaring that the prohibition against carrying concealed weapons shall not apply to civil officers of the United States "while in the discharge of their official duties," does not authorize a United States mail carrier to carry a concealed weapon while carrying the mail and while returning to his home after delivering the mail.

Douglas, J., dissenting.

Appeal from Superior Court, Gates County; Justice, Judge.

Riddick Boone was adjudged not guilty of carrying a concealed weapon on the facts set forth in a special verdict, and the state appeals. Reversed.

The Attorney General, for the State.

CLARK, C. J. The special verdict finds: "That within two years before finding the bill of indictment the defendant was United States mail carrier, bonded and sworn, from Adair to Topsy, in this state, and that on the day in question, while carrying the mail between said points, the defendant had a pistol, a deadly weapon, concealed on his person, and after delivering the mail at Topsy he carried the pistol concealed from Topsy to his home, one-half mile." The Constitution, art. 1, § 24, guaranteed to the defendant, as to all citizens, the right to bear arms. The Legislature, however, has the undoubted right to require that such arms shall be carried openly, and to make the carrying concealed weapons by persons when off their own premises an indictable offense. This it has done by section 1005 of the Code of 1883, which contains certain exceptions. The only exception which it is contended embraces the defendant is "civil officers of the United States while in the discharge of their official duties." The defendant does not come within the exception for two reasons:

1. "A mail carrier is not a public officer, but is a private agent of the contractor for carrying the mail" (and in some cases the contractor himself). *Mechem*, Pub. Off. § 41; *Sawyer v. Corse*, 17 Grat. 230, 99 Am. Dec. 445; *Throop*, Pub. Off. § 12; *State v. Bar-*

*nett*, 34 W. Va. 74, 11 S. E. 785; *Hathcote v. State*, 55 Ark. 181, 17 S. W. 721. In this last case it is said: "Engagement in the service of the federal government implies no license to violate state laws; and a crime against the state is not excused by the fact that the criminal was at the time, though not in the act of its commission, engaged in such service. No such doctrine is found in *Neagle's Case* (In *Re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55), for it only holds that what the federal government enjoins as a duty the state cannot punish as a crime. It by no means follows that if a federal officer, while engaged in his employment, does some independent act in violation of state laws, he may not be held to answer for it. The defendant shows no authority from the federal government empowering him, as a mail carrier, to carry weapons; and we think the fact that he was a mail carrier affords no justification for the act in the absence of such authority. *State v. Barnett*, 34 W. Va. 74, 11 S. E. 735." If the mail carrier thought that carrying a weapon was necessary for the protection of the mails, or of himself, or for any other reason, or chose to carry it for no reason at all, he had a right to do so, but he must carry it openly, as the law requires of all other citizens when off their own premises, except those whom the statute authorizes to carry concealed weapons. If his object was to keep off highwaymen, this could be better done by letting it be seen that he was armed than by carrying a concealed weapon.

2. Even if the defendant had been a civil officer of the United States (and not a mere contractor or agent of a contractor), the pistol was not carried "while in the discharge of his official duties," for it was no part of his official duties to execute the laws, or do anything which might require the use of weapons. Still less was he on duty when carrying the pistol concealed from Topsy to his house, half a mile away. In *State v. Hayne*, 88 N. C. 625, this court held that "the exemption from the provisions of the statute is only given to such officers while in the actual discharge of their official duties"; Judge Ashe saying, "The law gives no protection to a man under such circumstances [i. e., when off duty], although clothed with the authority of a deputy marshal of the United States, and having at the time warrants and process in his possession." In *Love v. State*, 32 Tex. Cr. R. 85, 22 S. W. 140, it is held that "a deputy postmaster, whose duties are confined to the post-office building, violates the law when, on his private business or pleasure, he is found carrying a pistol on the public streets." The statute (Code 1883, § 1005) forbidding carrying concealed weapons is a general one, and the exceptions are "officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the

militia and the state guard when called into active service, officers of the state, or of any county, city, or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties." These exceptions are not intended to create a privileged caste of office holders and military exempted from the prohibition, resting upon all other citizens, not to carry concealed weapons. But the exceptions in the statute simply authorize the classes named to carry concealed weapons when on duty, not as a privilege to them as a class, at all times, but for the public benefit, when in the discharge of duty. The defendant neither belonged to the exempted class nor was he on duty when going from Topsy to his home.

There is no question here of concealment, or of intent, which are matters of defense, but that subject has been recently and fully considered, with a review of the authorities, in *State v. Dixon*, 114 N. C. 860, 19 S. E. 364; *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563; *State v. Pigford*, 117 N. C. 748, 23 S. E. 182; *State v. Reams*, 121 N. C. 556, 27 S. E. 1004; *State v. Brown*, 125 N. C. 704, 34 S. E. 549. Upon the facts stated in the special verdict, the defendant should have been adjudged guilty.

The judgment is reversed, and the case remanded, that the sentence of the law may be imposed. Reversed.

DOUGLAS, J., dissents.

(132 N. C. 803)

#### REVELL v. THRASH.

(Supreme Court of North Carolina. June 6, 1903.)

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENT—EXPRESS AGREEMENT—DEFINITE TIME—EXCEPTIONS TO RULE—EVIDENCE—QUESTIONS FOR JURY—APPEAL—EXCEPTIONS.

1. An exception to evidence not referred to by counsel for appellant in their briefs or oral argument cannot be sustained.

2. The taking of interest in advance from the principal debtor after the maturity of the debt, without the knowledge or consent of the surety, is prima facie evidence of an extension of time, effecting the release of the surety.

3. An express agreement to extend the time of payment need not be proved by a surety relying on such extension as effecting his release.

4. The period of extension of payment given the principal debtor must be fixed and definite in order to discharge the surety.

5. In an action against a surety on a note and bond, it appeared that in October, 1895, the maker of the note, after the maturity thereof, paid the holder \$10, which was embraced in a credit on the accompanying bond in these words: "Interest paid to December 29, 1895;" the maker saying at the time: "I want to pay some interest." Held, that the question whether the intention of the parties was that the note was to be extended was for the jury.

6. The rule that a surety is discharged by an extension of time of payment given the prin-

cipal debtor without the surety's consent is not affected by the shortness of the time, provided it be definite and unconditional.

7. The rule that an extension which does not indulge the principal beyond the time in which a judgment could be obtained does not release the surety does not apply where the time of extension is definite and unconditional.

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by O. D. Revell against J. M. Thrash. Judgment for defendant, and plaintiff appeals. Affirmed.

Tucker & Murphy and F. A. Sondley, for appellant. Geo. A. Shuford and Chas. A. Moore, for appellee.

MONTGOMERY, J. There is only one exception to evidence appearing in the case, and that exception the counsel of the appellant did not refer to in their three briefs or in their oral arguments, and it is therefore almost useless to write that the exception is not sustained. The only question before the court is whether there was any sufficient evidence—any evidence more than a scintilla—that the plaintiff appellant extended the time for the payment of the note as to W. M. Cocke, the principal, without the knowledge or consent of the defendant, who was a surety.

The contentions of the appellant were, first, that, before a surety can be discharged or released because of time having been given to the principal debtor in which to pay his debt, there must be an agreement between the creditor and the principal for the extension; second, that the period for which such extension was given must be fixed and definite, and that there was no evidence in this case tending to prove such facts; third, that receiving interest in advance, without an express contract for extension, does not release a surety; and, fourth, that an extension which does not indulge the principal beyond the time in which a judgment could be obtained would not release a surety.

The plaintiff, in his complaint, duly verified, alleged that on the 11th of September, 18—, \$100 was paid on the note, and on October 22, 1895, \$150 and interest to December 29, 1895, and that the credits were indorsed upon the back of the note. It appears from his testimony that the \$100 was paid in 1893. In his testimony he stated that the \$150 was paid on the 27th October, 1895, and not on the 22d of October, as he alleged in his complaint, and as the credit appears on the note. He further said in his testimony that in October, 1895, without mentioning the day as he alleged in his complaint, Cocke, the principal, paid him \$10, and said at the time, "I want to pay some interest," and that in the calculation he found it paid the interest to December 29, 1895, and he so entered the credit. He further testified: "Note never extended; none asked. Cocke kept the interest paid up to December 29, 1895." Cocke died in 1893. He further said that the defendant appellee

¶ 2. See *Principal and Surety*, vol. 40, Cent. Dig. §§ 190, 204.



knew nothing of the payments made by Cocke, and did not consent to them.

Of course, a surety will not be discharged from his obligation in cases where he relies upon an extension of time given by the creditor to his principal debtor, unless it be shown that an agreement to that effect had been entered into between the creditor and his principal debtor, and without the knowledge or consent of the surety; but an agreement in so many words (i. e., an express agreement to extend the time) is not necessary to satisfy the rule. The acts and conduct of the parties constituting the facts of the case might be shown, from which the law would imply a sufficient agreement to extend. Daniel on Negotiable Instruments, § 1319. On this question a standard writer has said: "It is sufficient if a mutual understanding and intention to that effect are proved. If the parties act upon the terms of an implied agreement to that effect, it will be sufficient." Brandt on Suretyship, § 304. The same principle is announced in Hollingsworth v. Tomlinson, 108 N. C. 245, 12 S. E. 989; Chemical Co. v. Pegram, 112 N. C. 614, 17 S. E. 298.

It is also true, as stated in plaintiff's second contention, the period of extension must be fixed and definite. But that is certain which can be made certain, and if the taking of interest in advance from the principal debtor without the knowledge or consent of the surety be prima facie evidence of an extension of time, and therefore a release of the surety, unless rebutted, it seems to us there was evidence in this case fixing and marking the period of extension.

It becomes necessary now, before considering further the law as contended for in the plaintiff's first and second contentions, to consider and pass upon the question whether the receipt of interest in advance from the principal debtor is evidence tending to show an agreement and contract for an extension of time. That question seems to be settled in the affirmative by the decisions of our court, and in the works of the text-writers. Scott v. Harris, 76 N. C. 205; Sutton v. Walters, 118 N. C. 495, 24 S. E. 357. And in Hollingsworth v. Tomlinson, 108 N. C. 245, 12 S. E. 989, upon the same question, Judge Shepherd, for the court, quoted an extract from Brandt on Suretyship (section 305) as follows: "The general rule is that the reception of interest in advance upon a note is prima facie evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which the interest has been paid unless the right to sue be reserved by the agreement of the parties. The payment of the interest is not of itself a contract to delay, but is evidence of such contract; and, while this evidence may be rebutted, yet, in the absence of any rebutting evidence, it becomes conclusive." To the same effect are Tiedeman on Com. Paper, § 424 and Daniel on Neg. Inst. § 1318.

Now let us consider the evidence in this case with the law on the subject. The note matured on the 11th of June, 1893. According to the appellant's evidence, there was a payment of \$100 September 11, 1893. He said it was paid about six months after he bought it, which was ten years before he was testifying, and that he received \$150 on the 27th of October, 1895, although the credit is entered on the note itself October 22, 1895. He further testified that in October (without naming the day) he received \$10. That \$10 specifically does not appear as a credit indorsed on the note, but the plaintiff admitted that it was embraced in a credit on the bond in these words: "Interest paid to December 29, 1895." He further testified that Cocke kept the interest paid up to the 29th December, 1895. It is evident, from looking at the credit on the note from the complaint of the plaintiff and his own testimony, that an explanation is necessary as to the intention of the parties as to the \$10 interest payment. Now, when the plaintiff appellant received this \$10 payment from Cocke, accompanied by the words, "I want to pay some interest," what was meant by the transaction? It was not a question of law. It was a question of intention of the parties under all the evidence in the case, and it was for the consideration of the jury. The \$10 having been paid as interest and credited as interest, according to the calculation of the plaintiff creditor, the interest was paid in advance and until December 29, 1895. When that credit was received, the time of extension was definitely fixed to be as long as the amount would pay the interest, provided the jury should find from all the evidence that an extension of time was the intention of the parties. But the plaintiff contends in the last place that no harm or injury could or did come to the defendant if such extension of time did take place as is claimed by the defendant, for the reason that, before judgment could have been taken by the defendant against Cocke, if the defendant had paid the plaintiff the note, and sued Cocke for money paid to his use, Cocke had died, and that, if a judgment had been taken against Cocke's personal representative, it would have given him no preference over Cocke's other creditors. In support of that proposition the plaintiff's counsel referred us to Daniel's Negotiable Instruments, § 1319. In that section the general proposition is laid down that, "if the time be definite and unconditional, a day will suffice." The author there further says "the indulgence must be for a period longer than that which would be required by law for judgment to be obtained; otherwise, though upon a valid consideration, the surety will not be discharged." The author then cites as authority for that position Story on Promissory Notes, § 415. That author says there that, "if the agreement for extension be of such a nature that the maker can by law [italics the writ-

er's] obtain and entitle himself without the consent of the holder (as where the holder had been already discharged from the note in bankruptcy), there the agreement will not operate as a discharge of the indorsers, for the reason that the indorsers cannot, under such circumstances, be injured by the delay, or, if injured, it is by operation of law, and not dependent upon the act of the holder. Thus, for example, if pending a suit on the note against the maker the holder should agree to give time to the maker for payment thereof, short of the time within which judgment should regularly be obtained against him, that would not be a discharge of the indorser." And that is the same example given by Daniel in section 1319. But to show that it was not the intention of the author to vary the rule that, if the time be definite and unconditional, the shortness of time is immaterial, so that it be for a day or more, is clearly evidenced by the last few lines of section 1319: "And the general rule above stated applies only to cases where time has been given after suit brought, and does not apply where time is given by contract before any action has been commenced." In *Scott v. Fisher*, 110 N. C. 311, 14 S. E. 799, 28 Am. St. Rep. 688, this court recognizes the principle that there must be a definite time fixed for the extension of credit, and holds that an agreement to extend the time for 20 or 30 days is definite as to 20 days, and therefore discharges the surety; citing Daniel on Negotiable Instruments, § 1319. In *Forbes v. Sheppard*, 98 N. C. 111, 8 S. E. 817, the principal debtor paid to the creditor \$25 for indulgence. The creditor tendered the money back to the debtor, and commenced action on the same day of the receipt of the money against the principal debtor and the surety. The surety set up a release of himself because of this extension of time, and this court said: "The effect of a contract of forbearance to sue for a fixed and limited period, founded on a sufficient consideration with the principal, without reserving the right to proceed against the surety, and made without his assent, is too well settled to be further discussed." And further: "Inasmuch as no indulgence was in fact given, as suit was brought on the very day when the money was paid, in disregard of the contract, it occurred to us that it was thus virtually annulled, and no disability imposed on the surety to his disadvantage. But the authorities are to the contrary, and it is held that the exoneration grows out of the agreement to forbear, and is not affected by the creditor's breach of it after it was made." In *Pipkin v. Bond*, 40 N. C. 91, the question before the court was whether there was an indulgence to the principal with the knowledge or consent of the plaintiff, and whether that was done upon an agreement for forbearance, "which legally or equitably put it out of the power of the creditors to enforce payment from the principal for some period." Chief

Justice Ruffin, in delivering the opinion, quoted with approval the language of Lord Eldon in *Reese v. Barrington*, 2 Vesey, Jr. 545, where the same question was involved: "It is the most evident equity that the creditor should not carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor." And the Chief Justice further quoted from Lord Eldon in the same case: "He could not try the cause by inquiring what mischief the forbearance might have done to the surety, for that would go into a vast variety of speculation, upon which no sound principle could be built." The same view is expressed in Daniel on Negotiable Instruments (section 1313), where it is said: "The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured. Therefore, when there is a legal impossibility of injury, the principal does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt, and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held, did not discharge the indorser, because the latter could not, by making payment, have recourse against him. To discharge a surety by giving time to the principal, the creditor must put it out of his power for the time being to proceed against the principal." In *Swire v. Redmon*, 1 Q. B. Div. 536 (1876), it is said: "In the immense majority of cases the act does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it."

No error.

(132 N. C. 779)

#### HENDERSON v. DURHAM TRACTION CO.

(Supreme Court of North Carolina. June 6, 1903.)

#### STREET RAILWAYS—NEGLIGENCE—OPERATING CARS WITHOUT FENDER—VIOLATION OF STATUTE—SUSPENSION OF STATUTE—VALIDITY OF SUSPENSION.

1. Whether a street railway company was negligent in operating a car without a fender, as required by law, was a question for the jury.

2. Acts 1901, p. 968, c. 743, § 2, requires all street railway companies to use fenders in front of passenger cars, but provides that the corporation commission may "make exemptions" from the provision of the statute. The commission exempted all street railway companies from the provisions of the statute until otherwise ordered. Held, that the order amounted, not to an exemption, but to a suspension of the statute, and hence was invalid, and the statute remained in force.

Appeal from Superior Court, Durham County; W. R. Allen, Judge.

Action by Talmage Henderson against the Durham Traction Company. From a judgment for defendant, plaintiff appeals. Reversed.

Boone, Bryant & Biggs, for appellant.  
Manning & Foushee, for appellee.

CONNOR, J. This action was brought by the plaintiff, an infant suing by his next friend, for damages alleged to have been sustained by reason of personal injuries suffered by being struck by the defendant's street car in the city of Durham.

The complaint alleges that on or about the 30th day of July, 1902, the plaintiff was passing from his employer's place of business to the south side of Main street, where the defendant has a double track, about 5 feet apart; that about 9 o'clock p. m. a car was going westward on the northern track, and another car was going eastward on the southern track, and he came out of the drug store to cross the street just as the car going westward was passing the door, and stopped for it to go by, and this car kept him from seeing the east-bound car; that he was ignorant of the approach of that car, and as he stepped from the southern one of the double tracks he was struck by the east-bound car, knocked down upon the track, caught under the car, and dragged the distance of 20 yards or more, and was seriously injured. The complaint alleges that the defendant was negligent in three respects: (1) That, at the time of the approach of the car which injured the plaintiff, the motorman negligently and carelessly failed to sound the gong; (2) that, at the time of the injury complained of, the defendant had negligently and carelessly failed to properly equip its car which struck and injured the plaintiff with approved safeguards and appliances then in general use, in that it did not have a fender in front of said car, and, if said car had been properly equipped with a fender, the injury would not have occurred; (3) that if the defendant's motorman had been keeping a proper lookout, as reasonable and ordinary care required him to do, he could have discovered the plaintiff in time to have given warning, or stopped the car in time to save him from injury. The defendant, in its answer, denied each and every allegation charging negligence, and alleged that the plaintiff by his own carelessness and negligence contributed to the injury which he sustained. The following issues were submitted to the jury: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Did the plaintiff, by his negligence, contribute to his injury? (3) If so, notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of ordinary care, have avoided the injury? (4) What damage is the plaintiff entitled to recover?" Upon the conclusion of the testimony his honor intimated that he would instruct the jury to answer the first issue, "No." In deference thereto, the plaintiff submitted to a judgment of nonsuit, and appealed.

The plaintiff introduced James Rogers, who

testified that he saw the accident, and it occurred on Main street, between Fitzgerald's drug store and Five Points; that there are two street car tracks on Main street at the place of the accident, and the plaintiff was hurt by the car on the south track—the car going east. The witness was on the south side of Main street, and, when he first saw the plaintiff, he (plaintiff) was coming out of the drug store, on the north side of the street, nearly opposite the witness, and started running across to the other side of the street. As he started across, he looked up, and saw the car going west, and stopped for it to pass. This car going west made no stop, and, as it passed, the plaintiff started to cross the track, and the car going east caught him. He stepped behind the car going west. The witness does not think he could see the car going east, because of the car going west. The two tracks are about five feet apart. The car that caught the plaintiff was not running very fast; that is, it was running at an ordinary rate of speed. When the car hit the boy, the motorman was noticing the car going west—was not looking to the front, but at the car going west. The motorman on the car that struck the boy seemed to speed up a little, and "I holloed at the motorman, and told him that there was a boy under the car. Then he stopped the car, and asked me where the boy was, and I told him he was under the car. The boy was struck by the front of the car. There was no fender on the car. I could not see the boy at first. He was next to the front wheels, with his head against the wheels, his feet under the car, towards the west, and his body between the rails. His head was next to the wheel on the other rail, and he was dragged about 20 yards. A fender is something in the front of a car, like a cowcatcher, and runs within 8 inches of the rails. From the rail to the bed of the car is about 2 feet. The boy seemed to be dead under the car, and there was some talk whether they would move the car. There was nothing to prevent the boy from seeing the cars when he started from the store. When he started across the street, the cars were about 25 yards apart. This was not a street crossing. The boy started to run just as the car going west passed him, and had gotten to the middle of the track when the car going east struck him and knocked him down. The cars had not quite passed each other when the boy was struck. It was about half past nine o'clock at night. It was a summer car, and open. Trucks on the car do not come up to the front. The wheels are three or four feet from the front. There is a beam in front of the wheel, which is eight inches above the track, and this beam had passed over the boy when the car stopped. I heard the gong, but don't know on which car it was sounded."

The plaintiff testified that he got hurt, and has not been able to remember anything

about how he got hurt; that he started running; the cars passed the store every day and night; he had seen them pass with a bright light; knew where they passed each other, and could see a car plainly at Five Points, but did not remember seeing the car that night, nor anything about what occurred. He testified to the extent of his injuries.

The defendant introduced W. N. Latta, who testified that he was motorman on the car that struck the boy; that the car was going east, and, just as it passed the car going west, the boy darted into the car at the front end; that the car was lighted up, and had a headlight, and was a summer car. Gongs on both cars were ringing. The seats on the summer cars run entirely across, and parties get on at the side, first on the running board. The guard beam in front of the wheel is about  $4\frac{1}{2}$  inches from the pavement. When the witness saw the boy, he applied brakes and stopped the car as soon as he could. It went about 20 feet before he could stop. It was up grade, and was going from 4 to 6 miles an hour. The cars pass each other at that point from 48 to 60 times a day. Witness heard no one until after the car stopped. When the boy went under the car, "he kinder squealed." It took from 10 to 20 seconds to stop. The sill of the car in front is about 2 feet 5 inches from the pavement. The boy did not go in front of the car or between the wheels until after he fell. Witness was looking in front, and the boy was between the two tracks when he first saw him. Witness was at the front end of the car, about 4 feet from the north side of the car. No obstruction to him. Was looking to the front. The boy struck the car about the end of the running board. Ran into it "like a bird between you and the sun." The boy's running would throw him under the car as the car was struck. The witness was looking in front, and not at the other car passing. Could not stop the car within 20 or 30 feet. The car was lighted, and a headlight shining.

F. D. Markham, a witness for the plaintiff, testified that the beam is four inches in front of the wheel on the winter car. A street car fender is something like a cow-catcher on an engine, and is so shaped that if it catches anything it throws it up. It runs about ten inches above the track, and extends three or four inches on each side, and two or three feet in front, of the car. It is shaped something like the fingers of a grain cradle.

The defendant introduced, after objection by the plaintiff, a certified copy of the proceedings of a petition and order in the record of the corporation commission of North Carolina, as follows: "In the matter of the hearing, July 16, 1901, of the petition of the street railway companies of the state, asking to be exempt from the provisions of the act requiring city and street railway compa-

nies to use vestibule fronts and fenders on their cars, it was ordered as follows: Ordered, that the petition of the street railway companies to be exempt from the provisions of the act be denied as to vestibules, and as to the requirement of fenders the further consideration of the same is continued, and said street railway companies are exempt from the provisions of the act as to fenders until ordered otherwise by the commission."

In the view which we take of this case, it is not necessary to pass upon the testimony. We are of the opinion that in one phase of the case the plaintiff was entitled to go to the jury. There is a conflict between the authorities, whether or not a failure on the part of a corporation to perform a duty imposed by public statute, resulting in injury to another, is negligence per se, or whether it is evidence of negligence. After a careful examination of a number of authorities, we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence of negligence, to be submitted to the jury. "It is generally held (and this we regard as the true doctrine) that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action, unless it is the proximate cause of the injury complained of by the plaintiff." Elliott on Railroads, § 711. This court has held, in *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730, that "a rate of speed greater than that allowed by law is always, at least, evidence of negligence, and under certain circumstances may become negligence per se." Citing *Railway v. Ives*, 144 U. S. 418, 12 Sup. Ct. 679, 36 L. Ed. 485, in which it is said: "Indeed, it has been held in many cases that the running of railway trains within the limits of a city at a greater rate of speed than is allowed by an ordinance of such city is negligence per se. But perhaps the better and more generally accepted rule is that such an act on the part of the railway company is always to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence." This doctrine is supported by many well-considered cases, and we think it based upon sound principles. In *Hanlon v. Railroad*, 129 Mass. 310, it was held that "a violation of the city ordinance would be evidence, but not conclusive evidence, of negligence." In *Knuppel v. Ice Co.*, 84 N. Y. 488, it was held that "the violation of an ordinance is mere evidence of negligence, but not necessarily negligence." It should be submitted to the jury in connection with other testimony upon the question of negligence. In *Meek v. Pennsylvania Co. (Ohio)* 13 Am. & Eng. R. R. Cas. 646, the same doctrine is held, the court using the following language: "While the vio-

lation of a law or ordinance is not per se conclusive proof of negligence that will render the company liable, yet it is competent to be considered with all of the other evidence in the case. The ordinance was enacted for the purpose of rendering the streets more safe and convenient for the public. It is a police regulation defining what is a legitimate use of the streets by the railroad company. It was a command to those operating trains within the city limits, which it was their duty to obey; and a disobedience, either wilfully or negligently, is some evidence to be considered in determining the defendant's liability." The editor, in his notes, says that the weight of authority is to this effect.

This brings us to the question whether the failure to have a fender was a violation of the statute. Section 2, c. 743, p. 968, Acts 1901, provides "that all city and street passenger railway companies be and are hereby required to use practical fenders in front of all passengers cars run, manipulated or transported by them, and any company refusing or failing to comply with said requirement shall be subject to a fine of not less than \$10 nor more than \$100 for each day. The North Carolina corporation commission is hereby authorized to make exemptions from the provisions of this section in such cases as in their judgment the enforcement of this section is unnecessary." In the view which we take of the case, it does not become necessary to pass upon the constitutionality of that portion of the act which confers upon the corporation commission the power to make exemptions from its provisions. The question was not presented or referred to in the argument. The right of the Legislature to confer upon any other governmental agency the power to exempt any persons or corporations from the operation of a statute, the violation of which is made a misdemeanor, is, to say the least, exceedingly doubtful. There is a marked difference between the power to make statutes of local application dependent upon a vote of the people, and the power sought to be given the corporation commission in this instance. The statute here is complete. The duty is imposed, and the penalty for its violation fixed. A strict observance of the division of powers between the three co-ordinate departments of the government is absolutely essential to the preservation and the harmonious working of our system of government. The Constitution confers upon the Legislature alone all legislative authority, and declares that the power of suspending the laws without the consent of the people ought not to be exercised. An interesting discussion of this question may be found in *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275, and *Slinger v. Henneman*, 38 Wis. 505. The extent of the power which may be conferred upon the corporation commission is set forth and discussed by *Shepherd, C. J.*, in *Express Co. v. Railroad*, 111 N. C. 463, 16

S. E. 393. Conceding for the purpose of this opinion, only, that the portion of the act in question is constitutional, we think, by a proper construction of it, the extent of the power conferred upon the commission is one of exemption, and not of suspension. The order made by the commission exempts all street railway companies from the provisions of the act as to the fenders, until otherwise ordered by the commission; thus applying to all street railways in the state, and, of course, operating, if within the power of the corporation commission, to suspend the statute. This, we think, exceeds the power conferred by the statute, and is therefore invalid; thus leaving the act in force, and the duty of the street railway companies to provide fenders as prescribed by the act. The failure to do so was evidence proper to be submitted to the jury upon the question of negligence, and as to the proximate cause of the injury. If the jury should find, as a fact, that the failure to have the fender was the proximate cause of the injury (that is to say, that the plaintiff would not have been injured if the defendant had provided its cars with fenders), and that the plaintiff was not guilty of contributory negligence, or, if guilty, that the defendant had the last clear chance to prevent the injury, the plaintiff would be entitled to recover. The question presented by the testimony in regard to the relative rights and duties of street railway companies and travelers passing along and across the streets is discussed in *Moore v. Ry. Co.*, 128 N. C. 455, 39 S. E. 57. We simply decide in this case that the case should have been submitted to the jury under proper instructions. It is but just to the learned judge who tried the case to say that the question upon which this decision is based was not presented or argued before him or in this court.

We have neither discussed nor passed upon the testimony bearing upon the second issue. His honor having practically instructed the jury to find for the defendant upon the first issue, we confine our decision to his ruling in that respect. We must not be understood as expressing any opinion in regard to the other phases of the case.

There must be a new trial.

(122 N. C. 769)

FISHER et al. v. WESTERN CAROLINA BANK et al.

(Supreme Court of North Carolina. June 6, 1903.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—FILING—SUITS BY CREDITORS—VACATION OF ASSIGNMENT—EQUITABLE LIENS.

1. Under Code 1883, § 685, declaring that any conveyance of a corporation's property, whether absolutely or on condition, shall be void as to prior creditors, etc., if they commence proceedings to enforce their claims against such corporation within 60 days after the registration of the conveyance, the commencement of an action by creditors of a corpora-

tion within such time to recover their debts after the filing of an assignment for the benefit of creditors operates of itself to avoid such assignment.

2. Where creditors of a corporation sued on behalf of themselves and other creditors of a corporation to recover their claims after it had made an assignment for the benefit of creditors, which, as provided by Code 1883, § 685, operated to vacate such assignment, and such suits did not in any manner increase the assets applicable to the payment of the corporation's debts, plaintiffs in such suits were not entitled to a lien, by reason thereof, on the corporation's assets in the hands of a receiver.

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by Thomas Fisher and others against the Western Carolina Bank and others. From a judgment denying plaintiffs a prior lien on defendants' assets, plaintiffs appeal. Affirmed.

The defendant the Western Carolina Bank, a banking corporation created and existing under the laws of North Carolina, doing business at Asheville, in the county of Buncombe, and being largely indebted to numerous persons, many of whom had deposited money with it, and, among such depositors, to the plaintiffs (appellants herein) in several amounts, respectively, executed on the 12th day of October, 1897, a voluntary assignment to Lewis Maddux, its president, and L. P. McLeod, its former cashier, of all its property and property rights of every kind, consisting very largely of lands in said state, in trust to sell the same, and, after paying the expenses of the trust, to apply the proceeds of such sale upon various liabilities of that institution, giving preferences to certain of its creditors for large amounts in different classes. This deed was registered in said county of Buncombe on the 12th day of October, 1897. Thereafter, on the 12th day of October, 1897, the plaintiffs (appellants), with certain other of said creditors, commenced this action in the superior court of said Buncombe county for the purpose of attacking said assignment upon the ground that it was void as to themselves and the other creditors of said bank, because made with the intent to hinder, delay, and defraud themselves and such other creditors. On October 13, 1897, at 11:50 a. m., the plaintiffs filed therein their complaint. On October 12, 1897, the Battery Park Bank, one of the creditors who were given the first preference in said assignment, commenced in said superior court of Buncombe county an action against the Western Carolina Bank alone for the purpose of collecting its debt. In said action the said Battery Park Bank filed an affidavit, and thereupon moved for the appointment of a receiver to wind up the affairs of the said bank under sections 666, 668, of the Code. On October 13, 1897, at 11:30 o'clock p. m., the order was made by Judge Norwood appointing temporary receivers of said bank, and on October 16, 1897, the bond required by said order was filed, and the injunction in said action

was issued. The complaint in said last-mentioned action was filed on October 25, 1897. Said complaint alleged the insolvency of the bank and its indebtedness to the plaintiffs, and demanded judgment for the recovery of its debt and such other relief as it might be entitled to in the premises. The summonses in both actions were returnable to the December term, 1897, of the superior court of Buncombe county, and were duly served and so returned. At said December term, 1897, an order was made whereby said actions were consolidated, "without prejudice to the rights of any of said suitors to establish a prior lien on the assets of the said bank in the hands of said receivers, if by law they have acquired such preference by such independent suits, or by claimants of the bank having become parties thereto." At the September term, 1902, of the said court, this action was brought to trial, and a verdict was rendered establishing the indebtedness of the said defendant bank to the plaintiffs and others, and also finding that said deed of assignment was made with intent and for the purpose of hindering, delaying, and defrauding the plaintiffs and other creditors of the Western Carolina Bank. Upon the coming in of this verdict the plaintiffs (appellants) and others then acting with them moved the court for a judgment for the amounts so found due them from the defendant bank, and for judgment that said deed of assignment was fraudulent and void as against the plaintiffs and said other creditors. Plaintiffs (appellants) also moved the court, upon said verdict, for judgment declaring a lien in their favor upon the assets of the bank in the hands of the receivers to the amount of their indebtedness. This last motion was denied, and the court adjudged that the plaintiffs recover of the defendant bank the amounts of their several debts as fixed by the verdict of the jury, and further considered and adjudged "that the deed of assignment mentioned in the complaint, dated October 12, 1897, be, and the same is hereby, declared and decreed fraudulent and void as against the plaintiffs, creditors of the Western Carolina Bank," to which the plaintiffs excepted and appealed, assigning as error the refusal of the court to render judgment that the plaintiffs are entitled to a lien to the extent of the amount of their recoveries against the defendant bank.

F. A. Sondley, Whitson & Keith, Haywood Parker, Frank Carter, and Tucker & Murphy, for appellants. Chas. E. Jones, Merrimon & Merrimon, and Merrick & Barnard, for appellees.

CONNOR, J. (after stating the facts). Plaintiffs, relying upon the doctrine announced by this court in *Hancock v. Wooten*, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466, contend that the action brought by them for the purpose of attacking and avoiding the deed of assignment made by the defendant bank, and

subjecting the property to the payment of the debts of the bank, acquired a lien or preference in respect to the property and the assets of the bank over other creditors. The distinction between a general creditors' bill brought in behalf of all the creditors of an insolvent corporation or the estate of a deceased person, or to enforce the execution of a trust and administer the fund, and a "judgment creditors' bill," brought "for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances, and the like," is discussed and pointed out by Mr. Justice Shepherd in *Hancock's Case*. It having been held in *Bank v. Harris*, 84 N. C. 206, that under our judicial system, by which legal and equitable remedies are administered by the same court, and in one form of action, there was no longer any necessity for the creditor to obtain a judgment before bringing his action in the nature of a bill in equity to invalidate fraudulent assignments, etc., the term "judgment creditors' bill" is not strictly accurate as applied to our system of procedure. Formerly, the judgment creditor having, either by docketing his judgment or running out his execution, acquired a lien or legal preference in respect to lands or other legal assets, became entitled upon final decree to the preservation and enforcement of such liens as he had acquired. By filing his bill for the purpose of reaching and bringing within the jurisdiction of the court equitable or nonleviable assets, he acquired an equitable lien, or, as sometimes said, his bill was treated as an equitable *fi. fa.* Shepherd, J., referring to the effect of the change in the procedure, says: "The result of the decision is to render the proceeding still more efficacious, as we think that by its institution it creates a preference by way of an equitable lien whether the interest sought to be subjected be legal or equitable." By reason of this decision of our court much of the very interesting discussion and learning found in the works on equity jurisprudence and the English and American chancery reports is of but little practical value in the decision of this case. When the plaintiffs issued the summons in this action, they had no lien or rights other than general creditors, nor did the plaintiffs in the case of Battery Park Bank against defendant Bank have any such lien. The record presents the question, therefore, whether the plaintiffs' claim for a preference or equitable lien comes within the principle of *Hancock v. Wooten*, *supra*.

The assignment was made on the 12th day of October, 1897, and recorded at 9:30 o'clock a. m. on the same day. The summons in the action of Fisher and others (who are named) "and all other creditors of the Western Carolina Bank who may choose to come in and make themselves parties to this action"

against the Western Carolina Bank, Lewis Maddux, and L. P. McLeod, was issued and received by the sheriff on the same day, and served on October 16, 1897. The complaint was filed October 13, 1897, at 11:50 a. m. The complaint sets out the material allegations in regard to the incorporation, etc., and the indebtedness of the bank to the plaintiffs. The nineteenth allegation avers "that, as the plaintiffs are informed and believe, said deed of trust or voluntary assignment is fraudulent and void in law as to these plaintiffs, and was executed by defendant with the intent to hinder, delay, and defraud the plaintiffs and other creditors of the defendant bank." They demand judgment that they recover the amounts of their debts, that a receiver be appointed, that the deed of trust be declared void, etc. On the same day—October 12th—the Battery Park Bank, in its own behalf and all other creditors, issued summons against the Western Carolina Bank. This summons was served October 12, 1897. On the same day the plaintiff Battery Park Bank, by its cashier, filed an affidavit setting forth the indebtedness of the defendant bank, its insolvency, etc., and stating that it was entitled to have a receiver appointed pursuant to section 668 of the Code of 1883. On the 13th day of October, 1897, at 11:30 p. m., Norwood, J., made an order in said case appointing temporary receivers. Thereafter permanent receivers were appointed. The complaint in the action brought by the Battery Park Bank was filed October 25, 1897, alleging the insolvency of the bank, and its indebtedness to the plaintiff, and demanding judgment for its debt, and such other and further relief in the premises as it may be entitled to. In this action an order was made at the return term consolidating all of the actions brought against the defendant bank without prejudice to the rights of any of said suitors to establish a prior lien on the assets of the defendant bank in the hands of said receivers if by law they have acquired such preference by such independent suits or by claimants of the bank having become parties thereto. The defendant bank filed its answer, denying any fraudulent purpose or intent in the execution of the deed of assignment. The cause was brought to trial at the September term of court. The verdict of the jury fixed the indebtedness of the several plaintiffs, and found that the deed of assignment was made with intent to hinder, delay, and defraud plaintiffs and other creditors of the defendant bank.

The general principle governing the rights of creditors in the distribution of assets set forth in *Hancock v. Wooten*, *supra*, gives us but little aid in the decision of this case by reason of the provisions of our statute. Code 1883, § 685. The authorities all concur in holding that, unless prevented by some statute, a corporation, as a natural person, may convey its property for the benefit of its creditors, giving preference, and the credit-



ors may, by reducing their claims to judgments, acquire liens, which will be preserved and protected in proceedings instituted for winding up its affairs in case of insolvency. *Cotton Mills v. Cotton Mills*, 116 N. C. 647, 21 S. E. 431; 3 *Clark & Marshall on Private Corporations*, § 768, p. 2331. "The appointment of a receiver does not divest the property of prior existing liens, but affects only the manner and time of their enforcement. While the property is in the possession of receivers the right to enforce the liens is suspended, because the property is in the custody and control of the court." *Beach on Receivers*, 194. In this case the two actions were commenced by the issuing of the summonses simultaneously. The order appointing the receiver was made subsequent by about 12 hours to the filing of the complaint in the action of *Fisher and others*, but prior by three days to the service of the summons on the defendant bank in that action. The title of the receiver relates to the date of his appointment. "The courts have now, as a rule, come to the conclusion that the title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed, and the receiver remains out of possession pending such performance." *Beach on Receivers*, 209; *Worth v. Bank*, 122 N. C. 397, 29 S. E. 775; *Pelletier v. Lumber Co.*, 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837; *Bank v. Bank*, 127 N. C. 432, 37 S. E. 461. The action is commenced by issuing the summons. Code 1883, 199. It would seem to follow that neither party has any priority by reason of the time of beginning their action. It may be that, for the purpose of fixing the time when any rights of priority or liens attached, the day of service of the summons, when the party is brought into court, would be the proper time. In the view which we take of this case, however, it is not necessary to decide this question, and we leave it open. The plaintiffs base their claim to a lien upon the ground that their action was, as in *Hancock v. Wooten*, supra, brought for the purpose of vacating a fraudulent assignment and subjecting property put beyond the reach of the creditor, thus bringing it within the definition of a judgment creditors' bill, as distinguished from a general creditors' bill. The preferential lien given by courts of equity in such cases is based upon the reason assigned by Chancellor Walworth in *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454, cited by the court in *Hancock's Case*: "On further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful determination should, in the end, be obliged to divide the avails thereof with those who have slept upon their rights, or have intentionally kept back that they might profit by his exertions." It was as a reward for his diligence that he was permitted to take the fruits of his recovery. The jus-

tice of this rule was strikingly illustrated by the facts in *Hancock v. Wooten*. There the beneficiary under the fraudulent assignment was actively defending the assignment, and, after the successful litigation, in which the jury found the assignment fraudulent, he sought to share in the assets thus brought within the jurisdiction of the court. As was said by the court, referring to the defendant *Wooten*: "He and the plaintiffs had been fighting at arm's length, each endeavoring to establish a priority over the other. The plaintiffs have been victorious, and, the deed having been declared fraudulent and void as to them, their preference must be recognized, and the claim of the losing party postponed." The difficulty with which the plaintiffs are met in bringing themselves within this principle is found in the fact that either of the actions brought on the 12th of October must necessarily have resulted in the avoidance of the deed of assignment. In no possible point of view could the deed have been valid as against the creditors of the defendant bank after the institution of the suits, or either of them, within the 60 days. The Code of 1883, § 685, expressly declares: "Any conveyance of this property whether absolutely or upon condition, shall be void and of no effect as to creditors of said corporation existing prior to or at the time of the execution of the said deed and as to torts committed by such corporation, its agents or employes prior to or at the execution of the said deed, provided said creditors or persons injured or their representatives shall commence proceeding or action to enforce their claims against said corporation within 60 days after the registration of said deed as required by law." This section of the Code, immediately upon the commencement of either of the actions, avoided the deed of assignment, and there was no necessity for litigating the question as to the intent with which it was made. This court, referring to the effect of section 685 upon conveyances by corporations, in *Langston v. Improvement Co.*, 120 N. C. 132, 26 S. E. 644, says: "This being so, the real estate of defendant corporation remained liable to plaintiff's debt, notwithstanding the mortgage of defendant corporation to *Moye*. Section 685 of the Code, which section has been construed in *Coal Co. v. Electric Light Co.*, 118 N. C. 232 [24 S. E. 22]. But there is error in the judgment which declares a lien on the property of the corporation. Section 685 of the Code does not authorize the declaration of the lien, but only puts the mortgage out of the way of plaintiff's collecting his debt, and leaves the property in the same condition, so far as the debt is concerned, as if no mortgage had been made." This court has decided in *Bank v. Bank*, 127 N. C. 432, 37 S. E. 461, that the deed of assignment made by the defendant bank is void as to creditors bringing their action within 60 days after registration, and that no lien is created by the bringing of action. This would seem to



be decisive of the plaintiffs' contention, and to fully sustain the judgment of the court below. Both suits are brought in behalf of the plaintiffs and all other creditors. It will be observed that section 685 does not require that an action be brought for the purpose of setting aside or vacating the assignment, but that it becomes void and of no effect immediately upon the bringing of an action by the creditor to "enforce his claim." Hence it was unnecessary for the plaintiffs in their action to make any reference to, or ask any judgment in respect to, the deed of assignment. The finding of the jury in regard to the intent with which the deed was made was immaterial, and did not in any respect affect the rights of the creditors. The plaintiffs, therefore, not having by their diligence removed any obstructions to legal remedies or brought into the common fund for distribution any property or assets, do not bring themselves within the principle of *Hancock v. Wooten*, supra, and are not entitled to any lien or preference. His honor properly adjudged that the deed was void as to the creditors. This left the fund in the hands of the receivers, to be distributed under the direction of the court among the creditors. The question in respect to judgment lien was passed upon and settled by this court in the case of *Battery Park Bank v. The Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461.

The judgment of the court below is affirmed.

(132 N. C. 755)

LEE et al. v. BAIRD et al.

(Supreme Court of North Carolina. June 6, 1903.)

WILLS - CONSTRUCTION - "CHILDREN" -  
"HEIRS" - EQUITABLE CONVERSION -  
ADVANCEMENTS - DEDUCTION.

1. Testatrix devised certain property to her daughter B. for life, and directed that at her death it should be sold, and the proceeds equally divided among all of testatrix's children. In another provision she directed her executors to sell certain other land, and divide the proceeds among all her heirs. At the execution of her will, testatrix had seven living children, and six grandchildren, the issue of a deceased daughter. *Held*, that testatrix used the words "children" and "heirs" in their strict legal sense, and hence such grandchildren were not included in the bequest to testatrix's children, but were included in the bequest to her heirs.

2. Where testatrix directed her executors to sell certain real estate and divide the proceeds among her children and heirs, such direction operated as an equitable conversion, and the property and the proceeds of the sale thereof passed to the beneficiaries as personalty.

3. Where testatrix used the word "heirs" to represent a class to whom personalty was bequeathed, such term included those who would be entitled to take under the statute of distributions.

4. Testatrix, who had made certain advancements to some of her children, devised the proceeds of certain real estate to all of her heirs, and directed her executors to pay such of her children as had received no advancements a sum sufficient to make them all equal,

and if any of her heirs died before testatrix's death, leaving children, such children would take the share of their deceased parents. *Held* that, though such bequest was to testatrix's heirs jointly, they took per stirpes, and not per capita.

5. Testatrix bequeathed the proceeds of certain of her real estate to her heirs, and, by a subsequent clause of the will, directed her executors to present statements of advancements to such of her heirs as had received advancements during the life of testatrix or her husband, and, if any of the heirs had received no advancements, to pay to them a sum sufficient to make all of them equal, and to divide the remainder among all of her heirs. Testatrix had made advancements to a daughter who had died prior to the making of the will, and, if such advancements were deducted from the share of such daughter's children, they would be disinherited. *Held*, that the advancements referred to in the will were limited to those made to the persons entitled to take thereunder, and that the grandchildren were therefore not subject to a deduction from their share of advancements made to their deceased mother.

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by James B. Lee and others against J. R. Baird and others for the construction of a will, etc. From a judgment in favor of plaintiffs, defendants appeal. Modified.

Mrs. Eliza T. Baird, late of the county of Buncombe, widow, on the 23d of January, 1884, executed her last will and testament. The portions thereof material to the decision of this case are:

"Item 2. I bequeath unto my daughter, Vickie Baird, all my household and kitchen furniture, to be hers forever, and I bequeath to Vickie during her lifetime my Forest Hill property; and at her death to be sold and divided equally among all of my children."

"Item 4. The balance of the Marr Swamp place to be sold to pay my son Joseph the expenses of the lawsuit on Sec. 9, and if the amount received is more than enough to pay the expenses of the lawsuit, the remainder to be divided among all my children."

"Item 5. I request my executors to sell my lots in Asheville and my interest in the Craggy Mountain land and divide the money among all my heirs."

"Item 7. I request my executors to require of my heirs who have received advancements during the life of my husband or myself to present to them an itemized statement of such advancements before they shall receive any payment of the property directed to be sold in my will; and if any of my heirs have received no advancements, to pay to them a sum sufficient to make them all equal, and if any remainder to divide the amount amongst all of my heirs. And if any of my heirs die before my death, leaving heirs, the children of such deceased parent or parents, shall receive jointly the share coming to their parent or parents, - the share he or they would have received if he or they had been living at the date of my death."

At the date of the execution of said will, Mrs. Baird had seven living children. A daughter, Mrs. M. J. Lee, died October 5,

1878, leaving surviving six children. The testatrix had, when she made said will, numerous other grandchildren, children of living children. Victoria A. Baird, mentioned in item 2 of the will, died March 20, 1897, leaving no children. At the date of said will, T. J. Lee, the husband of M. J. Lee, and father of said children, was, and yet is, a man of fine business ability, prosperous, and wealthy, who provided well for his children. His wife had received from the testatrix large sums by way of advancements—exceeding, in all, \$3,000, and amounting to more than the advancements which were made by the testatrix to any of her other children prior to her death. The testatrix knew these facts at the time of making her will, and when she died. She was a woman of education and financial capacity, and in full possession of her faculties.

T. H. Cobb and F. A. Sondley, for appellants. Merrimon & Merrimon, for appellees.

CONNOR, J. (after stating case). This action is brought by the plaintiffs, five of the six children of Mrs. M. J. Lee, against the executors and children of Mrs. Baird, for the purpose of having the said will construed, and for an account of the proceeds of the property directed to be sold, and other relief. His honor, upon the facts found as above stated, adjudged that the property mentioned in the second item, to wit, the Forest Hill property, and that mentioned in items 4 and 5 of said will, became and were by the provisions of said will converted into personal property upon the death of the said testatrix, and were to be distributed as such by the executors named in the will, in accordance with the provisions of the seventh item of the will; that, by the provisions of the seventh item, it became the duty of the executors to require all of the heirs of the testatrix (by whom in said item and said will is meant those who would be entitled to the proceeds of the sales of the said real property under the statute of distributions of the state of North Carolina) to render an account of advancements, and that the said plaintiffs are entitled to receive from the proceeds of the said real property so much as would come to them, or each of them, upon the basis of a per capita distribution. From this judgment the defendants appealed.

Plaintiffs contend, first, that the real property directed to be sold was converted into personalty by the provisions of the will; second, that the word "children," in the will, includes the plaintiffs, who are grandchildren; third, that the word "heirs" is to be construed in the same way. The defendants, on the contrary, contend that the words "all of my children" exclude the plaintiffs from any participation in the proceeds of the Forest Hill property, and that the word "heirs," as used in the other items of the will, shall be construed to mean children, thereby exclud-

ing the plaintiffs from any share in the property mentioned in item 5.

In our efforts to adopt a construction of the will of Mrs. Baird, consistent with the rule laid down by the courts to guide them in such cases, we have encountered many and almost insurmountable difficulties. Either construction suggested by counsel for the respective parties, while supported by well-considered arguments and briefs, presents contradictions and leads to results difficult to reconcile with parts of the will. We have given the case anxious and careful consideration. The conclusion to which we have finally arrived is not free from difficulty, and much could be said in support of one or more other views.

The first question presented is, what meaning we shall attach, or we shall assume that the testatrix attached, to the word "children," as used in the second and fifth items of her will. The first proposition laid down by Sir James Wigram in his Rules for the Interpretation of Wills is: "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." Lord Cranworth, in *Hicks v. Sallitt*, 3 De G., M. & Gor. 782, 18 Jar. 915, says: "Where a testator uses a word which has a well-known ordinary acceptation, it must appear very certain that he has stated on the face of the will that he uses it in another sense, before the ordinary sense can be interfered with. In order to alter the meaning of a word, it must appear, not that the testator might have meant it in a different sense, but that he must have meant it in a different sense; and this can only be shown by pointing some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense." It is also an elementary rule "that every possible effort should be made by the court to reconcile the clauses seemingly repugnant, and to give effect to the whole will, for the presumption is that the testator meant something by every sentence and word in his will, and no court is justified in rejecting any portion of it until it is positively assured that the portion which it rejects cannot be reconciled with the general intention of the testator as expressed in some other portion of the will; and even when the general rule of repugnancy is applied of necessity, and the latter of the two inconsistent clauses is permitted to prevail over the former, it is a settled rule that the earlier of the two clauses will not be disturbed or rejected any further than is absolutely necessary to carry out the presumed intention of the testator as shown in the whole clause." Underhill on Wills, § 359.

Certainly the use of the words "all of my children" by the testatrix is free from ambiguity, and the uniform current of authority in this and other courts sustains the proposition that they will not be construed to include grandchildren, unless from necessity, which occurs when the will would be inoperative unless the sense of the word "children" were extended beyond its natural import, and when the testator has clearly shown by other words that he did not use the term "children" in the ordinary actual meaning of the word, but in a more extensive sense; that this construction can only arise from a clear intention or necessary implication, as where there are no children, but are grandchildren, or where the term "children" is further explained by a limitation over in default of issue. This court, in *Denny v. Clossie*, 39 N. C. 102, says: "The intention of the testator is the governing rule in the construction of wills, upon the principle that the law accords to every man the right to dispose of his property after his death as he shall please. If, therefore, his intention can be ascertained from the will, and it contravenes no rule of law, that intention shall be carried into effect. It sometimes becomes very difficult to ascertain what is the true meaning of the will, and the courts have been compelled to adopt various rules as indicating the will of the testator, which in such cases will be observed. \* \* \* It is manifest that the testator well understood the meaning of the words he used, and that he varied them as occasion required to meet his wishes in the disposition of his property. The objects of his bounty were his own children; and he had a legal right to dispose of his property as he desired. We have examined the authorities to which our attention has been directed. There is nothing in them to change the view we have taken of the case. They only provide that the word 'children' may, under peculiar circumstances, mean grandchildren, as when the meaning of the testator is uncertain, and the bequest must fail unless such construction be given. That is not the case here." *Ruffin, C. J.*, in *Ward v. Sutton*, 40 N. C. 421, says: "Every word is to be retained, and a sensible meaning put on it, if possible, so as to effectuate the apparent intent; and, if it be necessary to the sense, words, and even sentences, may be transposed. \* \* \* The gifts being to children, the general rule is that where there are persons who answer that description, grandchildren cannot take under it." *Battle, J.*, in *Mordecai v. Boylan*, 59 N. C. 366, says: "The testator clearly shows by his will that he understood the distinction between children and grandchildren. The general rule, therefore, must prevail, that, in the division of the residue directed to be made among his children, the testator's grandchildren and great-grandchildren cannot be included." The same view is taken in *Boylan v. Boylan*, 62 N. C. 160. In *Carson v. Carson*, 62 N. C. 58,

it is settled that, where there are gifts in a will to children, grandchildren cannot take, when there are any persons answering to the description of children. Upon the same principle, a power conferred upon a person to dispose of a fund among children will not authorize a disposition of a part of the fund to grandchildren, at least while there are any children who can take it.

A careful examination of our own Reports, with the aid of very excellent briefs of counsel, fails to disclose a single case in which the term "children" has been held to include grandchildren. An examination of the authorities shows that this court is in harmony with the courts of other states and of England. *Walworth, Ch.*, in *Mowatt v. Carow*, 7 Paige, 339, 32 Am. Dec. 641, says: "The word 'children,' in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as the ancestor; but it may include them where there are no persons in existence who would answer to the description of children, in the ordinary sense of the word, at the time of making a will, or where there could not be any such at the time or in the event contemplated by the testator, or where the testator has clearly shown by the use of other words that he used the word 'children' as synonymous with 'descendants' or 'issue,' or to designate or include illegitimate offspring, grandchildren, or stepchildren." *Redfield on Wills* (3d Ed.) p. 16. "The word children, when used in a will, does not ordinarily include grandchildren, but grandchildren and great-grandchildren may take under this word, if necessary to accomplish the testator's intention." *Scott v. Nelson*, 3 Port. 452, 29 Am. Dec. 286. "It is a well-settled rule of construction in this state, as well as elsewhere, that the word 'children,' in a will, does not include grandchildren, unless it appears from the context to have been so intended by the testator, or such meaning is necessary to carry out his manifest intent." *Castner's Appeal*, 88 Pa. 491. *Moncure, P.*, in *Moon v. Stone's Executors*, 19 Grat. 328, uses the following language: "But whatever may be our conjecture on that subject, we cannot give effect to any supposed intention which is not expressed by the words of the will. \* \* \* We sit here not to make wills for testators, but to expound them. And we must give effect to every will as it is written by the testator, provided it be legal, however strange and capricious it may seem to have been. \* \* \* Here is an express loan to his daughter Sallie during her natural life. This is plain language, and, standing by itself, cannot be misunderstood. What is there in the will to change its natural meaning? Only the word 'children,' which twice follows it in the same clause. Now, this word 'children' is just as plain as the loan for life previously given. Its meaning is, issue in the first degree." In *Reeves v. Brimen*, 4 Vesey,

697, the Master of Rolls says: "As to the principal point, it is a rule of construction that every word of a will must have a meaning imputed to it, if it is capable of a meaning without a violation of the general intent or of any other provision in the will with which it may appear inconsistent. 'Children' may mean grandchildren when there can be no other construction, but not otherwise." The same principle is applied in *Hone v. Van Schaick*, 3 N. Y. 538; *Ewing v. Handley*, 4 Litt. 346, 14 Am. Dec. 140. In *Estate of Hunt*, 138 Pa. 260, 19 Atl. 548, 19 Am. St. Rep. 640, Grear, J., after stating the rule, says: "With us, it has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms." *Presley v. Davis*, 7 Rich. Eq. 105, 62 Am. Dec. 396. In the case of *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763, Judge Story says: "Although in its primary sense the word 'children' is a descriptive personari who are to take, there is not the slightest difficulty in giving it the other sense when the structure of the devise requires it." The learned judge was not discussing the question as to whether the word "children" would include grandchildren, but was dealing with a limitation in a deed, for he says: "So that in the present case there is an evident necessity of construing the word 'children' to mean issue or heirs of the body. If so, they are words of limitation, and not of purchase." So, also, is the point decided in *Wild's Case*, 3 Coke's Rep. 288.

It is contended, however, that by reference to the seventh clause of the will it is apparent that the testatrix intended by the use of the word "children" to include her grandchildren, because she therein provides that "my heirs who have received advancements during the life of my husband or myself are to present an itemized statement of such advances before they shall receive any payment of the property directed to be sold in my will; and if any of my heirs have received no advancements, to pay to them a sum sufficient to make them all equal, and if any remainder to divide the amount amongst all of my heirs. And if any of my heirs die before my death leaving heirs the children of such deceased parent or parents shall receive jointly the share coming to their parent or parents—the share he or they would have received if he or they had been living at the date of my death." That this language indicates a purpose on the part of the testatrix to have an equal division of all her property "directed to be sold" between her children and the children of those who have predeceased her. It will be observed that in the fifth item of the will she directs a sale by the executors of her lot in Asheville and her interest in the Craggy Mountain land, and a division of the money "among all my heirs." We thus see that she has used the word "heirs" in the fifth and seventh items of her will, and the words "all my children" in the second

and fourth items. Mrs. Lee died before the execution of the will, leaving the plaintiffs as her children. This fact, of course, was known to the testatrix. The testatrix had other grandchildren, being the children of her living children. If it be true, as contended, that no reasonable construction can be placed upon the entire will, consistent with the general intention and purpose of the testatrix, otherwise than by construing the word "children" to mean grandchildren, and this general intent is so manifest as to exclude all reasonable doubt, then that construction must be placed upon the will, as contended by the plaintiffs. It appears by the deposition of John R. Baird, one of the executors, that the Forest Hill property referred to in item 2 is worth about \$13,000. It is conceded that Mrs. Lee had been advanced \$3,100. There is no suggestion as to the value of the property referred to in item 4, or what amount, if any, would remain after paying the expenses of the lawsuit referred to. It will be observed also that the Forest Hill property is given to Vickie Baird for life, "and at her death to be sold and divided equally among all my children." While it may be that the executors would, upon the death of Vickie, be authorized to sell the property for the purpose of division, no express duty is imposed upon them in that respect, and it is very doubtful whether they have the power to sell, whereas in item 5 the language is, "I request my executors to sell," etc. Referring to item 7, the language is, "The property directed to be sold in my will." It may well be that it was the property referred to in item 5, given by the testatrix to "all my heirs," which was referred to in item 7. This construction would exclude the language of item 7 from any reference to items 2 and 4. But it is said that the testatrix makes reference to any of her heirs who might "die before my death leaving heirs," etc. It is difficult to understand how she could have referred by that language to Mrs. Lee, who had been dead six years before testatrix made her will. Keeping in view the principle that we must, if possible, ascertain and effectuate the intention of the testator, and that in doing so we must keep in view the primary rule of construction, that every word and clause of the will shall be given force and effect, and the further rule that words are to be construed in their primary and original sense, we conclude that the testatrix did not intend her grandchildren to share in the proceeds of her Forest Hill property; that she did intend them to share in the proceeds of the lots in Asheville and the Craggy Mountain land, she using in respect to that property the words "among all my heirs." Adopting this view, item 5 is to be read in connection with item 7, whereas items 2 and 4 are not included in the provisions of item 7.

Having thus disposed of the proceeds of the Forest Hill property, we proceed to ascertain the rights of the plaintiffs and defend-

ants in respect to the property mentioned in item 5. The direction to sell operates as an equitable conversion, and the property, or proceeds thereof, pass to the beneficiaries as personalty. *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704; *Benbow v. Moore*, 114 N. C. 623, 19 S. E. 156. Therefore the word "heirs" must be understood and construed to describe those persons who would take as distributees. This would, of course, include the plaintiffs.

We cannot, consistently with the principle which we have announced, adopt the argument of the defendants, and construe the word "heirs," in the fifth and seventh clauses, as synonymous with "children"; thereby excluding the plaintiffs from all participation in the proceeds of the Asheville lots and the Craggy Mountain lands. The testatrix, by the same process of reasoning which we have followed in regard to the use of the word "children," must have understood that the word "heirs" was more comprehensive than "children," and used the words "all of my heirs" as including those who would have taken the property if she had died intestate. There are some difficulties presented in treating the word "heirs" in a strictly legal sense. The property passes to the children and grandchildren as personalty, and they take the proceeds. "It is too well settled to need citation of many authorities for its support that the term 'heirs,' when used with reference to those to whom personal estate is given, means those who take by law, or under the statute of distributions." *Burgin v. Patton*, 58 N. C. 428; *Brothers v. Cartwright*, 55 N. C. 118, 64 Am. Dec. 563.

We are next required to ascertain the basis upon which the distribution is to be made. "It is well settled, as a general rule, that if a testator gives an estate to be equally divided between A. and B. and the heirs of C., and the latter has several children, the division will be per capita; but, if there be anything in the will indicative of an intention that the devisees or legatees shall take as families, the general rule will not apply, and the property will be divided per stirpes, and not per capita." *Burgin v. Patton*, 58 N. C. 426, citing *Ward v. Stow*, 17 N. C. 509, 27 Am. Dec. 238. Among the cases cited as falling within the exception to the general rule are *Martin v. Gould*, 17 N. C. 306; *Spivey v. Spivey*, 37 N. C. 100; *Henderson v. Womack*, 41 N. C. 437. In *Bivens v. Phifer*, 47 N. C. 436, *Battle, J.*, referring to the language of *Lord Langdale* in *Martin v. Drinkwater*, 2 Bevan, 216, says: "I consider the rule as settled that you are at liberty to prove the circumstances of the testator so far as to enable the court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions." *Lowe v. Carter*, 55 N. C. 377, at page 386. *Battle, J.*, in *Bivens v. Phifer*, supra, says: "In construing his will, in order to ascertain what that provision is in-

tended to be, we have a right to look at the condition of his estate as it is found to be at the time when the will was made." Availing ourselves of this principle, and of the admissions in the record in respect to the condition of Mrs. Baird's family known to her, and reading items 5 and 7 together, it would be difficult to suppose that she intended to give her grandchildren, the children of Mrs. Lee, nearly one-half of the proceeds of the property, especially in view of the fact that the father of these children was a man of large means and in a prosperous condition. There is an evident purpose expressed in item 7 to have equality in regard to the property directed to be sold. We are therefore of the opinion that the case falls within the exception to the general rule, and that the children of Mrs. Lee take the portion of the proceeds of the property directed to be sold which their mother would have taken if living. Are they to account for advancements made to their mother? The general rule is that in case of intestacy grandchildren must account for advancements made to their father or mother, but not gifts made to themselves. The children of Mrs. Lee take under the will as purchasers, and not as distributees. The statute of distributions is only invoked for the purpose of ascertaining the basis or principle upon which the division is to be made. It will be noted that it is "my heirs who have received advancements during the life of my husband," etc. Treating the word "heirs" as describing the persons who are to take, the children of Mrs. Lee have received no advancements. This, of course, was well known to Mrs. Baird; and it was equally well known that, their mother being dead, the word "heirs" could not refer to her. As she has excluded the children of Mrs. Lee from any interest in the Forest Hill and Marr Swamp places by the use of the word "children," we may reasonably infer that she was induced to do so because of the advancements made to their mother, and that she did not intend that her children should account for these advancements in the distribution of the other property, because she must have known that to have done so would practically disinherit them. It is said that she was a woman of intelligence, business capacity, and gave her affairs careful and faithful consideration. Her property disposed of, other than that specifically devised, consisted of her Forest Hill property, the town lots, the Craggy Mountain property, and Marr Swamp. She must have known something of the value of her property, and, of course, was fully cognizant of the condition of her family, number of children, etc.; and we cannot attribute to her the purpose to include the grandchildren in the distribution of the proceeds of the property mentioned in item 5, and, by requiring them to account for the amount advanced their mother, practically disinherit them. In the statement made by the execu-

tor, the town lots and Craggy Mountain property sold for, and is estimated to be worth, \$7,900. Mrs. Lee, the mother of the children, received \$3,100. Therefore to call upon them to account for this would be to disinherit them. This would be equally true if the Pea Ridge property, given to Mrs. Richards, and the 640 acres given to R. W. Baird, be treated as advancements, as seems to have been done in the estimate made by the executors. We think, however, that this property could not be treated as advancements, under the language of item 7. The term "advancement," as used by Mrs. Baird, must be understood to have been used in its ordinary and legal sense, and not to include property devised in her will. This view is strengthened by the language, "who have received advancements during the life of my husband or myself." We therefore conclude that the plaintiffs are not to account for the advancements received by their mother—this by reason of the language of the will. The result of our anxious consideration and careful investigation of the case in the light of the authorities we have been able to find to aid us is that the plaintiffs take no interest in the Forest Hill property, or in any balance that may remain of the Marr Swamp property; that they are entitled to share in the proceeds of the Asheville lots and the Craggy Mountain property, taking the same share which their mother would have taken if living; that they are not accountable for advancements. We do not understand that any controversy is made in respect to the rights of the plaintiffs in the share of the property which passed to Victoria Baird, under item 5 of the will, if she died intestate. Their rights are fixed by the canons of descent and the statute of distributions.

A judgment will be drawn in accordance with the decision of this court as herein set out. The costs will be paid by the executors out of the funds in their hands. Modified.

(132 N. C. 856)

**SEAWELL v. CAROLINA CENT. R. CO.**  
(Supreme Court of North Carolina. June 10, 1903.)

**CARRIERS—ASSAULT ON PASSENGER—SUFFICIENCY OF EVIDENCE—MISCONDUCT AT TRIAL.**

1. Evidence in an action by a passenger, who was at a railway station waiting for a train, against the railroad company, for permitting, countenancing, and participating in an assault on plaintiff, examined, and held to justify the refusal of a nonsuit.

2. It is not misconduct warranting a reversal that during the trial, and when reading the evidence to the jury, the court moved to a table within the bar, in front of the jury.

3. A railroad company sued by a passenger for permitting an assault on him cannot complain that, after the arrest of one of its witnesses for laughing during the trial, the court, on the witness' explanation that he was not laughing, but coughing, released him from custody, and took no further notice of his misconduct.

Appeal from Superior Court, Moore County; Robinson, Judge.

Action by H. F. Seawell against the Carolina Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. D. Shaw, Day & Bell, Shepherd & Shepherd, and Murchison & Johnson, for appellant. W. J. Adams, U. L. Spence, and Douglass & Simms, for appellee.

CLARK, C. J. The complaint alleges "that on or about the 2d day of June, 1900, the plaintiff, who had previously purchased, for a valuable consideration, a mileage ticket, then in his possession, which entitled him to transportation on said Carolina Central Railroad, entered upon the premises of the defendant at its station in the town of Shelby, in the county of Cleveland, for the purpose of boarding as a passenger a train of the defendant company, which, according to the schedule and time-table of the defendant, as plaintiff is informed and believes, was expected to arrive at said station within a short time thereafter, with a view to traveling on said train from said station to Hamlet, in Richmond county; that while the plaintiff was thus on the premises of the defendant, awaiting the arrival of said train, and between the time of the arrival and departure of said train, and while the plaintiff was in the act of entering said train for the purpose of riding as a passenger thereon from said town of Shelby to said town of Hamlet, and while the relation of passenger and carrier subsisted between the plaintiff and the defendant, as the plaintiff is advised and believes, the defendant company, through one Walter Ramsey and Paul Carroll, who, as plaintiff is informed and believes, were then the agents and employes of the defendant in said town of Shelby, and had charge of the business and premises of the defendant at said station, and were then and there engaged in the service of said company, together with other persons to the plaintiff unknown, wrongfully and unlawfully did assault and beat the plaintiff, striking him on the face and on various other parts of his person with eggs, and did otherwise maltreat the plaintiff, and, in the presence of the plaintiff and of various other persons, did use indecent, insulting, and opprobrious language with reference to the plaintiff while at said station, by reason of which assault, battery, and maltreatment the plaintiff was obliged to ride on said train, in the presence of various passengers, from said station in Shelby to the city of Charlotte, in clothing which was badly soiled by the impact and bursting of said eggs, and thereby rendered uncomfortable, disagreeable, and for the time unfit for use on said train or other public place, or in the presence of said passengers or other persons, and by reason of which assault, battery, and other maltreatment the plaintiff is greatly

humiliated, injured in body, mind, and reputation, and damaged in a large sum, to wit, in the sum of ten thousand dollars." For a second cause, the same state of facts is set out, save that, instead of alleging the active participation of the agents of the defendant, it is averred that the assault, in the manner and under the circumstances as above described, was committed by various persons to the plaintiff unknown, in the presence of Walter Ramseur and Paul Carroll, agents of the defendant, who then and there had charge of the premises of the defendant at said station, "and the defendant neglected, failed, and refused, through its agents and employes, to restrain the conduct of said persons, or in any manner to interfere with them, or to protect or to offer protection to the plaintiff against said assaults, insults, and maltreatment, but, on the contrary, the defendant, through its said agents and employes encouraged, aided, and abetted the same."

The chief exception relied on is to the refusal of the motion to nonsuit the plaintiff. The evidence showed that he had bought a ticket, and was at the station to take the train, and while so awaiting he was assaulted in the manner stated in the complaint. "When a person comes upon the premises of a railroad company at the station, with a ticket, or with the purpose of purchasing one, he becomes a passenger" (Tillett v. Railroad, 115 N. C. 665, 20 S. E. 480; Hansley v. Railroad, 115 N. C. 603, 20 S. E. 523, 32 L. R. A. 543, 44 Am. St. Rep. 474), and the right to care and protection begins (Dodge v. Steamboat Co. [Mass.] 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541). It is the duty of a carrier to protect its passengers from injury, insult, violence, and ill treatment from its servants, other passengers, or third persons. Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Cogdell v. Railroad, 124 N. C. 302, 32 S. E. 706; Owens v. Railroad, 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642; Palmer v. Railroad, 131 N. C. 250, 42 S. E. 904; Steamboat Co. v. Brackett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; 5 Am. & Eng. Enc. (2d Ed.) 541; Traction Co. v. Lane (Tenn.) 53 S. W. 557, 46 L. R. A. 549. The answer admits that Ramseur was its employé, but alleges that Carroll was a servant temporarily employed by Ramseur. There was evidence that Ramseur, the station agent, knew the plaintiff; that he lived east of Shelby, and the next train was the one going east; that Ramseur saw the plaintiff on the platform at which passengers would board the train, with his traveling bag, 10 minutes before that train arrived; that Ramseur was on the platform of the depot when the first eggs were thrown at the plaintiff; that Ramseur came out of the depot building with the crowd by whom the eggs were thrown at the plaintiff from the company's platform, and that Ramseur was there

when the last eggs were thrown, and was laughing because the eggs were thrown, and, soon after the first shower of eggs, Ramseur said, "You did not egg him enough;" and that the plaintiff had a mileage ticket. As to Carroll, there was evidence that he was there to do anything Ramseur ordered, and especially to load and unload baggage; that he came out of Ramseur's office and threw an egg at the plaintiff, and that this was one of the first eggs thrown at him; that Carroll also threw the last egg. There was also evidence that the crowd was egging the plaintiff and laughing and jeering at him and pelting him with eggs, in plain view of Ramseur, and that he neither did nor said anything to prevent it, but simply laughed. Indeed, Ramseur admitted in his testimony that he offered no remonstrance to the crowd, and that he waved his hands at the plaintiff and laughed as the train moved off. There was also evidence that Thrower, the conductor, was within 15 or 20 feet of the plaintiff, and offered him no protection; that no other agent or employé of the defendant offered him any protection; that Ramseur and Carroll were in the crowd on the platform, when some one in the crowd said: "Leave here, you Populist dog. You suck eggs. I see them on you;" the whole crowd laughed and jeered, Hamrick calling out, "Put that suck-egg dog off at Buffalo, and let him wash himself;" that neither Ramseur, the station agent, nor Wells, the assistant agent, nor any one else in the service of the company, made any effort to stop the assault or insult, and that Ramseur, Wells, and Carroll joined in the laughter at the insults and assault; that the plaintiff was just opposite Ramseur's office when the egging occurred; that the egging crowd went into Ramseur's office several times before the beginning of the assault, and came out of the office with Ramseur immediately before the assault. There was evidence contradictory of some parts of the above evidence, but, upon a motion to nonsuit, the court can only consider the evidence favorable to the plaintiff, and in the most favorable light for him. The evidence was properly submitted to the jury to determine the truth of the controverted matters of fact.

The exceptions to evidence do not require discussion, and, indeed, were not much pressed here.

The charge was as follows, but the exceptions entered thereto are without merit; and, indeed, they are omitted from the defendant's brief, except the last exception:

"This is an action brought by the plaintiff against the defendant to recover damages for an assault made upon him by its agents and employes while the relations of passenger and carrier existed. This is his first cause of action. The burden is on the plaintiff to satisfy you by the greater weight of the evidence that the relationship of passenger and carrier existed, and if you find as a fact from the evidence, and by the greater weight



thereof, that the plaintiff had a mileage book entitling him to passage over the defendant company's road, and that he came to the depot of the defendant ten or fifteen minutes before the departure of the train, with the purpose to take passage on said train, and was at the place where passengers usually assemble for this purpose of boarding the train, then you will respond 'Yes' to the first issue. If the plaintiff has failed to so satisfy you, you will respond to the first issue 'No,' and will not consider the other issues." To this the defendant excepted. (Eleventh exception.)

"In passing upon the second issue, the burden is on the plaintiff to satisfy you by the greater weight of evidence that the assault was committed by the agents and employes of the defendant company, or that they aided and abetted and encouraged said assault; and if the jury find as a fact from the evidence, and by the greater weight thereof, that the agents and employes of the defendant company either assaulted, or aided, abetted, or encouraged such assault upon the plaintiff, while acting within the general scope of their employment (and 'acting within scope of employment' means while on duty as agents and employes of defendant company), you will respond 'Yes' to the second issue. If not so satisfied, you will respond 'No' to said issue." To this the defendant excepted. (Twelfth exception.)

"For a second cause of action, the plaintiff alleges that while the relationship of passenger and carrier existed he was assaulted at the depot of the defendant company while he was there for the purpose of taking passage on defendant's train, and at the place where passengers assemble for the purpose of boarding the train, and that the agents and employes of defendant, after they had notice of said assault made upon him by the persons who were at the depot, failed and neglected to afford to him the assistance and protection which was their duty to do, provided the jury respond to the first issue in the affirmative. The burden is on the plaintiff to satisfy you by the greater weight of the evidence of the fact that the agents and employes of the defendant company had notice of the purpose on the part of those who assaulted the plaintiff and had an opportunity to offer aid and protection to the plaintiff, and failed and neglected to do so; and, if the plaintiff has so satisfied you, then you will respond 'Yes' to the third issue, and, if not so satisfied, you will respond 'No' to said issue." To this the defendant excepted. (Thirteenth exception.)

"If the jury respond 'No' to the first, second, and third issues, then you will not consider the fourth issue; but if the jury respond 'Yes' to first issue, and respond 'Yes' to either one of the issues 2 and 3, then you will consider the fourth issue, as to damage. In passing upon this issue, the court charges you that the plaintiff is entitled to recover

such actual damage as will compensate him for the injury to his wearing apparel, for any physical pain he suffered, and for the mental anguish he endured, by reason of the assault." To this the defendant excepted. (Fourteenth exception.)

"The court began reading the evidence to the jury Thursday evening, and continued to read until it began to grow dark, when the court moved to a table within the bar, in front of the jury, where there was sufficient light, and continued in this place during the remainder of the session Thursday evening. When the court convened Friday morning, the court resumed its position which it had occupied Thursday evening, because of the convenience, and to save the voice of the court, and to enable the jury to hear the testimony and the charge of the court." Defendant excepted. (Fifteenth exception.)

"During the trial of this cause, and while the plaintiff was testifying as to his condition during the assault, and how he got the eggs out of his ear and face, some persons in the audience broke out in a loud laugh. The court required the jury to retire, and then stated, during the absence of the jury, that, if there were any persons in the audience who had come for the purpose of laughing this case out of court, it would be well for them to retire at once; that, if it were repeated, such unseemly and disreputable conduct would be punished by sending the person or persons engaged in it to jail for contempt of court. Afterwards some of these parties were called as witnesses for the defendant, and testified that they engaged in the egging of the plaintiff. Later, during the hearing of the testimony, when Lineberger was sitting on the front seat, in full view of the court, and while one of the defendant's witnesses was testifying to how he pelted the plaintiff with eggs, the court saw and heard Lineberger break out in a loud laugh, and directed the sheriff to take him into custody. This was done, and Lineberger was placed out of view of the jury, and remained there until he was called as a witness for the defense as to the character of some of the defendant's witnesses. At the close of his testimony the witness asked to make a statement to the court, and said that he was not laughing; that he had a bad cough, and had his head down to cough, so as not to make a disturbance; that he was one of the men who condemned what was done. This man was known to the court to be a witness at the time he was ordered into custody, and the purpose was to attach him for contempt; but after his statement the court took no further notice of his conduct, and released him from custody." Defendant excepted. (Sixteenth exception.)

The judge stated that he saw and heard the witness laugh. The failure of the judge to take any further notice of the matter, or to punish for contempt, was not a matter for exception by the defendant. This and the



preceding exception are evidently on the ground that the trial was prejudiced by the conduct of the judge, but we find nothing therein to sustain the allegation.

**Affirmed.**

(122 N. C. 829)

**FRITZ v. SOUTHERN RY. CO.**

(Supreme Court of North Carolina. June 6, 1903.)

**CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—NONSUIT.**

1. Plaintiff, attempting to alight from defendant's train, had reached the second step of the platform, when a heavy man caught hold of the car rail, swung himself up on the step, his valise striking plaintiff on the knee and injuring her. The conductor of the train and plaintiff's father were both standing near by. Plaintiff testified it could not reasonably have been anticipated the man was going to hit her. The conductor could have seen the man coming if he had been attending to his business. The rules of the company required conductors to give particular attention to women and children, etc. *Held*, that a motion for a nonsuit was properly granted.

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; McNeill, Judge.

Action by Bertha Fritz against the Southern Railway Company. Judgment for defendant. Plaintiff appeals. **Affirmed.**

L. M. Scott and John A. Barringer, for appellant. King & Kimball, for appellee.

CONNOR, J. This action is prosecuted by the plaintiff for the recovery of damages sustained by her on account of the alleged negligence of the defendant. The plaintiff alleges, and the testimony for the purpose of this appeal establishes the fact, that she was on the 12th of August, 1899, a passenger on the defendant's train, and that she purchased a ticket from Thomasville to High Point, reaching the last-named place about 9 o'clock at night. After the train stopped at the station, she, together with other passengers, left the car at the rear end, following the conductor, for the purpose of alighting. She had reached the second step, and the conductor was standing on the ground, his head turned back over his shoulder in the direction of the engine, in which direction there were some young ladies. If he had been standing straight, he would have been facing the plaintiff. The plaintiff's father was standing behind the conductor about three paces, and a little to the west of him. Quite a crowd were at the station. As the plaintiff reached the second step, a heavy man, with a valise in his hands, came rapidly down the side of the car in the direction of the engine, and, as he reached the step, caught hold of the car rail, and swung himself up on the step, his valise striking the plaintiff on the knee and injuring her. The train was stopped at the usual place. The conductor was in front of the steps. The man intended to board the train, and the conductor told him to stop. He no-

ticed the man after he had gotten up, and told him to stand aside where he was, and the man did so. The plaintiff, in response to a question, testified: "I believe you said on a former trial that this man came rushing up very hastily in the direction of the engine, and made no stop? Answer. Yes." "You said that you could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated? Answer. Yes." "And you say it now? Answer. Yes." When the man got up, the plaintiff came down, and when in reach of the conductor he took her hand. The plaintiff had no reason to believe that the man was going to hit her. The whole thing was quickly done. The conductor could have seen him coming from the direction of the engine if he had been attending to his business. The plaintiff's father was standing about three paces away. The car steps are 26 inches wide and 22 inches between rails. The plaintiff's father said that the man who struck her was a large, red-faced man; looked like he might have been a mechanic. The conductor helped the plaintiff down. The platform was a good one. The plaintiff introduced certain rules of the defendant company, and showed that they were furnished to conductors in its employ:

"Rule 408. Conductors must always be vigilant to foresee, and as far as possible to prevent, anything which might cause accident or delay to their trains."

"Rule 426. They must contribute, as far as they can, without being unduly officious, to the convenience and comfort of passengers, and must give particular attention to women and children who are unattended, and to all persons who are infirm, inexperienced, or otherwise unable to care for themselves."

"Rule 448. Passenger conductors should never lose sight of the fact that their duties are of a most delicate and responsible character, and demand unusual judgment, tact, and courtesy, and that the safety of their trains and passengers and the reputation of the road are dependent upon their discretion and care."

Upon the close of the plaintiff's testimony the defendant moved for a judgment of nonsuit, which was allowed, and the plaintiff appealed.

When this cause was before this court at the February term, 1902 (130 N. C. 279, 41 S. E. 532), the testimony was the same as upon this appeal, except that the rules of the company had not then been introduced. Furches, C. J., speaking for the court, said: "After a careful examination of the evidence, we are of the opinion that the defendant's motion, at the close of the plaintiff's evidence, to nonsuit the plaintiff, should have been allowed. There is no evidence, in our opinion, showing negligence on the part of the defendant." The case was disposed of upon another question.

We are of the opinion that the ruling of this court should be affirmed. We do not

think the rules of the company introduced by the plaintiff did more than declare the measure of duty which the defendant owes to its passengers. In *Britton v. Railroad*, 88 N. C. 536, 43 Am. Rep. 749, Ruffin, J., says: "According to the uniform tendency of these adjudications, which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and, while not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter, which might reasonably be expected to occur under the circumstances of the case and the condition of the parties." This rule we find fully sustained by the decisions of other courts and the textbooks. In *Putnam v. Broadway & Seventh Ave. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190, it is said: "A railroad company has the power of refusing to receive as a passenger or to expel any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience, of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety or annoying others; and this police power the conductor or other servant of the company in charge of the car or train is bound to exercise with all the means he can command, whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected from one who is improperly received or permitted to continue as a passenger, the carrier is responsible." The Supreme Court of Iowa, in *Felton v. Railroad Co.*, 69 Iowa, 577, 29 N. W. 618, held that upon a finding by the jury that the defendant ought not reasonably to have anticipated that an assault would be committed on the deceased the defendant was not liable. In *Flint v. Transportation Co.*, 34 Conn. 554, Fed. Cas. No. 4,873, it is held that "carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur, in view of all the circumstances, and of the number and character of persons on board." There is no controversy in this case in regard to the relation which the plaintiff occupied toward the defendant. She was a passenger, having paid her fare, and at the time of the injury the contract of carriage had not come to an end. She was, therefore, entitled to demand of the defendant the degree of care for her protection pre-

scribed by the law and the rules of the company. In the very excellent brief filed by the plaintiff's counsel many authorities are cited to establish this proposition. They also cite authorities to the effect that, if the conductor was negligent, and by reason of such negligence a third party—as, in this case, a fellow passenger—injured the plaintiff, the defendant would be liable. The question which lies at the threshold of this case is whether there is any negligence on the part of the conductor. It will be observed that in the cases cited the question of liability is made to turn upon a neglect of duty, as do all cases of negligence. The right to recover is dependent upon a failure on the part of the conductor to maintain such care as would prevent an injury which could be reasonably anticipated, or, as said by Justice Ruffin in *Britton's Case*, supra, "could have been foreseen and prevented." The plaintiff here testifies expressly that the man who injured her was coming very rapidly, and that "you could not have anticipated that he was going to hit you, and it could not have been reasonably anticipated." Applying the principle which is to govern the case, this language of the plaintiff relieves the defendant of any actionable neglect. Her statement is sustained by the circumstances surrounding the transaction. She said, in reply to a question, that she had no reason to believe that this man was going to hit her. Her father, standing within three paces of the conductor, and seeing the man coming, did not anticipate any trouble. The man had a right, as a passenger seeking to board the train, to go to the step, and, so soon as he could safely do so, enter the car. The fact that he was coming rapidly was not calculated, in view of the conduct of men under such circumstances, to arouse in the conductor any apprehension that he would attempt to board the car in a rough and violent manner. He made no such impression on the plaintiff or her father. If the conductor had stopped him before he reached the step, the defendant would have been liable in an action for damages.

We do not intend to relax in the slightest degree the rules of the company or the high degree of care which the law requires of conductors in protecting their passengers. But we do not think that, in view of this testimony, these rules, applied to the conductor's conduct, show any negligence on his part. The general rule is that whenever a carrier, through its agents or servants, knows or has opportunity to know of a threatened injury, or might have reasonably anticipated the injury, and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, the carrier is liable. We have carefully examined the case of *Sheridan v. B. & N. Ry. Co.*, 36 N. Y. 39, 93 Am. Dec. 490, cited by the plaintiff's counsel. There the plaintiff's intestate, a child of nine years, was compelled by the conductor of a crowd-

ed railroad car to stand upon the platform, and while there was thrown from the car by the hasty and careless exit of another passenger. The company was properly held liable, Mr. Justice Hunt saying: "For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrance, properly, so far as the defendants are concerned. If, by the motion of the cars, he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars he had been pushed from his standing place, the defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd and in aiding in throwing the deceased from the cars; but this does not relieve the defendant's wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendant's illegal conduct in overcrowding their cars and in placing the deceased upon the platform, that produced the disastrous result." The wrongful act of the defendant in that case was in compelling the plaintiff's intestate to stand upon the platform. In our case there was no wrongful act in respect to the plaintiff's being upon the second step in alighting from the car. There was no suggestion of overcrowding preventing her from leaving the car in the usual manner, nor is there any suggestion that the conductor was not in his proper place. The only suggestion made is that he was looking over his shoulder, with an intimation that his attention was attracted by some young ladies. It does not appear that he was prevented from seeing the man approach the car. On the contrary, the plaintiff testifies that immediately upon his swinging himself upon the step the conductor stopped him. While we fully recognize the very delicate duties imposed upon conductors in looking after their passengers, and would not lower the standard by which their duty is measured, we cannot fail to also recognize that as the train stops at the station the duty becomes exceedingly difficult in respect to passengers alighting and those desiring to enter the car. We would not be willing to say that the momentary attraction of the conductor's attention, even by young ladies, would constitute negligence. In applying the rules of law to the conduct of men in the discharge of their various duties of life, we must recognize existing conditions; and, while we enforce a high degree of care between agents and servants of railroads and their passengers, we must not impose unreasonable requirements, or expect men to anticipate and

provide against contingencies beyond the capacity of the human mind. It is certainly desirable that in public stations and in other places where people assemble more consideration for each other's welfare, safety, and comfort be observed. The conduct of the man who caused this injury was inconsiderate, and perhaps rude, but conductors, no more than other men, can be required to anticipate that men are going to act in a rude and inconsiderate manner towards ladies. While they must be upon the alert, they cannot be expected to anticipate conduct which the plaintiff herself says could not have been anticipated, and which did not attract the attention of her father, standing near by the conductor. While the injury sustained by the plaintiff is a source of regret, we cannot see that it is the result of any actionable negligence on the part of the defendant's conductor. In regard to the width of the steps, it is not suggested that they should be wide enough for two persons to pass. The rules of the company require that passengers entering cars shall await the exit of those leaving. This, we think, is a reasonable requirement.

Upon the whole evidence we are of the opinion that the judgment of nonsuit should be affirmed.

CLARK, C. J. (dissenting). The defendant owed the plaintiff a safe exit from its cars. The usual requirement nowadays, wherever there is much travel, is that outgoing passengers leave by one door of the car and incoming passengers enter at the other. This prevents any collision between the two streams of passengers, and it is negligence for a railroad company not to establish and enforce reasonable regulations, which are in general use, to prevent accidents by the strong trampling upon the weak, burly men running over weak and delicate women and children. The plaintiff was descending, and on the second step, when a strong, able-bodied man with a heavy, iron-bound valise in his hand caught hold of the iron stanchion to swing himself up. The conductor was standing by the step, and, if advertent to his duties, instead of allowing his attention to be attracted elsewhere, he could certainly have put out his hand more quickly than the man could swing his own weight and that of the valise up, and have made him wait until the lady and other passengers had gotten out. At least, this was evidence for the jury to consider; and this court, I think, should not hold as a proposition of law that it was not negligence for the conductor to permit the heavy man and his heavy valise to crowd up the steps, 22 inches wide, on which the lady was descending, and where she had the right of way. The lady says she did not anticipate the man would strike her with the valise. If she had, it might have been contributory negligence, possibly, not to have

called out, or shrunk back (if possible); but because, relying on the care of the defendant's servant, she was not thus guilty of contributory negligence, it is hard measure to hold that therefore the conductor was not negligent in not stopping the man, nor the company in not having safe regulations to prevent collision between incoming and outgoing streams of passengers. The conductor was at the foot of the steps, and should have seen, sooner than the lady or than her father, who was three steps away, that the heavy man with the heavy valise had laid hold of the iron rod to swing up on the crowded steps. The conductor's hand should have been instantly stretched out across the steps, and he should have told the man politely, but firmly, he could not go up till those on the steps had descended. If there was any reason to the contrary, the conductor should have gone on the stand, and have told what it was. Whether the conductor was attending to his duties or negligent in the premises was a matter of fact to be determined by the jury.

When the case was here on the former appeal (130 N. C. 279, 41 S. E. 532) this present question as to whether there was any evidence was not before the court, and could not be, for the appeal was by the plaintiff from the judgment below granting the new trial, and the court expressly so stated in the opinion. Besides, there was some additional evidence on the last trial. His honor in the second trial below was doubtless misled by the first headnote in the former appeal.

(132 N. C. 783)

#### RITCHIE v. FOWLER et al.

(Supreme Court of North Carolina. June 6, 1903.)

#### PUBLIC LANDS — CONFLICTING GRANTS — ACTION TO DECLARE TRUST — DEMURRER TO EVIDENCE — LIMITATIONS.

1. In an action brought by plaintiff, claiming under the junior grantee of public land, against defendants, who were alleged to claim under the senior grantee, to have the defendants declared trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, it was stated in the case on appeal that defendants claimed under the senior grantee, but it nowhere appeared affirmatively that they had acquired the latter's title. *Held* error to overrule defendants' demurrer to the evidence, and to instruct the jury, if they believed the evidence, to find for plaintiff.

2. An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by Code 1883, § 158, which provides that "an action for relief not herein provided for must be commenced within 10 years."

Douglas, J., dissenting.

Appeal from Superior Court, Macon County; Justice, Judge.

Action by W. R. L. Ritchie against Frederick Fowler and others. Judgment for plaintiff. Defendants appeal. Reversed.

Kope Elias and Shepherd & Shepherd, for appellants. S. L. Kelly, for appellee.

CLARK, C. J. One Howard entered, under the law as to Cherokee lands (2 Code 1883, c. 11), three tracts of land, for 700 acres, in June, 1855, and two other tracts, for 300 acres, in June, 1853. The purchase money was thereafter duly paid. Subsequently (when, is not stated) these entries were duly surveyed, located, and bounded. In February, 1870, grants for the above five tracts were issued to the assignees of Howard, and registered in Macon county in November, 1885, and said grantees conveyed to the plaintiff by deed duly registered. In April, 1867, the same lands, as is admitted, were entered by one Herrin, who took out grants for the same in May, 1869, which were registered in Macon county in October, 1872. It is stated in the case on appeal that the defendants claim under Herrin, but it nowhere appears affirmatively that they have acquired Herrin's title. This is an action to have the defendants declared trustees for the plaintiff, and to require them to convey to him such title and interest as they may claim. The defendants denied each allegation of the complaint, and pleaded the 10-year statute of limitation, and, further, that the entries under which the plaintiff claimed were lapsed and abandoned, and, besides, that said entries were too vague and uncertain to give notice to a subsequent enterer or grantee. There was no possession shown by either party. The only issue submitted was, "Is the plaintiff the equitable owner of the lands described in the complaint?" The defendants demurred to the evidence. The court instructed the jury, if they believed the above evidence, to answer the issue "Yes." Verdict and judgment accordingly, and appeal.

The exception is not very clearly stated to have been to the overruling of the demurrer to the evidence and to the instruction to the jury, but we so understand it, and it was so treated on the argument. It was error to overrule the demurrer, or to so instruct the jury, for it nowhere appears that Herrin's title had passed to the defendants. The bare statement that they "claimed under Herrin" did not authorize the decree that the defendants "are declared trustees for the benefit of the plaintiff" of all said lands, and directing a conveyance by them to him.

The registration of the Herrin grants in 1872 was constructive notice to the plaintiff and those under whom he claims, and in the absence of evidence showing that the statute did not run, by reason of coverture, infancy, etc., the plaintiff is barred by failure to take this action within 10 years from October, 1872. Code 1883, § 158.

Neither the entries of Howard nor of Herin are set out in the proof, nor admitted. They are set out in the complaint, and, if in the form there stated, the entries of both parties are void for vagueness and uncertainty, but the answer specifically denies every allegation in the complaint. *Kimsey v. Munday*, 112 N. C. 816, 17 S. E. 583, and *Gilchrist v. Middleton*, 108 N. C. 705, 13 S. E. 227, relied on by the plaintiff, only bear upon the question of abandonment as between the state and the enterer, and not upon the statute of limitations, between the junior grantee, who is seeking to convert the senior grantee into a trustee for his benefit, and compel a conveyance.

New trial.

DOUGLAS, J., dissents.

(133 N. C. 795)

JOHNSTON et al. v. CASE et al.

(Supreme Court of North Carolina. June 6, 1903.)

DEEDS—DUPLICATE—DESCRIPTION—REFERENCE TO ANOTHER DEED.

1. A writing signed by a grantor, not under seal, purporting to convey land described to a grantee, and to which is annexed a memorandum reciting that it is a duplicate of a lost deed previously executed by the grantor to the grantee, as near as the grantor can make it, is not admissible in evidence to show title in the grantee.

2. Where the description in a deed was defective, but was followed by a recital that it was the land sold by a named grantor to a named grantee, the description in the deed executed by the named grantor could not be referred to for the purpose of identifying the land described in the defective deed, without proof that the deed referred to was executed before the defective deed.

On petition for rehearing. Petition dismissed.

For former opinion, see 42 S. E. 957.

Jones & Jones, for appellants. Merrimon & Merrimon, Chas. A. Moore, and Geo. A. Shuford, for appellees.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at the last term, and is reported in 131 N. C. 491, 42 S. E. 957. The plaintiffs, who have petitioned for the rehearing, assigned several errors in the former opinion and judgment of the court; but we deem it necessary to consider but one of them, as the decision of the court, by which a new trial was awarded, must be sustained upon the ground we now take with reference to that assignment of error.

It appears that the plaintiffs undertook to establish title to the land in controversy by showing that it had been mortgaged by one James Case, ancestor of the defendants, to William Case; and then they attempted to show that William Case in 1855 had conveyed

the land by deed to W. L. Henry. This deed was not produced, and it was alleged to have been lost. Plaintiffs then introduced in evidence a paper writing, signed by William Case, but not under seal, purporting to convey the land to W. L. Henry, which bore date as of the 15th day of May, 1855, but was not proved and registered until 1887. There was annexed to, and proven and registered with this deed, a memorandum as follows: "The above is a duplicate of a deed heretofore executed by me to W. L. Henry and his heirs for the said lands, which deed was lost before it was registered. This is a duplicate of the same tenor and date as near as I can make it. [Signed] Wm. Case." The defendants objected to the introduction of this paper writing. The objection was overruled, and they excepted. The plaintiffs then introduced a deed from Jesse Sumner, sheriff, to George Brooks, under whom they claimed, and also evidence tending to show, as they contended, that they had been in adverse possession of the land for more than seven years under this deed, which was held by this court to be color of title. *Mfg. Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456. The description of the land by metes and bounds in this deed was defective, but immediately after that description are these words: "Containing one hundred acres more or less, being the land sold by William Case to W. L. Henry." And the plaintiffs insisted that by this reference the description in the deed from William Case to W. L. Henry, if such a deed was ever made, constituted a part of the description of the land in the deed of Jesse Sumner, sheriff, to George Brooks—as much so as if the land had been described in the latter deed by the same metes and bounds contained in the former—and that the description would in this way be made definite and certain, and that the adverse possession of the plaintiffs and those under whom they claimed was held for a sufficient length of time, therefore, "under known and visible lines and boundaries, and under colorable title," to ripen and perfect their title. In order to avoid the effect of the disabilities of defendants, or some of them, the plaintiffs contended that they had shown conveyances from James Case, ancestor of defendants, to William Case, and from the latter to W. L. Henry, and that W. L. Henry had held adverse possession, under the deed to him as color of title, for a length of time sufficient to ripen his title, but that he had subsequently lost this title by reason of the color of title and adverse possession of the plaintiffs and those under whom they claim; that, as the statute commenced to run in the lifetime of James Case, the defendants, his heirs, are barred, though under disability, and that, in order to show title in themselves, it was competent for the plaintiffs to prove that the title of James Case was lost by him, and the title to the land acquired by W. L. Henry by adverse possession under

¶ 2. See Deeds, vol. 16, Cent. Dig. § 34.

color; and that W. L. Henry, in turn, had lost his title, and the title to the land was acquired by the plaintiffs by subsequent possession under color. It is further contended that it was not necessary to connect themselves with the title once held by W. L. Henry, but that they could show, as they had done, an independent title acquired by color and possession adverse to him—in other words, that they had acquired the title, not under him, but independently of him, by their color and adverse possession. As we understand it, this is the contention of the plaintiffs, and they may be right in asserting that they could acquire title to the land in that way; but we do not now decide whether this is so, or not, for, if they are right, a part of the evidence by which they sought to establish this title was not competent, and should not have been admitted. We refer to the unsealed paper writing, purporting to be a copy of the alleged deed from William Case to W. L. Henry. It does not appear in the case when this paper writing was executed. It is dated May 15, 1855, which is said to be the date of the deed of which it is alleged to be a copy, but it was not proved and registered until December 9, 1887. It is true that the deed concludes with the following words: "In testimony whereof I have hereto set my hand and seal the day and year first above written." But it is evident that this was intended merely to make the paper conform to the supposed original, both in tenor and date, and this purpose is clearly manifested in the memorandum annexed to the deed, which was introduced with it in evidence. The deed of Jesse Sumner, sheriff, to George Brooks, was executed in 1869.

It must be conceded that the description in one deed may be referred to in another for the purpose of identifying and making more certain the lines and boundaries of the land which is intended to be conveyed (*Everitt v. Thomas*, 23 N. C. 252; *Reed v. Reed*, 93 N. C. 462; *Davidson v. Arledge*, 88 N. C. 322; *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152), "provided," as is said in the last case cited, "the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it," and provided, further, that the deed to which reference is made is produced at the trial (*Reed v. Reed*, supra). In our case the original deed was not produced, and perhaps could not be, as it is alleged to have been lost. It does not appear, as we have said, when the paper writing from William Case to W. L. Henry, registered in 1887, was executed, and we do not think it was competent for the plaintiffs to prove the contents of the original by the unworn declaration of William Case in the memorandum that it was a copy of the original conveyance. Indeed, he does not even state that it is a true copy, but says, "This is a duplicate of the same tenor and date as near as I can make it." If the copy or substitute for the original

deed had been executed before the date of the sheriff's deed to Brooks, there might be some ground upon which to base an argument that it could be used for the purpose of showing what land was meant by the following language in the sheriff's deed: "Containing one hundred acres more or less, being the land sold by William Case to W. L. Henry." *King v. Little*, 61 N. C. 484; *Little v. King*, 64 N. C. 361. But the burden would be upon the plaintiff to show that the paper alleged to be a substitute for the original deed was executed before the date of the sheriff's deed. If it was not in existence at the date of the sheriff's deed, how could it be said to be the deed referred to therein?

It is unnecessary, in the view we have taken of the case, to consider the other assignments of error, except for the purpose of saying that the court by inadvertence erroneously assumed at the last term that the plaintiffs had admitted in their reply to the answer that the title to the land was at one time in James Case, the ancestor of the defendants. It appears by a careful examination of the pleadings that it was denied by the plaintiffs that James Case ever had any title to the land. The case is now decided and the new trial awarded upon the single ground stated in this opinion, and without any prejudice to the plaintiffs by reason of the other grounds set forth in the former opinion.

There was error in admitting the paper alleged to have been made by William Case to W. L. Henry, and registered in 1887, for the reason herein given, and the decision at the last term will stand, subject to the qualification above stated. Petition dismissed.

(132 N. C. 852)

COGDELL v. WILMINGTON & W. R. CO.  
(Supreme Court of North Carolina. June 10, 1903.)

DEATH OF SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE—PRESUMPTION OF EXERCISE—REQUESTED INSTRUCTIONS—SUBSTITUTION OF INSTRUCTION—PLEADING—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY—EVIDENCE—EXPERT TESTIMONY.

1. In an action for negligent death, whether the plank on which deceased stood would, if sound, have been sufficient to have supported a man of his weight with safety, was not a subject of expert testimony.

2. The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself.

3. In an action for negligent death of a servant, it was error to refuse a requested charge that the law "presumes" that a person found dead and killed by alleged negligence of another has exercised due care himself, and to substitute therefor a charge that an "inference arises from the instinct of self-preservation" that the person killed has exercised due care himself; the words "presumption" and "inference" not having the same significance.

4. An averment that plaintiff's intestate's death was not caused by defendant's negligence,

¶ 2. See *Death*, vol. 15, Cent. Dig. §§ 76, 78.

but by his own negligence, is not sufficient to raise the defense of contributory negligence.

Petition for rehearing. Petition allowed.  
For former opinion, see 41 S. E. 541.

WALKER, J. This case is before us the third time, upon a petition to rehear and revise the former judgment of this court, rendered at February term, 1902, affirming the judgment of the court below, which was adverse to the plaintiff. The case is reported in 124 N. C. 302, 32 S. E. 706, and 130 N. C. 313, 41 S. E. 541.

We think it is necessary to refer to only three of the exceptions taken by the plaintiff at the trial:

The plaintiff proposed to ask a witness the following question: "If this plank on the apron had been sound, and not cedar-hearted or rotten, could a man of Cogdell's weight and size have stood on it with safety and thrown off the lump coal, or fallen on it from the top of the car, without its breaking under him?" Defendant objected to this question, the objection was sustained, and plaintiff excepted. We do not think that this matter is the subject of expert or opinion evidence. The witness could well have described the plank and its condition, and the jury would then have been just as competent to form an opinion as to its strength and safety as the witness. The conclusion reached by the court at the last term upon this question was correct, for the reasons stated in the opinion of the court.

The plaintiff in apt time requested the court to charge the jury that "the law presumes that a person found dead and killed by alleged negligence of another has exercised due care himself." The court refused to give this instruction, and charged the jury, in its stead, that "an inference arises from the instinct of self-preservation that the person killed has exercised due care himself." We are of the opinion that the court erred in refusing to give the instruction as prayed for by the plaintiff, and in substituting therefor the instruction which it did give with reference to this matter. It is well settled that the court is not required to charge the jury in the very words of a prayer for instruction, but if the prayer contains a correct statement of the law, as applicable to the facts of the case, the court must give it, at least substantially, and cannot substitute an instruction of its own for it, if thereby the instruction as requested to be given is weakened or diminished in its force. While the court is not required to use the words of the prayer, it must not change the substance of it in a way calculated to impair its force. The law does not regard the form, but even the form should not be so modified as to impart to the instruction less weight than it would have with the jury if given as it was submitted to the court, provided always that the instruction, as asked, is in itself correct with reference to the case presented by the proof. In the case now

under consideration the court was requested to charge that there was a presumption that the deceased had exercised care, which the court refused to give, but charged the jury that there was an inference that due care was exercised. It is undoubtedly true that the law raises a presumption of care, and the party against whom it is raised must overcome it by proof of facts inconsistent with the fact presumed. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury. In *Johnson v. Chambers*, 32 N. C. 292, *Pearson, J.*, distinguishes between a presumption and inference. "Malice," says he, "may in some cases be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should have been left to them." We do not think the charge given by the court in response to this prayer of the plaintiff was the full equivalent, even in substance, of the latter; and, as we have seen, it must be so, to justify the court in changing the form of the instruction. When the court refused to give the instruction as plaintiff requested it to be given, and substituted that which was given, the jury might well have inferred that the court was of the opinion that the prayer for instruction was too strongly worded, and that the inference was to be drawn by them, and that it was not obligatory upon them to infer the fact of care on the part of the intestate. In the case of *Bragaw v. Supreme Lodge*, 124 N. C. 154, 32 S. E. 544, the court recognizes the legal difference between a presumption and an inference. The court had charged the jury that, if a notice was correctly addressed and deposited in the post office, the law presumes that it was received, and therefore had been duly served; but afterwards the court left it to the jury to decide, as an open question of fact, or as an inference to be drawn from the evidence, whether the notice had been served or not. This court held that it was error to have thus weakened the force of the presumption.

The plaintiff objected to the submission of the issue as to contributory negligence, and we think the objection should have been sustained. It is alleged in the answer that the intestate's death was not caused by any negligence of the defendant, but by his own negligence. This is not a sufficient statement of

the defense of contributory negligence. Indeed, it is not a statement of contributory negligence at all, for the law, when contributory negligence exists, presupposes the negligence of the defendant, which is denied in the answer in this case. The answer in this respect did not state any matter which could not have been considered under the first issue. What is said in the answer is nothing more than an averment that there was no negligence on the part of the defendant, and that the intestate's death was caused solely by his own negligence. If a pleading is defective in statement, the defect will be waived, unless the opposing party demurs to the pleading for that reason. Where there is any uncertainty or indefiniteness in the statement, the court will order the pleading to be made certain and definite on motion, if made in apt time. This is not a case of defective or indefinite statement, but an entire failure to plead the defensive matter. The court may, and no doubt will, permit an amendment of the answer in this respect if the defendant desires it.

There must be a new trial, because of the errors pointed out. Petition allowed.

(132 N. C. 865)

**ELMORE v. SEABOARD AIR-LINE RY. CO.**

(Supreme Court of North Carolina. June 10, 1903.)

**MASTER — INJURIES TO SERVANT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DEFECTIVE APPLIANCES — AUTOMATIC COUPLERS — DUTY TO PROVIDE — APPEAL — RE-HEARING — WHEN GRANTED.**

1. A petition to rehear will not be entertained unless some material point was overlooked, or some controlling authority escaped the attention of the court, or some other weighty consideration requires it.

2. In an action by a brakeman for damages for personal injuries, there can be no recovery where the injury was caused, not by a defective coupler, but because plaintiff negligently used his foot to push the bumper in place.

3. The failure of a railroad company to have self-coupling devices on their freight cars is a continuing negligence, per se; and, to an action for an injury resulting therefrom, contributory negligence is not a defense.

4. The fact that an employé remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employé, if injured while coupling its cars by hand.

5. The neglectful failure on the part of a railroad company to keep automatic couplers in proper condition and repair is negligence, as much as if the cars had never been equipped with such couplers.

6. In an action for a servant's injuries, a charge that if a coupler was out of order, so that it was necessary to go between the cars to make the coupling, and plaintiff was directed by the conductor, whom he was under duty to obey, to couple the cars, and he was compelled to go between the cars to couple, and it was dangerous, and more probable that it could not be safely done than that it could, plaintiff would be guilty of contributory negligence, was sufficiently favorable to defendant.

7. In an action for a servant's injuries, an instruction that if plaintiff knew that the coupler was out of order, and that it was too dan-

gerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that by reason of his position he acted foolishly and without prudence with reference to the character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler, was sufficiently favorable to defendant.

Montgomery, J., dissenting.

Petition for rehearing. Granted.

For former opinions, see 41 S. E. 786; 42 S. E. 989.

I. F. Dortch, W. T. Dortch, and W. E. Munroe, for plaintiff. Day & Bell, Shepherd & Shepherd, and T. B. Womack, for defendant.

CONNOR, J. This cause is before us upon a second petition to rehear. We have given the case a very careful consideration, recognizing the well-settled principle, by which this court has always been governed, that a petition to rehear will not be entertained unless it appears that some material point was overlooked, or some controlling authority escaped the attention of the court, or some other weighty consideration requires it. *Hannon v. Grizzard*, 99 N. C. 161, 6 S. E. 93; *Fisher v. Mining Co.*, 97 N. C. 95, 4 S. E. 772.

This cause was heard at the February term, 1902, upon an appeal from the judgment of the superior court of Wayne county in favor of the plaintiff. The judgment was affirmed by a majority of the court, two of the justices dissenting. Clark, J., said: "This case is simply a repetition of *Greenlee v. R. R.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 390, 65 Am. St. Rep. 734, *Troxler v. R. R.*, 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, and of several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but, when plaintiff was injured in making a coupling, there was evidence that the automatic coupler had been out of repair five months or more, to the knowledge of the defendant." The opinion concludes: "It is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employé, which would not have happened if there had been a coupler, this is continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans*. If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as failure to have the automatic coupler on that car." Cook, J., dissented upon the ground that, in his opinion, the court should have instructed the jury that, upon the whole evidence, they should answer the second issue, to wit, "Did the plaintiff by his own negligence contribute to his injury?" in the affirmative. Mr. Justice Montgomery concurred in the dissenting opinion. The cause



was reheard at the August term, 1902 (131 N. C. 569, 42 S. E. 989), and the opinion of the majority of the court was adverse to the plaintiff; Clark, J., and Douglas, J., writing dissenting opinions.

We are now called upon to re-examine the record in the light of the several opinions and dissenting opinions heretofore filed. The syllabus of the report of the case at the last term states the conclusion arrived at by the majority of the court as follows: "In an action by a brakeman for damages for personal injuries, the injury being caused, not by a defective coupler, but because the plaintiff negligently used his foot to push the bumper in place while doing the coupling, he cannot recover." We unhesitatingly adopt this as a correct proposition of law. The fact put in issue by the pleadings, and in respect to which testimony was introduced by the plaintiff and defendant, is whether there was a defective coupler, and whether the plaintiff was injured by reason of such defect, and whether he was at the time in the discharge of his duty: that is, whether he was ordered by the conductor to make the coupling. Of course, if he was not injured by a defective coupler, or if he was not in the discharge of his duty, or if he was not in the discharge of his duty, or if he recklessly or carelessly went between the cars, he could not recover. This brings us to an examination of the testimony and his honor's charge.

The allegation is that the plaintiff, being in the employment of the defendant as a flagman on September 17, 1900, was ordered by the conductor in charge of said train, whose orders plaintiff was bound to obey, to remain near the cars on the main track, below the side track, for the purpose of coupling the cars to the cars upon the side track, which order the said conductor well knew could not be performed without going between such cars, on account of the condition of the coupler; and the said cars upon the side track were put in motion by the defendant, and were negligently permitted to roll very rapidly, by means of what is known as "kicking cars," along said side track and on the main track, and while in the discharge of such duty was injured by reason of the defective condition of the coupler. These allegations are denied. It was also denied that it was any part of the plaintiff's duty to couple the cars, or that he was ordered to do so by the conductor; and it is alleged that his act in doing so was voluntary and officious, and that he negligently and carelessly undertook to use his foot to kick over the drawhead, instead of his hands, and that in so doing his foot slipped, and was caught between the drawheads and was crushed, and that he was injured by his own gross negligence. Upon these allegations, appropriate issues were submitted to the jury. Without reviewing the testimony, it is sufficient to say, and it is not denied, that there was testimony in behalf of the plaintiff to the effect that the cars were supplied with automatic couplers, but that

at the time of the injury they were not in proper condition; that they had been in a defective condition for several months; and that the conductor knew of it. There was also evidence that the plaintiff knew of the defective condition of the couplers. There was evidence that plaintiff was ordered by the conductor to make the coupling, and that it was the duty of the conductor to report persons engaged in the service under him for disobedience of orders, and that upon such report they would be discharged. There was testimony in behalf of the defendant contradicting much of this testimony. The plaintiff was asked the question: "If the coupler had been in perfect condition, would you have been able to couple without putting your foot between there?" He answered: "Yes, sir; I would have been able to fix it without my foot." Upon cross-examination he was asked: "Why did you go between those cars when you knew that it was against the rules of the company to do so, and when you were ordered to do a dangerous thing by the conductor?" To which he answered: "I obeyed him, sir." He was asked: "Did you know that he could not discharge you?" He answered: "I knew if he reported me that he could have me discharged if I disobeyed him." He was asked the question upon cross-examination: "If the link had been in perfect condition, would you have had to kick it?" To which he answered: "No, sir. Did you not know that it was carelessness to use your foot to do such a thing? I had seen other people use their feet. I was instructed to couple, and I tried to do so." He was asked if he knew the rule prohibiting employes from going in between the cars while they are coupled to the engine, or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose, while the train is in motion, and providing that one who did so was acting at his own risk and against the rules of the company, and would be subject to discharge from the service. He answered that he had never read it, and had never heard it read. He had heard of it. That he violated the rule because he was instructed by the conductor. That he knew that the coupler was out of repair. Heard the conductor say so. There was much other testimony from the plaintiff along the same line. The defendant introduced the conductor and several other witnesses, who contradicted the plaintiff in many material respects. The testimony was conflicting and contradictory. Upon the close of the evidence, defendant moved the court to nonsuit the plaintiff, which motion was refused. The court charged the jury as follows:

"It was the duty of the defendant to furnish the train of cars spoken of in evidence with the automatic couplers, and it is admitted that they had automatic couplers, and it was further its duty to inspect, from time to time, these couplers, for the purpose of seeing if they were in repair, and if they fail-

ed in this respect, and if said couplers became out of repair, it was guilty of negligence; [but if the jury shall find from the evidence that the part of the coupler on the end of the caboose car was not quite in line with the corresponding part on the end of the car coming toward it, and to which it was to be coupled, and if the plaintiff, to get it in line, kicked the part on the end of the caboose, and if the jury further find that the standard automatic coupler on said cars had some play in its socket, allowing it to move to the right and left on account of curves in the track, and that this was necessary for the movement of the train, and if the jury shall find that this was the proper way for such couplers to be, and if the jury shall further find that this was the natural result from its proper construction and use, and that the coupler was not otherwise out of repair, then the defendant was not negligent in failing to provide these couplers as prescribed by law."] To this part of the charge inclosed in brackets, the defendant excepted.

["If the jury further find from the evidence that the train of cars spoken of in evidence had automatic couplers, which would have made it unnecessary for the plaintiff, coupling the cars, to go between them and to use his hand or foot, and they further find that those couplers had become out of repair for such a length of time that the defendant knew or ought to have known that they were out of repair, and for such a length of time that defendant could have had them repaired, and that the defendant failed to repair said couplers, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, and that, in the condition in which the couplers were, that it was necessary, in order to couple, to use the hand or foot, and they further find that the plaintiff was a flagman on said train, and under the direction of the conductor, and that the conductor directed him to couple the cars, and in doing so he was injured, and if the jury further find that the plaintiff would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the first issue 'Yes.'] To so much of the charge inclosed in brackets, the defendant excepted.

["If the jury find from the evidence that the train of cars had automatic couplers, which would have made it unnecessary for the plaintiff, coupling the cars, to go between them, and it is admitted that they had standard automatic couplers, and if they further find from the evidence that these couplers were in repair, so that it was unnecessary for the plaintiff, coupling the cars, to go between them, and that the plaintiff was a flagman on said train, and under the direction of the conductor, and the conductor directed him to couple the cars, and in so doing he did go between them unnecessarily, and was injured, then it is the duty of the jury to answer the first issue 'No.'] To so

much of charge in brackets, the defendant excepted.

"If you answer the first issue 'No,' you need go no further, but return your verdict; but, if you answer the first issue 'Yes,' then you proceed to answer the second issue. The second issue, you will understand, is this: 'Did the plaintiff by his own negligence contribute to the injury complained of?'

["Now, coming to the consideration of the second issue, if you should reach that issue, if the jury find from the evidence that the couplers were out of repair, and had been for such a length of time that the defendant knew, or by the exercise of reasonable care could have known, that they were out of repair, and for such a length of time that the defendant, by the exercise of reasonable diligence, could have had them repaired, and that the plaintiff coupled the cars under the direction of the conductor, and that it was his duty to obey the conductor, and that he would not have been injured but for the condition of the couplers, then it would be the duty of the jury to answer the second issue 'No.'] To that part of the charge in brackets, the defendant excepted.

["And if the jury further find from the evidence that the plaintiff undertook to couple the cars under the direction of the conductor, and that it was his duty to obey the conductor, and, but for the condition of the couplers, he would not have been injured, this would be a continuing negligence on the part of the defendant, and would continue up to the time of the injury, and would be a negligence subsequent to any negligence of the plaintiff, if such existed, and the negligence of the plaintiff under these circumstances would not be the proximate cause of the injury, and would not be contributory negligence; and in that event it would be the duty of the jury to answer the second issue 'No.'] To that part of the charge inclosed in brackets, the defendant excepted.

["But this instruction is given subject to an instruction which I will give you further on, and this will be so although they may further find from the evidence that the plaintiff undertook to couple the cars in disobedience of the rule of the company, and although they may further find from the evidence that the coupling was dangerous, and that he knew it was dangerous, and although they may believe that he was negligent in coupling the cars, and did not exercise due care on his part. This is given subject to an instruction I will now give you, which is the one alluded to in the previous instruction."] To that part of the charge inclosed in brackets, the defendant excepted.

"In case of the use of couplers by railroads, they are required to use improved couplers, to prevent going between the cars to couple, and automatic couplers are such: and it is admitted that the defendant did

use automatic couplers at the time of the plaintiff's injury, but it is contended that the one in use at the time of the injury was out of repair, and that it was known to be so by the defendant, or had been so for such a length of time that the defendant should have known it, and this is denied by the defendant, so that is a matter of contention.

["In this case, if the jury find by the greater weight of evidence that this particular coupler was out of order, so that it was necessary to go between the cars to couple, and the plaintiff was directed by the conductor to couple the cars, and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that if the jury shall further find that it was dangerous, and that the probability that it could not safely be done was greater against his chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue, would be 'Yes.'"] To that part of the charge inclosed in brackets, the defendant excepted.

["This is the instruction I said I would give you, to which a previous instruction was subject: If the jury find from the evidence that the coupler was out of order, and that the plaintiff knew it was such, and that it was too dangerous, under the rule I have just given, to go between the cars to couple, and if the jury find further that the plaintiff stood on the ground and used his foot to make the coupling, and that by reason of his position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was carelessness, and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part, and even if the defendant knew of the defective condition of the coupling; and in that event it would be the duty of the jury to answer the second issue 'Yes.'"] To that part of the charge inclosed in brackets the defendant excepted.

["If the plaintiff acted recklessly and without care, if the jury have previously found the defendant guilty of negligence, the plaintiff could not recover. Now, it is important for you to get that distinction, under the matters in controversy. If you find that the plaintiff was injured by reason of the negligence of the defendant in not having these couplers in proper condition, but when, if you answer the first issue 'Yes,' and in considering the second issue, you should find that the plaintiff, acting under the direction of the conductor, and being subject to his orders, if you find he was so, went in between the cars to couple them, when the conditions were such that it was so dangerous that the chances were greater against his safety than in favor of it, then it would be such recklessness as would make him guilty of contributory negligence, or if, after

he went in there, he acted with such carelessness as made his chances greater against his safety than in his favor, he would be guilty of contributory negligence; and in case of either of these findings it would be the duty of the jury to answer the second issue 'Yes.' Now, if you answer the second issue, then you would proceed no further with your verdict."] To that part of the charge inclosed in brackets, the defendant excepted.

This court has decided in *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, that the failure to have self-coupling devices on their cars was negligence per se; that it was a continuing negligence, and the question of contributory negligence did not arise when an employé was injured by reason of the failure to have automatic couplers in proper condition; that the fact that plaintiff remained in the service of the railroad company, knowing that its freight cars were not equipped with self-couplers, did not excuse the railroad from liability to such employé, if injured while coupling its cars by hand. The doctrine of assumption of risk has no application where the law requires the use of new appliances to secure the safety of employes. This doctrine is approved in *Troxler v. Railroad*, 122 N. C. 902, 30 S. E. 117. Mr. Justice Montgomery, in the opinion in this case (131 N. C. 573, 42 S. E. 990), says: "We are not disposed to modify in the least the decision made in *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, in which we decided that the railroad companies in this state should equip both their passenger and freight cars with self-couplers, and we are of the opinion that a neglectful failure to keep the couplers in proper condition and repair would be as culpable as if the cars had never been so equipped." In *Fleming v. Railroad*, 131 N. C. 476, 42 S. E. 905, Mr. Justice Montgomery says: "It has been decided by this court that 'the failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defendant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability.' *Troxler v. R. Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. There can be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury." Chief Justice Furches, in his opinion, says: "While I agree to the doctrine in the *Greenlee* and in the *Troxl-*

Cases, as I understand them, I cannot agree that they apply to the facts in this case." We must accept the doctrine laid down by this court in the Greenlee and Troxler Cases as the law of this case. His honor clearly followed the law, as thus laid down, in charging the jury in regard to the first issue, and could not, in the light of those cases, have charged the jury, as a matter of law, to answer the second issue "Yes." He did charge the jury that if they found, by the greater weight of evidence, that this particular coupler was out of order, so that it was necessary to go between the cars to couple, and the plaintiff was directed by the conductor to couple the cars, and that it was his duty to obey the conductor, and that he was compelled to go between the cars to couple, and that it was dangerous, and the probability that it could not be safely done was greater against the chances of doing it safely than in favor of it, then it would be a case of contributory negligence, and the answer to the second issue would be "Yes." The defendant excepted to this charge. It seems to us that it was as favorable as the defendant could have asked for or was entitled to. His honor further charged the jury, upon the second issue, that if the plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and if the jury further find that plaintiff stood on the ground and used his foot to make the coupling, and that by reason of his position he acted foolishly, recklessly, and without prudence with reference to the character of the work, and that this act was careless, and that the chances of his safety were less in favor of him than against him, then it would be contributory negligence on his part, and even if the defendant knew of the defective condition of the coupler, and in that event it would be the duty of the jury to answer the second issue "Yes." The defendant excepted to this instruction. We think it as favorable as could have been asked by the defendant. His honor repeated to the jury that, if the plaintiff acted recklessly and without care, plaintiff could not recover.

We have examined the instructions with care, and have held the case under advisement for a long time. We are unable to see any reversible error in his honor's instruction. The contentions were clearly and fairly stated to the jury, and we think his honor's charge, upon the whole, correct. Whether the verdict of the jury is in accordance with the weight of the testimony, in view of the many contradictions therein, we have not considered, and it would not be proper for us to do so.

The case of *Voelker v. Chicago, M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867, is very similar to the facts in this case, the court saying: "The statutory requirement with respect to equipping cars with automatic couplers

[referring to the act of Congress] was enacted in order to protect railway employes, as far as possible, from the risk incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employes to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that, to make the coupling, the employe must subject himself to all the risk and dangers that inhered in the old and dangerous link and pin method of coupling, it is subjecting such employe to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employe to risk to life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on part of the master is certainly negligence which will become actionable if injury results therefrom to the employe." This court has held in *Mason v. Railroad*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, that an employe, "when acting under the order of the conductor, but contrary to a rule of the railroad company to which he has assented, was injured in coupling defective cars, of which he had no notice until it was too late to escape, it was error to withdraw the case from the jury on the ground that plaintiff, upon such facts, could not recover." The relation existing between the conductor and brakeman, with their relative rights and duties, and in respect to giving and obeying orders, is clearly set forth by Mr. Justice Field in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 391, 5 Sup. Ct. 184, 28 L. Ed. 787, and the subject is fully and ably discussed by Mr. Justice Avery in *Mason v. Railroad*, *supra*.

Much of the argument in this cause before us was directed to the contention that the accident could not have occurred in the manner testified to by the plaintiff. The decision of this question was peculiarly the province of the jury, and its verdict, read in the light of the testimony and the instructions given, establishes the contention made by the plaintiff. The only portion of this record which we can review is the instruction of his honor. This we have done carefully, and find no reversible error therein. We are of the opinion that the judgment of this court at the February term, 1902, should be affirmed.

This will be certified to the superior court of Wayne county, to the end that the judgment below be affirmed.

Petition allowed.

MONTGOMERY, J. (dissenting). I cannot concur in the disposition of the petition to rehear this case. The evidence in the case was stated correctly, as I think, in the opinion of the court (131 N. C. 569, 42 S. E. 989); and my views of the law, as in that opinion written, have undergone no change. It would serve no good purpose to repeat here what was written in the reported case above referred to.

(132 N. C. 1120)

### STATE v. WILCOX.

(Supreme Court of North Carolina. June 10, 1903.)

**MURDER — EVIDENCE — SUFFICIENCY — CIRCUMSTANTIAL EVIDENCE — REASONABLE DOUBT — EXPERT TESTIMONY — QUALIFICATION OF EXPERT — RULING OF TRIAL COURT — REVIEW ON APPEAL — CAUSE OF DEATH — CREDIBILITY OF TESTIMONY.**

1. Where there is any evidence to sustain the trial court's conclusion that a witness is qualified as an expert, such conclusion is final, and not subject to review.

2. It is not necessary that a physician, learned and experienced in his science and profession, should have actually seen or made an autopsy in a case like the one on trial, in order to qualify him to testify.

3. Testimony of physicians that, from their experience and learning as practitioners, they considered themselves competent to give an opinion satisfactory to themselves on medical matters, and as to the cause of death of a person, their information being derived from standard authorities, from which their opinions were formed, was sufficient to show them qualified as experts.

4. In a prosecution for murder, expert testimony of physicians as to the cause of death of deceased, and the kind of an instrument which produced it, was admissible.

5. In a prosecution for murder, expert testimony of physicians to the effect that absence of water in the stomach of deceased indicated that she came to her death otherwise than by drowning was admissible.

6. In a prosecution for murder, the weight to be attached to the opinion of physicians as to the cause of death of deceased, etc., is for the jury to determine.

7. In a prosecution for murder, it was proper to permit a witness to explain the location of points in the vicinity of the alleged homicide by the use of a map drawn by himself.

8. In a prosecution for murder, evidence that since the incarceration of defendant, and since his first trial, he had had opportunities to escape from the jail where he was incarcerated, of which he declined to avail himself, was properly excluded.

9. Where defendant was convicted of murder in the second degree, exceptions directed against rulings on instructions relative to murder in the first degree are immaterial.

10. The court is not required to give instructions in the language of the prayers, provided that the instructions given are correct, and cover the various phases of the testimony.

11. In a prosecution for murder, an instruction defining reasonable doubt as "fully satisfied," or "satisfied to a moral certainty," and that the

words "reasonable doubt" are very nearly self-explanatory," was proper.

12. In a prosecution for murder, an instruction that, where circumstantial evidence is relied upon to convict, it should be clear, convincing, and conclusive, excluding all rational doubt as to the prisoner's guilt, and that every material and necessary circumstance must be established beyond a reasonable doubt, was proper.

13. In a prosecution for murder, an instruction stating that the court had submitted the evidence to the jury for their consideration under the rules laid down for their government, upon which they should base their verdict, did not violate the statute prohibiting the judge from expressing an opinion as to the weight of the evidence.

14. It is the province of the jury to pass on the credibility of witnesses, and to ascertain the truth of testimony.

15. In a prosecution for murder, proof that accused was influenced by a strong motive of interest to commit the offense proved, although weak and inconclusive in itself, is a circumstance to be used in conjunction with others which tend to implicate the accused.

16. In a prosecution for murder, evidence considered, and held sufficient to justify a conviction of murder in the second degree.

Appeal from Superior Court, Perquimans County; Council, Judge.

James Wilcox was convicted of murder in the second degree, and appeals. Affirmed.

E. F. Aydtlett and W. M. Bond, for appellant. Robert D. Gilmer, Atty. Gen., for the State.

CONNOR, J. This was an indictment against the defendant for the murder of Nellie Cropsey. The state introduced testimony tending to show that W. H. Cropsey, the father of the deceased, had been living in Elizabeth City since April, 1898; that at the time of the disappearance of deceased, and for two years prior thereto, his residence was within a short distance of the Pasquotank river; that deceased was at the time of her death 19 years old; that the defendant met her in June, 1898, and began paying her attention, he being a young unmarried man; that his attentions were marked by frequent visits—as often as three times a week; that he gave her a number of presents, and carried her to ride and sailing and to places of amusement. "He gave her a silver dish at one Christmas, a pin at the next, and on her birthday in July a diamond ring. He also gave her small pictures of himself, and a parasol." In September, 1901, defendant and deceased had a "kind of falling out." She was heard to say to him about the middle of September, "If you are going to act like this the rest of the season, you can stay at home." About the 1st of October, 1901, Miss Carrie Cropsey, a cousin of deceased, came from Brooklyn to make a visit to the family. About this time there was a series of religious meetings in Elizabeth City. Defendant frequently went with deceased, and at other times went for her and took her home. She joined the church October 13th. At the time of the fair, October 22d, defendant and deceased were friendly. He gave her tick-

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1062.

ets for herself, sister, and cousin. They remained friendly until November 7th. Prior to that day he visited her every night, and sometimes in the afternoon. On the night of November 7th he was at the home of the deceased. Her sister and cousin were in the parlor with them. When he left, she said "Pull," which meant "Hurry." She went to the door with him, and came back immediately. He did not take her remark in fun. He visited the house after that. Deceased never spoke to him after that night, nor did he speak to her. She never went to the door with him after that night. She was seen walking with her cousin and defendant once, her cousin being between them. Deceased was to make a visit to New York, intending to leave on Saturday, November 23d. This was known to the defendant. On Tuesday afternoon before her disappearance her cousin came home, and said she was going to the skating rink with the defendant that night. When he came and rang the bell, deceased declined to let him in. The cousin, Carrie, let him in. When the defendant came in and took a seat, he said to deceased, "I guess your corn is getting better." She turned to her sister, Miss Ollie Cropsey, laughed, and said, "A little," in a very low voice. Deceased and her sister were dancing just before defendant came in. Defendant turned to Miss Carrie and said, "I expect it is time you were getting your hat." She went upstairs, leaving Ollie and deceased in the parlor. No words were passed between defendant and deceased. Ollie talked with him. When the defendant and Carrie returned from the rink, deceased was writing a letter. They brought some fruit with them, which they put in another room. Defendant did not speak to deceased. After sitting some time, deceased said: "I certainly would enjoy a good apple to-night." Carrie turned to defendant and said, "How about the fruit?" He said, "It is yours." Carrie handed the fruit. Deceased said, "No, thanks." She would not have any apple. Defendant stayed a little while, took his hat, and left. When he was gone, deceased said: "This is a good joke on Jim." She took an apple and commenced eating it. Defendant left about half past 10 or 11 o'clock. On Wednesday afternoon, November 20, 1901, Carrie and one of the sisters of the deceased went to town, and came back, accompanied by defendant, about half past 5. Defendant indulged in some pleasantries with Ollie. He left in about half an hour. No words passed between him and deceased. He returned about 8, or half past. Carrie let him in. Roy Crawford was at the Cropsey house, visiting Ollie. He was not on good terms with the defendant. Deceased was sitting at table, sewing. She continued sewing until about 9:30 o'clock, when she put her sewing up and got some musical instruments. They had some music. Defendant did not speak to her. "Just sat there gazing at nothing." Had hardly spoken

to any one. He finally said Miss Bunett was going to be married. The members of the family began to leave the parlor to retire, until deceased, defendant, Ollie, and Crawford were the only ones left. Defendant asked if there was any water in the pump. Ollie got up to get a glass. He said: "I don't want your glass. I might poison it." He took his watch out six or seven times. At 11 o'clock he looked at it and said: "Your clock is just like my watch." They all stood up. Roy stood by deceased and took hold of her chin, saying, "You are looking mighty sweet to-night." Ollie said, "As if she don't always look so." Defendant rolled up a cigarette and took his hat, saying, "Mamma said I must be in at 11 o'clock to-night." Ollie said, "Jim, you are getting good." He made some slight remark, took his hat from the rocking chair, and started out. When he got in the hall, the door was partly open. He walked out and said, "Nell, can I see you out here a minute?" She looked at her sister, said nothing, and went into the hall with the defendant. She was never seen alive again by her family. This was the first time she had gone to the door with the defendant since November 7th. He had been there every other night. He had taken Carrie and a sister of deceased sailing. Deceased left the door open. Ollie closed it. Roy Crawford remained in the parlor with Ollie some time, and then went out. Ollie went in the front hall with him, and found the two doors open, and the screen door flapping in the wind. She said to Roy: "This is funny. Nell gone upstairs, leaving me to shut up alone." She went upstairs and retired. She felt in the bed for Nell, but she was not there. In a short time Mr. Cropsey, the father, came downstairs. Some time after, Ollie notified her father of Nell's absence. Family got up and began to search for her. It was a very cold, clear, moonlight night. Father, mother, and sisters looked over premises for deceased, and called for her. Could not find her. Before defendant left on the night of November 20th, "the subject of drowning was brought up either by Carrie or defendant." He said: "That is one thing I would like to do. It is such a pleasant sensation. I would not mind it." Deceased said: "That is one thing I would never want to do. I would not want my hair coming out straight." Her hair was in curl papers. She said: "If I die, I would want to freeze to death." The Cropsey residence fronts up the Pasquotank river, Riverside avenue running between the front fence and the river. It is 66 feet from the bottom step to the front gate. The street is 33 feet wide. From the edge of the street to the river shore is 112 feet, making the entire distance from the steps to the river 211 feet. A little to the left of a line from the house to the street is a summerhouse, about 150 feet from the gate, and about 40 or 50 feet to the bank of the river. A little to the left of the summerhouse is a fishhouse, 350

feet, and near by are some cypress trees in the water. Up the street 830 feet is the pier of the Hayman Shipyards. To the end of the pier is about 500 feet, making 1,350 feet from gate to end of the pier. The water at the end of the pier is 10 or 12 feet deep. The Tolley house is 2,500 feet from the Cropsey gate. Witness walked it in 10 minutes. Defendant lives up that street 4,300 feet from the Cropsey house, 1,800 feet from the Ives place. Several measurements of the water near the Cropsey house were taken, showing depth at 10 feet from shore  $2\frac{1}{2}$  feet; 35 feet from shore, 3 feet deep; running out to 75 feet, 4 feet deep.

C. T. Parker testified that on the night of November 20th he was at Fletcher's store at about 10 o'clock, and remained there about 10 minutes. That he was driving a horse to a top buggy, traveling about five or six miles an hour, and passed the Cropsey house. That he met a man and woman near the gate of the Cropsey house. Somewhere near there. Might have been about the gate. Did not know exactly. They were medium-sized people. Their faces were turned towards each other. The man was taller than the woman. Witness was right close to them. Was in street, and they were on the sidewalk. They were walking. Does not know the parties. Knows Wilcox. Has known him a long time. It was a bright moonlight night. He took no notice of them. Witness met a man about 50 steps after meeting the man and woman. This man could see the two persons walking the road. There was no crook in the road. Man and woman were talking to each other, he thinks.

Leonard Owens testified that he has known defendant five years. He was on the street the night of November 20th. Was within 15 feet of Ives' house, between Ives' and Tolley's house. About 11:30 o'clock met defendant, who said, "Hello, old boy." Witness said, "Hello, Jim." He said, "Where have you been keeping yourself?" Witness said, "I have been coming and going," etc. Asked him to take a cigarette. Said he was making one. After talking a little, they parted, and witness went home. Witness went up Hunter street about 200 yards, crossed, and went over to Morgan street, where he lives. He called his wife, and went upstairs. As he was undressing, the town clock struck 12. About four or five hundred yards from where he met defendant to where he lives. Nothing unusual in defendant's appearance or conversation. He talked friendly. Witness passed Cropsey house. Did not know what time.

Capt. Bailey testified that Owens left the boat at 11:30 o'clock. He got witness a pint of whisky, and sent it by a negro, Sherman, whom witness sent with him. Sherman was back in about 10 minutes. Witness' watch was two minutes faster than the town clock.

W. H. Cropsey testified: Deceased was a good swimmer. Had seen her plunge into

the water. He retired on night of November 20th at 8:25 o'clock, got up at 11:45, blew his lamp out at 12 o'clock, went downstairs at 12:45, and heard dogs barking. Was notified by his daughter of absence of deceased. Searched for her. Went to Dawson, chief of police, and told him about missing deceased. That was about 1:15 o'clock. Dawson came to house with defendant at 4 a. m. Witness' wife was crying. Defendant looked cold and indifferent. His wife asked defendant something. He began to tremble, and witness walked out of room. Daughter was well educated and a lively girl.

Dawson testified: Was called up by Mr. Cropsey between 2 and 3 o'clock in the morning. Went to home of father of defendant. Went upstairs with defendant's father. Defendant was lying in bed on left side. Mr. Meade was in same bed. Defendant was asleep. Witness called him, saying: "I want you to go over to Mr. Cropsey's with me." Defendant said: "All right. I will go." He got up and dressed and went downstairs. When they got in street, witness said: "Jim, what do you think about this case?" Defendant said: "I don't know what to think." Witness said: "When was the last time you saw Miss Cropsey, and where was she?" He said: "I left her standing on the front porch." Witness said: "Did she seem to be in any trouble?" He said: "Well, yes. I left her crying." Witness said: "What was she crying about?" He said: "I gave her back her picture, and she said, 'I know what that means,' and began to cry, and I turned off and left her." Defendant said he came home. Witness said: "Now have you had any quarrels—had any lovers' quarrels, or anything like that?" He said: "Well, no. Nothing more than she laughed in my face, and I told her the laugh would be on the other side." Defendant said that on the night before that (that is, Tuesday night) he went in the room and asked her how her corn was, and he said that was when she laughed in his face. He also said that some one brought up the subject of suicide that night; that deceased said that she would rather commit suicide by freezing than any other way; that about a year ago, in a summerhouse, she said in a crowd that, if she was going to commit suicide, she would drown herself, and tie a stone around her neck. When they got near the Ives house, defendant said: "Right here last night I met Leonard Owens about half past eleven." When they reached the Cropsey house, the family was in the dining room. Defendant passed through sitting room. Curtain hanging in the door. He took hold of it. Mrs. Cropsey came up and put her arm upon his shoulder and said: "Jim, tell us where Nell is, for your sake, for my sake, and for your mother's sake. Please tell us where Nell is." He said: "Mrs. Cropsey, I don't know. I can swear that I don't know." He said nothing else. Defendant was put under arrest, and was released about 12 o'clock on

that day. He was arrested a second time, and carried before Mr. Wilson and four other justices, and released on his own recognizance. He was, at his own request, sworn, and said that he went to call on deceased, and left about 10 minutes after 11 o'clock; that he rolled up a cigarette, and asked Miss Nell to let him see her in the hall, and she went in the hall with him; that he left her on the porch, crying; and that he had not seen her since. He did not go back after leaving the yard. The mayor required defendant to appear before him every day at 12 o'clock until further notice, which he did.

Charles Reid, deputy sheriff, testified that the Sunday after deceased disappeared, at request of defendant's father and mother, he went with defendant to Mr. Cropsey's. On the way, witness said: "Jim, it looks to me like you ought to explain this, as it is getting you into trouble, not for your sake, but for your mother's." After walking about 20 steps, he said: "I have told all I can tell." Witness took defendant to Mr. Cropsey's, at railroad. They had some conversation. They went to the house. Mrs. Cropsey put her arm over his neck and asked him if he knew where Nell was, and, if so, to tell her. He said: "I don't know where she is." She then said: "You say you left her crying?" He said: "Yes." Mrs. Cropsey said: "Had you ever seen her crying before?" He said: "I don't know what she was crying about, unless I told her I was going to quit her." Mrs. Cropsey was crying. Defendant's manner was very indifferent. Defendant showed witness the position in which he left deceased. He walked to the right side of the porch, and put his arm up on the porch, and leaned his head against his arm. The left temple was exposed. He said that he was standing on the second or third step. He first said he was standing there five minutes, and then said it might have been 15 minutes. The people were engaged in searching for deceased, dragging the river, etc., 37 days. Defendant took no part in the search. One day Mr. Cropsey said to defendant, standing on the street, "Jim, ain't you ever going to say anything or do anything towards finding Nell?" Defendant said, "I have said all I am going to say, and done all I am going to do," or words to that effect. On the day the body was found, defendant was arrested. Deputy sheriff said to him: "You are a pretty looking chap for a young lady to go off and drown herself about." He threw himself back in the buggy and laughed, and said: "Ain't I, though?" Witness asked him if he couldn't have seen her from the hill to the house, and he said: "Yes; I could have seen her, and, if I had known all this trouble was coming, I would have called her sister out before I left." His general appearance and manner is that of indifference.

P. B. Hayman testified that defendant worked with him from September until the preliminary trials in this case. Once during

the time, witness said: "I wish we could find her or hear something from her." Defendant said, "I wish to the Lord we could"; that he would go look for her, but if he found her they would say right off that he had killed her. This was about the time they were dragging for her.

C. A. Long testified that he was in boat with Mr. Stillman on the river on December 27th. Went out in small boat from the shore near front of the Cropsey residence. Fifty yards from shore, saw body of deceased. Top of her head was out of the water, floating. Mr. Cropsey went out and identified the body. There were no weights on it. Dress was muddy. Body was nearly in front of residence, between bathhouse and summerhouse, looking from the shore. Some bricks near where body was found; some stubble, stumps, etc.

Dr. Fearing, coroner, 33 years old, graduate of College of Physicians and Surgeons, general practitioner, took charge of the body on December 27th, about 50 yards in river. Body was staked and tied, floating face down. Had body covered with quilts and carried to outhouse. Impaneled jury, and sent for Drs. Wood and McMullen. Found no disarrangement of clothing. Took off clothing. Found no evidence of violence at that time. Top skin slipped off when touched. Hair slipped off. Made incision in body. Deceased was chaste. She was a virgin. Cut open stomach. Found one or two tablespoonfuls of fluid—undigested food. Heart in perfect state of preservation; empty; normal in appearance. Lungs likewise. Cut through large section right lower lobe. Found it contained no water. Upon pressure, it emitted a dark, mucous fluid—about half tablespoonful. Do not think there was any froth in it. Pleural cavity empty. Did not examine head at that time. Two of jurors thought it looked a little thicker or enlarged on left side. Jury left and went to town. Went back after dinner. Made an incision all around head above left ear. Began on right side and went to left. No blood in right temple. As we cut through left temple, discovered a contusion. A fluid—about a tablespoonful dark fluid blood—ran out. It was very blue down to the membrane of the bone. It indicated a wound or contusion. There was no fracture of bone. No evidence of violence to membrane of the brain. Brain was very soft. Offensive odor. Of the organs, the brain is the seventh in order to decompose. Witness gives opinion that wound on left temple was given with some round instrument, padded. Examination was made about an hour after body was taken out of the water. The condition of the stomach, heart, pleural cavity, and lungs indicates that the deceased came to her death by means other than drowning; that she received a blow which stunned her and rendered her unconscious. Body was not swollen. Body of person drowned usually swollen.



len when taken out of the water. Wound had the appearance of having been stricken before death. Dr. Wood assisted in making the autopsy. He testified that he was 58 years old, and had been practicing medicine since 1868.

There was some conflicting evidence in regard to the clothes which the defendant had on the night of the 20th November. Mr. Meade testified that he slept in the same bed with the defendant. Did not hear him when he came home. Saw defendant's clothes the next morning when he got up, that he had worn that night. They were hanging up behind the door. Thinks they were the same he had on at the time of the trial.

The defendant objected to the testimony of Dr. Wood and Dr. Fearing as experts. Dr. Wood stated that, from his experience as a practitioner, and learning as a physician, he considered himself competent to give an opinion satisfactory to himself on medical matters; also as to the death of a person—whether it was caused by drowning or otherwise. That he had no experience before this in examining the body of a person alleged to have been drowned. This was the first autopsy he had made in such a case. That he derived his information from the authorities, Reese and Taylor. That, from an examination of these authors, he was prepared to express an opinion. That they devoted from 8 to 14 pages to the subject of drowning. They are considered standard authorities. Dr. Fearing testified to substantially the same. The court found as a fact that the witnesses were experts. Defendant excepted to the finding of the court, and objected to the witnesses testifying as experts in this case. Objection overruled. Defendant excepted. If there is any evidence to sustain his honor's conclusion, it is final, and not subject to review. *Smith, C. J., in Flynt v. Bodenhamer, 80 N. C. 205, thus declares the law: "The court must decide whether the witness has had the necessary experience to enable him to testify as an expert. But the value of his opinion, when admissible, must be determined by a jury alone, and depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of these opportunities. If a regular, continuous practice of his profession for 30 years does not entitle the witness to be regarded as an expert or experienced physician, it is difficult to conceive what would do so." The finding of the judge is conclusive. State v. Cole, 94 N. C. 964, and cases cited. It is not necessary that a physician, learned and experienced in his science and profession, should have actually seen or made an autopsy in a case like the one on trial. In State v. Clark, 34 N. C. 152, 155, Ruffin, C. J., says: "That circumstance does not touch the question of competency, though it may lessen the credit given to the testimony. \* \* \* It is the point for the man of science to consider, whether in a particular state of*

facts he can or cannot form a sound opinion, which would satisfy his own judgment as to the matter of fact. In the next place, if it were the office of the court to determine whether the circumstances were or were not sufficient to enable the witness to form such an opinion, it could not be held they were insufficient merely because exactly such a case as this had not before fallen under the observation of the witness, or under his notice in the course of his reading. For the man of science is distinguished from an empiric in nothing more than in not relying on specific, and also in not waiting for exact similitudes in things material and immaterial before forming a judgment whether two patients are laboring under diseases of the same character, and requiring the like treatment. It is the province of science to discover general principles from long and accurate observation and sound reasoning." We are of the opinion that his honor's finding that Drs. Wood and Fearing were experts is sustained by ample testimony. The exception thereto cannot be sustained.

The doctors were asked the following questions: "Q. From the appearance of that bruise and dark blood and the contusion—was there any contusion? A. Yes, sir. Q. What, in your judgment, produced it?" Defendant objected to the witness testifying as to what caused the bruise or contusion on the left temple of the corpse of Ella Cropsey. Objection overruled, and defendant excepted. "A. I think a direct blow produced it. Q. What shaped instrument would probably have produced that bruise?" Defendant objected. "Q. Upon your examination of that wound, are you in a position to give an opinion as to what produced it? A. No, sir; I could not give a positive opinion. Q. Upon your examination of the wound, what kind of an instrument or weapon, if any, produced it? A. I think some covered instrument would have produced it—a blunt covered instrument. Q. From the examination of the wound, are you prepared to give an opinion satisfactory to yourself as to the character of the weapon or instrument used, if any? A. Positively, no; I am not. Q. From your examination of the wound on the head, are you prepared to give an opinion of what caused the bruise? A. I think I am, sir. Q. Please give that opinion. A. I think she was struck by some blunt instrument; something that would not break the skin; a direct blow on the left temple. Q. From your examination and knowledge of the wound, are you prepared to give an opinion as to whether this blow was produced before or after death? A. Yes, sir. Q. Please give that opinion. A. If the wound was inflicted just before death, or just after death, it is hard to tell which, because of the blood being diffused in the muscles of that wound. The blood was circulating from the blow given." To all of the foregoing questions and answers the defendant objected, and, upon objection being overruled, excepted.

We think the questions and answers competent to be considered by the jury. "In reference to questions involved in controversy like the present, namely, as to the nature and effect of a wound described to a witness, it certainly is to a considerable extent a matter of science. Whether a wound was made by a shot, or a sword or other sharp instrument, can, beyond all doubt, be better judged of by one who has habitually examined and treated wounds of such kinds." *State v. Clark*, 34 N. C. 154; *Lawson on Expert & Opinion Ev.* 125. "The opinions of medical men are constantly admitted as to the cause of disease or death, or the consequences of wounds, \* \* \* and as to other subjects of professional skill." *Greenleaf on Ev.* vol. 1, § 440. In *Gardiner v. People*, 6 Parker, Cr. R. 202, it is held that "medical witnesses are competent to testify as to the kind of an instrument or weapon that would produce a wound or fracture, and whether a particular wound or fracture may have been made with an instrument mentioned to the witness." *Williams v. State*, 64 Md. 384, 1 Atl. 887; *Kerr on Law of Homicide*, § 479; *State v. Harris*, 63 N. C. 1. Taft, Circuit Judge, in *Manufacturers' Accident & Indem. Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620, says: "The witness was an expert, and it is proper to ask his judgment of the conditions which he found in the body of the deceased, and what they indicated as to the cause of his death." Several questions were submitted to the expert physicians, based upon the assumption that the jury find certain conditions incorporated in the question, in respect to which there had been testimony before them, and the opinions of the physicians asked as to the probable cause of death, based upon such finding of fact by the jury. The physicians were asked the following questions: "Upon a post mortem examination of a person taken from the water, what does the absence of water in the stomach indicate?" A similar question was asked in respect to the absence of water in the lungs. To each of these questions witnesses answered that they "indicate that the deceased came to her death otherwise than by drowning." To all of these questions the defendant excepted. The questions were formulated in accordance with the rules prescribed by this court in *State v. Bowman*, 78 N. C. 509. In *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501, the question is asked the witness: "Doctor, from the nature of the examination that you made of the heart, lungs, eyes, mouth, neck, and general appearance, together with the mutilation you have testified to, do you come to any conclusion as to whether the death occurred by drowning or by other means?" to which he answered: "Yes; my opinion was that the man did not come to his death by drowning; that he was dead before he was put into the water." The ruling of the court is directly in point,

and sustained by numerous other authorities which sustain his honor's ruling upon the several questions in regard to the opinion evidence of the experts as to the manner in which the deceased came to her death, as indicated by the physical condition found upon the autopsy. *Maxwell's Criminal Procedure* (2d Ed.) 204. The weight to be attached to these opinions is peculiarly the province of the jury.

The defendant objected to the diagram made by the witness H. T. Greenleaf, by which the witness proposed to demonstrate to the jury the location of the Cropsey residence, and other points immediately around there. The objection was overruled, and defendant excepted. The defendant also objected to any examination of the witness with reference to the map. The exception cannot be sustained. The map was not admitted in evidence, but it was competent "for the purpose of enabling the witness to explain his testimony, and enabling the jury to understand it. Diagrams, plats, and the like, are of frequent use for this purpose in the trial of causes, and for such purpose the use of the map was admissible. *Dobson v. Whiseman*, 101 N. C. 645, 8 S. E. 126; *Riddle v. Germanton*, 117 N. C. 387, 23 S. E. 332.

The defendant offered to prove by Mr. Reid, the deputy sheriff, that since his incarceration, and since the first trial, also, he has had opportunities to escape from the jail where he was so incarcerated, and that he declined to avail himself of them. The testimony was, upon objection, excluded, and the defendant excepted. The exact question has been decided by this court in *State v. Taylor*, 61 N. C. 508; *Battle, J.*, saying: "The argument in favor of the exception is that, as the flight of an alleged criminal is admissible as evidence against him, his refusal to flee in the first instance, and his declining to escape after having been committed to jail, ought to be admitted as evidence in his favor. The argument is plausible, but it would be permitting prisoners to make evidence for themselves by their subsequent acts." The writer of this opinion, speaking for himself, has been impressed with the argument, and, subject to well-defined limitations (as, for instance, that the defendant was, without any agency on his part, given an opportunity to escape, and refused to accept), is inclined to the opinion that his conduct is competent to go to the jury, to be given such weight as, under the circumstances of the case, it is entitled to. There is nothing, however, in this case to take the question out of the well-settled rule, and the exception cannot be sustained.

We have disposed of the exceptions made by the defendant to the admission and rejection of testimony, and find no error in the rulings of the court.

The defendant made a number of requests for instructions, directed to the question of murder in the first degree, which, by the ver-

dict of the jury, become immaterial and unnecessary to be considered.

The defendant requested his honor to charge the jury that the prisoner is not called upon to introduce any testimony until the state has made out its case with evidence sufficient to satisfy their minds beyond a reasonable doubt. This instruction was given.

The court was also requested to instruct the jury: "This is a case in which the state relies upon circumstantial evidence for the conviction of the prisoner. Before the state can ask you to convict upon this kind of evidence, it must prove each material circumstance relied upon, beyond a reasonable doubt; and, if it fails to prove any material circumstance relied upon, it will be your duty to return a verdict of not guilty." Several other instructions were asked in which the same principle is expressed in different form. It is well settled that the court is not required to give instructions in the language of the defendant's prayers, provided that the instructions given are correct, and cover the various phases of the testimony as prescribed by the act (Code 1883, § 413).

His honor charged the jury as follows: "What is meant by the term 'reasonable doubt' is, fully satisfied, or satisfied to a moral certainty. The words 'reasonable doubt,' in themselves, are about as near self-explanatory as any explanation that can be made of them." This language has the approval of this court. Dick, J., in *State v. Matthews*, 66 N. C. 106, 114, says: "The rule requiring proof beyond a reasonable doubt does not require the state, even in a case of circumstantial testimony, to prove such a coincidence of circumstances as precludes other hypotheses except the guilt of the prisoner. The rule is that the circumstances and evidence must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. Where any reasonable hypothesis of innocence exists in the minds of the jury, there must necessarily be a reasonable doubt as to the guilt of the accused, and he is always entitled to the benefit of that doubt." We think his honor's charge is in accordance with this principle. His honor further charged the jury: "In the trial of this case the state relies upon what is known as 'circumstantial evidence for conviction'; hence it becomes the duty of the court to instruct you upon the rules of law applicable to this class of evidence, and how it should be considered by juries. Circumstantial evidence is a recognized instrumentality of the law in the ascertainment of truth, and, when properly understood and applied, highly satisfactory in matters of gravest moment. Where such evidence is relied upon to convict, it should be clear, convincing, and conclusive in its connections and combinations, excluding all rational doubt as to the prisoner's guilt. \* \* \* When such evidence is relied on for conviction, ev-

ery material and necessary circumstance must be established beyond a reasonable doubt, and the entire circumstances so established must be so strong as to exclude every reasonable supposition but that of guilt." This language is fully sustained by numerous decisions of this court. His honor adopted the language used by Merrimon, C. J., speaking for the court, in *State v. Brackville*, 106 N. C. 701, 710, 11 S. E. 284, and sustained by the authorities cited. His honor said to the jury: "Reference has been made during the argument of the case as to the sufficiency or insufficiency of the evidence to be submitted to you for your consideration. The court has submitted the evidence to you, and you will consider it under the rules I have laid down for your government, and render your verdict based upon it." The defendant excepted to this language, and contended that it violates the statute prohibiting the judge from expressing an opinion as to the weight of the evidence. We are unable to see how such construction could be placed upon the language of the court. His honor simply stated to the jury, in view of the argument made by the counsel for state and defendant, that, as a matter of law, there was evidence to be submitted to them, the weight and credibility of which, and conclusions to be drawn therefrom, were for their consideration under the rules laid down in his charge. We can see no force in the objection.

We have examined the several prayers for instruction, and the exceptions of the defendant to the charges given. We find no error in his honor's ruling in respect to them. The charge was clear, and presented to the jury the testimony and the law bearing thereupon fairly to the state and the defendant.

The defendant requested the court to charge the jury that, upon the whole of the evidence, they should find a verdict of not guilty. It is upon the exception to the refusal to do so that the defendant's counsel strongly and earnestly urged upon us to grant a new trial. We have considered the case with that anxious care and solicitude to arrive at a correct conclusion which its importance to the state and the defendant demands. Either the deceased came to her untimely death by self-destruction, being driven thereto by what strongly impresses us, in any aspect of the testimony, as a trifling with her affections, or she was the victim of a cruel murder. If the first be true, the defendant is entitled to a new trial, and to have the jury instructed that they should render a verdict of not guilty upon the testimony; leaving him to that remorse which would come to him for his treatment of her as detailed by himself. If the last theory be true, nothing but the natural hesitation of a jury to find a verdict for the highest grade of crime upon circumstantial evidence has saved the defendant from the extreme penalty of the law. It is difficult to read the testimony in this case without emotion. It

is pathetic and painful. We have, however, considered it in the "dry light" of judicial investigation. "If the evidence, taken as a whole, will not warrant a verdict of guilty, there is no evidence sufficient to be left to the jury, and the court should so declare." *State v. Powell*, 94 N. C. 965. Again, it is said: "The facts, their relation, connection, and combination, should be natural, reasonable, clear, and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in its connection and combination, excluding a rational doubt as to the prisoner's guilt; and it is not sufficient to be left to the jury, unless, in some aspect of it, they might reasonably render a verdict of guilty." *Brackville's Case*, 106 N. C. 710, 11 S. E. 284. Such is the standard laid down by this court by which the testimony is to be measured by us in passing upon this exception to his honor's ruling. By this we are to understand that it is the province of the jury to pass upon the credibility of the witnesses, and ascertain the truth of the testimony. The exception is based upon the assumption that it is all true; that the witnesses have testified truthfully. The defendant's contention is that, in this view of the case, the state has not presented such evidence as should have been submitted to the consideration of the jury. The defendant earnestly insists that the evidence points to the fact that the deceased came to her death by suicide. It is argued that she had opportunity, motive, and time to drown herself. Adopting the well-considered language of the brief of defendant's counsel, they contend she had the motive. The defendant had for three years been her lover—the only one she ever had. He had been loyal to her, and regular in his attentions. Her cousin's visit to the Cropsey home had attracted the attention of the defendant. His attentions were divided. She began to be jealous, and treated him coolly. His continued visits to the cousin made the deceased independent, and appear indifferent. She continued to love him, kept his presents, and remained in the room when he was there. She was lively, and tried to throw off this feeling. He returned her pictures and parasol. On the evening of her disappearance, just before she was to leave for New York, she was overcome by the turn in her affairs, and, feeling that it was an easy way to end her troubled life, she rushed, without stopping to think, to the river, and threw herself in. This line of thought has been strongly pressed upon us by the defendant's able and zealous counsel. To the adoption of this view there are several serious difficulties. There can be no doubt that the deceased was deeply grieved and distressed by the conduct of the defendant, and that her affections were trifled with. Her conduct showed her to be a young woman of deep and strong feeling. The last scene which we have from an eyewitness strongly

impresses this fact upon us. "As he was leaving the room, he said, 'Nell, can I see you out here a minute?' Nell looked at me, never answered, and went into the hall with him. This was the last time she was seen alive by any of her family." So far as it appears that she ever thought or spoke of suicide, she had expressed an abhorrence of being drowned. We attach, however, but little importance to the testimony in this respect. Assuming that she ever contemplated suicide by drowning, it is far from clear that she had the time or opportunity for doing so on the night of November 20th. She went on the porch with the defendant at about 11 o'clock. Defendant says that he left her on the porch at about 11:05 or 11:10. Roy Crawford left the house in a short time. Parker passed there, evidently, a short time after 11 o'clock. The testimony shows the condition of the river at and near to the front of the Cropsey residence, with its receding shores, is such as to make it necessary for her, if drowned there, to go out 75 feet from the shore before reaching water 4 feet deep. At points along the shore where the bank was steep, there were bushes and briars. The testimony in respect to the river and shore all conflict with the theory that she could have thrown herself into the water. That which is most conclusive against the theory of suicide is what may be termed the natural evidence. If she walked out into the river upon the receding shore until she reached deep water, it is impossible to understand how she could have received the blow upon her left temple. That the wound upon the left temple was as described by the experts and three of the coroner's jury is established beyond controversy. It is impossible to account for it upon any other theory than that she was stricken with some instrument, or that she threw herself into the river at deep water and came in contact with some hard substance. In the case of *Cluverius v. Commonwealth*, 81 Va. 825, we find the court discussing the theory of suicide of Lillian Madison. Lewis, P., says: "The mark of a straight blow over and back of her right eye, which did not abrade the skin, could not have been made by her throwing herself or falling face foremost, or headlong, and striking upon the brick of the incline to the water in the reservoir, because it is not probable, if, indeed, it is possible, that such an impingement would not have either staved in her skull, or glazed and lacerated her skin." If this unfortunate girl had plunged into the water, and struck, with sufficient violence to have made the contusion found upon the left temple, any hard substance, it would surely have glanced and lacerated her skin. The stumps, bricks, and roots spoken of by the witnesses were on the edge of the shore. If she had fallen and struck her head upon them before going into the water, and became insensible, she could not have gone further. The suggestion that she did so is improbable.

The opinion of the physicians that she received the blow from some blunt instrument is fully sustained by the appearance of the wound. The condition of the lungs and stomach of the deceased, in the opinion of the physicians, are inconsistent with the theory of suicide by drowning. The appearance of the wound, the blood still under the skin, the color, all indicate that the blow was struck during her life. The absence of water from the stomach or lungs indicates either death or insensibility at the time of or prior to being placed in the water. The physicians testify with caution in regard to the conclusions to be drawn from the conditions found upon the body. An examination of Wharton & Stille's Medical Jurisprudence confirms their testimony and their opinion. The concurrent opinion of two physicians who made the autopsy that the deceased did not come to her death by drowning, together with the other testimony, is certainly sufficient to be submitted to the jury, and, if believed by them, to sustain their conclusion that the deceased did not commit suicide. If the deceased received the wound upon her head before being thrown into the water, this would contradict the theory of suicide; and, as we have seen, it is, to say the least, exceedingly improbable that she received the wound otherwise than in accordance with the opinions of the physicians. The work which we have examined upon medical jurisprudence states that the body of a person will remain in the water before rising or floating for a much longer period in cold weather than in warm. The testimony shows that the weather continued cold during the entire 37 days. The body was in a perfect state of preservation.

Having reached the conclusion that the theory of suicide cannot be sustained, we proceed to inquire whether there is sufficient evidence to go to the jury, connecting the defendant with the death of the deceased. It is urged that he had the motive, the opportunity, the time. In a criminal case, where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent. Some motive, temptation, or evil impulse, we may assume, is the source of every crime. Not always can we discover what it is, so that the proof of a motive is indispensable to a conviction. Bishop's New Criminal Procedure, vol. 1 (4th Ed.) § 1077. "We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. \* \* \* If we should hold that no crime is to be punished, except such as is rational, there would be no crime to be punished, for no crime can be found that is rational. The motive is never

correlative to the crime; never accurately proportioned to it." Wharton on Criminal Law (9th Ed.) vol. 1, § 121. It is, of course, difficult to the same mind to understand how, from the conditions by which this defendant were surrounded, and the relation which he bore to the deceased, it is possible for him to have taken her life. Yet it must be conceded that the relations between them were such as to arouse his evil impulse. What passed between them after she left her sister in the parlor will never be known. "The various springs by which human motives are supplied are frequently difficult to trace, but perhaps none are more difficult than those having their fountainhead in envies and jealousies which agitate the human heart. \* \* \* In the administration of the criminal law, any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the attestation of innocence, or points to the perpetrator of the crime." *Hunter v. State*, 43 Ga. 483, 523. A man's motive may be gathered from his acts, and so his conduct may be gathered from the motive by which he was known to be influenced. Proof that the party accused was influenced by a strong motive of interest to commit the offense proved to have been committed, although weak and inconclusive in itself, yet it is a circumstance to be used in conjunction with others which tend to implicate the accused. The defendant had the opportunity, and was the last person seen with the deceased. The time which elapsed between the moment that he went out of the door, she following him, and the time he was seen by Owens, was sufficient for him to have taken her life. The blow on the head was but the matter of a moment. The defendant left the room in the Cropsey house five minutes after 11 o'clock, and deceased immediately joined him in the hall, or, as he says, on the porch. He is next seen by Owens at the Ives house, about 2,500 feet from the Cropsey house, at about 11:30—probably, in view of the testimony, 10 minutes later. It is in evidence, and experience tells us, that this distance can be walked by a young man, in full health, on a cold moonlight night, in 10 minutes. Defendant says that he was with the deceased on the porch 5 minutes, and afterwards said 10 or 15 minutes, and left her there crying. Ollie Cropsey says that Crawford left the house 20 or 25 minutes after defendant. She went upstairs, and went to bed. In a short time she heard her father get up. He testifies that this was about 11:45. All of which tends to show that defendant had left the house a short time after 11 o'clock. Where was he and where was the deceased between this time and his meeting Owens? He says that he left her crying on the porch. Parker says that he passed the Cropsey house at about 11 o'clock, and saw near the gate a man and woman walking on the sidewalk. It is not

an unreasonable conclusion to draw that the man and woman seen by Parker were the defendant and the deceased. There is no suggestion to the contrary. If so, defendant is contradicted in saying that he left her on the porch. If they were on the street, walking, where were they going—what became of her? No one saw her after she left her sister to go into the hall with defendant, unless Parker did, until 37 days thereafter her lifeless body is found 50 yards in the river, in front of her father's house, with a contused wound upon her left temple. Who the man was, seen by Parker, walking 50 steps away from the man and woman, is left to conjecture. It would have thrown much light upon this mysterious case if this man had been called as a witness. Parker says he could have seen the man and woman. The deceased met her fate within this half hour. The defendant is, of all persons in the world, most deeply interested in accounting for his every movement from the moment that he asked deceased to go with him into the hall and the moment he met Owens near the Ives place. There is not the slightest suggestion that any one, save the defendant, had either the opportunity or any motive to take her life or do her harm. There is not a suggestion that she had offended another human being. He says that he told her that he was going to quit her; that he gave her back her picture; that she said she knew what that meant; that he walked off, and left her crying, and did not look back. While the conduct of a man under the circumstances surrounding the defendant from the time that he was awakened by Dawson, and told that Nellie Cropsey was missing, and the time that her body was found, should not be viewed with an eye to detect guilt in every movement, word spoken, and expression used, yet such conduct is competent to be considered by the jury to aid them in ascertaining the truth. The defendant's conduct is difficult to understand and interpret, viewed from any standpoint. His indifference to the fate of the woman towards whom he had occupied the relation of an accepted suitor for nearly two years, and with whom he had been trifling for one month, finally giving to her affections and pride a deadly thrust by telling her that he was going to quit her, is difficult to understand. His total indifference to the grief of her mother as she appealed to him, by the most tender and sacred ties, for the sake of his own and the mother of the missing girl, to tell her something to throw light upon the terrible mystery surrounding the fate of her daughter, when, as we may readily understand, her memory is surrounded by suggestions darker and more terrible than death itself, is incomprehensible. Not one word of sympathy or comfort or offer of

assistance came from him. When the father makes the final appeal to him, with cold indifference he says: "I have said all that I am going to say, and done all that I am going to do." And when he learned that her body had been found, and the suggestion is made to him that she had drowned herself because of him, he laughs and indulges in levity. But it is said that he did not flee; that, although given every opportunity to do so, he remained at home; that he denied knowing her whereabouts; that he said he last saw her on the steps, crying. These facts were submitted to the jury, and given their proper weight. "It cannot be said that the verdict of the jury in this case, although founded on circumstantial evidence alone, was without evidence, or plainly against the evidence. The circumstances proved pointed with fatal precision to the plaintiff in error, and there is not a circumstance which points to any other person or agent. The theory of suicide finds no substantial support from the proved facts. All the surroundings of the deceased on that dreary and dismal night, remote from human habitation, in that gloomy locality, led away from suicide, without the proved facts indicating violence to her person, and plainly destroying the idea of suicide. The jury were the triers of the fact, and they have rendered their verdict of guilty, and the court below did not err in refusing to set it aside and grant a new trial." This language used by the court in *Cluverius v. Commonwealth*, supra, in so far as it applies to the facts in this case, appropriately expresses the conclusion to which we have arrived. We think that, measured by the standard prescribed by law, the evidence was properly submitted to the jury, and we cannot say they have not reached a correct conclusion. Human tribunals can only deal with such cases in the light of such testimony as it is possible to obtain. No man can say with absolute certainty what the very truth of the matter is, but, calling to our aid the experience and wisdom of the sages of the law, and examining the testimony as it is certified to us, we are of the opinion that it is sufficient to bring the minds of an intelligent and fair-minded jury, under the instruction of a learned, just, and impartial judge, to the conclusion to a moral certainty that the defendant is guilty. That is the extent of our duty. In the discharge of it, we must declare that we find in the record no error.

DOUGLAS, J. (concurring only in result). I cannot concur in the opinion of the court as to the weight of the evidence. All that I can say, in justice either to the prisoner or myself, is that an impartial jury has found him guilty upon evidence tending to prove his guilt. Further I cannot go.

(132 N. C. 730)

**COX v. WALL & HUSKE.**

(Supreme Court of North Carolina. June 6, 1903.)

**BANKRUPTCY — FRAUDULENT CONVEYANCE—  
SETTING ASIDE—ACTION BY TRUSTEE—BONA  
FIDE PURCHASER—BURDEN OF PROOF.**

1. Bankr. Act July 1, 1898, § 67e, 30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449], declares that transfers of property by an insolvent within four months of the bankruptcy petition, which are void under the laws of the state, shall be void under the bankrupt act, as against creditors, and all conveyances made within such time, with intent to defraud creditors, shall be void, except as to bona fide purchasers, and all property so conveyed shall pass to the trustee. Section 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vests in the trustee all property transferred by the bankrupt in fraud of creditors; and section 70e provides that the trustee may avoid any transfer by the bankrupt, which any creditor might have avoided, etc. *Held*, that under such statutes the trustee is entitled to have a fraudulent conveyance set aside, provided any creditor of the bankrupt would be entitled to the same relief.

2. Code 1883, § 1545, provides that all conveyances made with intent to defraud creditors shall be void. Section 1547 declares that voluntary conveyances are protected when the donor retains property sufficient and available for the satisfaction of existing debts, and section 1548 provides that nothing contained in the preceding sections shall impeach any conveyance made in good faith, on and for a good consideration, to any person not having notice of the fraud. *Held*, that section 1548 was, in effect, a proviso restricting the provisions of the previous sections, and hence, where a grantee of property fraudulently conveyed claimed protection as a bona fide holder, the burden of proof was on him not only to show that he purchased for a valuable consideration, but that he took without notice of the grantor's fraud.

Douglas, J., dissenting.

Appeal from Superior Court, Forsyth County; Shaw, Judge.

Action by Walter O. Cox, as trustee in bankruptcy of W. H. Gilbert, against Wall & Huske. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Lindsay Patterson, L. M. Swink and A. H. Eller, for appellant. Glenn, Manly & Hendren, Watson, Buxton & Watson and E. E. Gray, for appellee.

**WALKER, J.** This action was brought by the plaintiff, who was trustee in bankruptcy of W. H. Gilbert, to set aside a conveyance by Gilbert of a stock of merchandise, which the plaintiff alleges was made in violation of the provisions of the bankrupt act against fraudulent conveyances, and also in fraud of his creditors, and which is therefore condemned both by the bankrupt law and our statutes. The evidence in the case was voluminous, and we will not attempt to set it out or review it in detail, as it will be quite sufficient for a decision of this appeal, in the view we take of the case, to refer to one of the prayers for instruction which the plaintiff requested the court to give, and which the court refused to give to the jury, and also

to the charge of the court with reference to the subject-matter of that prayer. The issues submitted to the jury, and the answers thereto, were as follows: "(1) Was the conveyance of the stock of goods from W. H. Gilbert to Wall & Huske made with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them? Yes. (2) Was the sale of the goods to Wall & Huske by Gilbert made with the intent on the part of the said Gilbert to unlawfully prefer one or more of his creditors, as alleged in the complaint? No. (3) Did Wall & Huske purchase said stock of goods in good faith, and for a present fair consideration? Yes. (4) Did the payment by Gilbert to Wall & Huske of the debt due by him to said Wall & Huske constitute an unlawful preference? No." The plaintiff in apt time tendered an issue as follows: "Did either of the defendants J. D. Wall or D. W. Huske have knowledge or notice of such fraudulent intent on the part of the defendant Gilbert?" The court refused to submit the issue, and the plaintiff excepted. At the close of the evidence, the defendants agreed that the jury should answer the first issue "Yes." With reference to the third issue submitted by the court, the plaintiff requested the court to charge the jury that, as the conveyance was admitted to have been made by Gilbert with intent to hinder, delay, and defraud his creditors, the burden was on the defendants to show not only that they purchased for value, but without notice of the said intent to defraud. The court not only refused to give this instruction, but, on the contrary, charged the jury that, even if the conveyance was made with a fraudulent intent, yet if the jury found that the defendants paid a present fair consideration for the goods, the plaintiff must show by the preponderance of the evidence that the defendants were not purchasers in good faith; that is, that the defendants either participated in Gilbert's fraudulent or unlawful intent, or that they had notice thereof at the time of the purchase.

We will not stop to consider whether there is any essential or substantial difference between the third issue submitted by the court, and the issue tendered by the plaintiffs in lieu thereof; that is, whether there is any difference, in legal contemplation, between a purchase without notice of the fraudulent intent of the debtor in conveying away his property, when a valuable consideration has been paid, and a purchase in good faith, and for a present fair consideration. We shall treat the two issues as if they are in law substantially the same.

It is provided in the bankrupt act, § 67e (Act July 1, 1898, 30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]), that fraudulent transfers of property, made by an insolvent debtor at any time within four months prior to the filing of the petition against him, which are null and void under the law of the state in which the property is situated, shall

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 809, 817.

be void, under said act, against his creditors, if he be adjudged a bankrupt, and shall pass to the trustee in bankruptcy, and all conveyances and transfers made within said time with intent to hinder, delay, or defraud creditors shall likewise be void, except as to purchasers in good faith and for a present fair consideration, and all property so conveyed shall pass to his trustee. By section 70a of the act, it is provided that the trustee of the estate of a bankrupt shall be vested by operation of law with the title to "all property transferred by him in fraud of his creditors"; and by section 70e it is provided that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred from the person to whom it was transferred, "unless he be a bona fide holder for value prior to the date of the adjudication." The plaintiff, therefore, is entitled to have the conveyance set aside, and to recover the property transferred by Gilbert with an intent admittedly fraudulent, provided any creditor of Gilbert would be entitled to the same relief. The provisions of the statute of 13 Elizabeth, with some modifications, have been enacted into law in this state, and will be found in the Code of 1883, § 1545. By that section, all conveyances made with intent to hinder, delay, or defraud creditors are declared to be utterly void and of no effect. Then follows section 1546, which contains substantially the provision of 27 Elizabeth against conveyances made with intent to defraud purchasers. By section 1547, voluntary conveyances are protected when the donor retains property sufficient and available for the satisfaction of his existing debts, but the indebtedness of the donor is declared to be evidence from which an intent to defraud may be inferred. These sections are followed by section 1548, by which it is provided as follows: "Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud." We have recited these different provisions of the law in regard to fraudulent conveyances with the view of showing the order of their enactment, and the purpose of the Legislature that section 1548 should constitute an independent provision, operating as a proviso to the other sections, and further for the purpose of showing that the matters therein stated were intended to be strictly of a defensive character, and are required to be averred and proved by the party who relies on their existence in order to validate a conveyance which the law has declared to be void because made with a fraudulent intent. The rule is of general application that matter contained in a proviso, or constituting an exception to something which precedes, must be pleaded and

proved by him who would take advantage of it. *Wadsworth v. Stewart*, 97 N. C. 116, 2 S. E. 190; *Gorman v. Bellamy*, 82 N. C. 496: When a deed is made with a fraudulent intent, the law condemns it and pronounces it void, and it remains void, of course, until it is shown for some reason to be valid. Nothing else appearing, it is void, and he who claims under it must aver and prove whatever is necessary to sustain its validity. The burden is on the purchaser, therefore, to show, under the statute, that he purchased not only for value, but without notice.

It is said that the burden of proof, by the decisions in some other jurisdictions, does not rest on the purchaser to show anything, save that he paid a fair price, and that, this being shown, the burden is shifted, and the plaintiff must show a want of notice. We will not undertake to examine the decisions of other states, for it seems to us that it would be vain and useless to do so, as the question must be decided by the law as contained in our statutes, and as declared in the decisions of this court.

It is also suggested that the rule requiring the plaintiff to take the burden of proving notice, when the purchaser or defendant has shown that a fair consideration was paid for the property, has been laid down by this court in *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59, and that there is no authority here to the contrary. We do not think that the question was presented in the case of *Peeler v. Peeler*. That case involved the validity of a conveyance made by a husband to his wife, and the court held that, from the relation of the parties, the law raised a presumption of fraud, without any proof of fraud by the plaintiff, and that the burden was upon the wife to show that she paid value for the property conveyed to her by her husband, and when she had done this the burden shifted to the plaintiff, not to show that she purchased with notice, but to show that her husband had an actual intent to defraud. There was not an exception in the case that related to the burden of proof, nor does the court refer to it in its opinion. It appears from the charge to the jury, which is set out on page 629, 109 N. C., 14 S. E. 59, that the burden was placed upon the defendant, and the judgment of the court below was affirmed. The case is not in point, and we think that there are authorities in this state which state the rule under our statute to be that the burden is upon the purchaser to prove not only a valuable consideration, but want of notice. In *Young v. Lathrop*, 67 N. C. 63, 12 Am. Rep. 603, the court held that section 1548 was a proviso to the preceding sections of the chapter; and *Pearson, C. J.*, in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to



supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser by carrying it back to the donor, and claiming the title from him, and thus prevent the title of the first purchaser from being 'impeached and made void.' Page 72, 67 N. C., 12 Am. Rep. 603. This shows that the court was of the opinion that by section 1548 the purchaser is required to aver and prove affirmatively that he comes within the terms of section 1548, in order to take his case out of the operation of the preceding sections. Why should this not be so? It is conceded that he must show that he bought for value, but the statute provides not only that he must have bought for value, but also without notice, and makes both a valuable consideration and want of notice essential to the validity of his title. If, therefore, he is required to prove one of the essential elements of a good title as against the creditor who has shown that the deed was void because it was fraudulent, why not the other? It will not do to say that the law will not impute wrong or evil to any one, and will not, therefore, presume that his purchase was not bona fide, in the absence of proof to the contrary, because this would contravene the express provision of the statute, which declares that the deed shall be utterly void and of no effect unless it appears that the title had been acquired by a bona fide purchaser for value, and without notice of the fraud. In the original statute of 13 Elizabeth, and in our act of 1715, what is now section 1548 of the Code of 1883, was a proviso to the preceding sections of those statutes in regard to fraudulent conveyances. In *Elgenbrun v. Smith*, 98 N. C. 215, 4 S. E. 126, this court says: "The rule is that the purchaser, knowing of the judgment, must purchase with the view and purpose to defeat the creditor's execution; and, if he does it with that purpose, it is fraudulent, notwithstanding he may give a full price. The question of fraud depends upon the motive. The purchase must be bona fide as well as upon good consideration. This was the rule as declared by Lord Mansfield upon repeated occasions." In *Tredwell v. Graham*, 88 N. C. 214, this court, through Ruffin, J., says: "As said by Pearson, C. J., in *Cansler v. Cobb*, 77 N. C. 30, when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of the fraudulent intent on the part of his grantor." In *Davis v. Council*, 92 N. C. 730, it is said by the court, through Smith, C. J.: "The proposition itself is an imperfect statement of the principle of law, as it omits the material qualification that such purchaser should not have had notice of the fraudulent character of the title of the party from whom he derives his." Citing Code 1883, § 1548. In *Odum v. Riddick*, 104 N. C. 521, 10 S. E. 606, 7 L. R. A. 118, 17 Am. St. Rep. 686, it is said that "a purchaser

for value from one whose deed is declared by the jury to be fraudulent and void gets a good title, if he has no notice of the fraud in his vendor's deed." Bigelow, referring to this subject, says: "But it may still be thought necessary to inquire whether the plaintiff himself has really sustained the burden of proof, so as to require the defendant to come to the support of his defense, by merely showing fraud. It may be asked if the plaintiff ought not to go further, and, though he has made a case of fraud in the grantor, offer some definite evidence of notice, or, what for the present purpose is the same thing, that the conveyance to the defendant was voluntary. The answer of the authorities, though not without here and there a discordant note, is that evidence of the fraud is enough, and this whether the case be one of fraud on creditors, or fraud on a vendor. Such is the better answer in those states in which, in cases of fraud upon creditors, notice to the purchaser is sufficient to defeat his title." 1 Big. Fraud, p. 131.

But we think the question is directly passed upon and settled in two cases by this court. In *Saunders v. Lee*, 101 N. C. 7, 7 S. E. 592, the court says: "In *Gahee v. Sneed*, 21 N. C. 833, it is held that, when a purchaser from a fraudulent grantee seeks relief on the ground that he is an innocent purchaser without notice, he must deny notice, and so he must in an answer when he sets up the same defense to the bill of an impeaching creditor;" and *Gaston, J.*, delivering the opinion, after thus stating the rule, adds: "The want of notice is an essential part of his equity in the one case, and of his defense in the other, and it is a general rule in pleading that whatever is essential to the right of the party must be averred by him." It would appear from these cases that whatever must exist in order to protect the title must be averred and proved by him who holds that title. The burden is with him. But not so when it is sought to convert one into a trustee because he bought with notice. In the former case the title is deemed to be bad until it is shown to be good. In the latter case the title is presumed to be good until it is shown to be bad by him who would assail it. In *Wade v. Saunders*, 70 N. C. 275, Pearson, C. J., for the court, says: "The finding of the jury 'that the deed executed by Aaron Saunders to his son Jesse Saunders was not bona fide, but was fraudulent and done with purpose to defraud his creditors,' disposes of the other points made in the case on the part of the defendants; for how can Romulus F. Saunders, who claims under Jesse, the fraudulent donee, stand upon fairer ground than he does, except as a purchaser for valuable consideration, and without notice of the fraud attempted to be done by the said Jesse and his father, the defendant Aaron? There was no evidence of his being an innocent purchaser." In the same case (plaintiff's appeal), page 279, Pearson, C. J., for the court,

says: "We have not been able to see the force of his honor's reasoning in regard to the legal effect of the two deeds of Jesse to Romulus Saunders, or how the legal effect of the deeds could be at all affected by the fact that the 'existence of this *prima facie* title had been brought to the notice of the court by the plaintiffs themselves.' Had the plaintiffs demanded judgment that these two deeds be canceled in order to remove a cloud from the title, then Romulus F. Saunders would have been a necessary party; and, although the deed from Aaron to Jesse was deemed void, still Romulus would be allowed to protect his title by showing that he was a bona fide purchaser for valuable consideration, without notice of the fraud that vitiates the deed to Jesse, but the onus probandi would have been on him, and *prima facie* his title would be affected by the same infirmity."

The plea that the defendant is a purchaser for value and without notice is in the nature of a plea of confession and avoidance, and the matter in avoidance is to be proved by the party pleading it. If it be said that the purchaser in that case will be required to prove a negative, the answer is that, though somewhat negative in form, it is an affirmative plea in substance; and, besides, it is peculiarly within the purchaser's knowledge whether he had notice, or not, of the fraud, and he can now testify in his own behalf. We think this view of the case is sustained by authority. In *Boone v. Chiles*, 10 Pet. 210, it is said: "But still this will not be done on mere averment or allegation. The protection of such bona fide purchaser is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity arising from the payment of the money, and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill. A new case is presented, not responsive to the bill, but one founded on a right and title operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. It must be established affirmatively by the defendant, independently of his oath. \* \* \* Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice. The case stated must be made out. Evidence will not be permitted to be given of any other matter not set out." In *Jewett v. Palmer*, 7 Johns. Ch. 65, 11 Am. Dec. 401, the court lays down the following rule: "To support the plea of a bona fide purchaser without notice, the defendant must aver and prove not only that he had no notice of the plaintiff's rights before his purchase, but that he had actually paid the money before such notice." In *Weber v. Rothchild*, 15 Or. 390, 391, 15

Pac. 653, 3 Am. St. Rep. 162, it is said: "Here the defendant, Rothchild, has alleged facts in one part of his answer tending to show that he is a bona fide purchaser for value, without notice of this property, but he has offered no evidence whatever on those issues. The plea of a bona fide purchaser for value, as here alleged, is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it. Another rule of law, equally elementary, which is frequently applied in such cases, is that, when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact." The case just cited quotes with approval *Tredwell v. Graham*, 88 N. C. 208. In *Young v. Schofield*, 132 Mo. 663, 34 S. W. 499, it is said: "Inasmuch as the averment or defense of being 'an innocent purchaser' is an affirmative allegation or plea, so must the evidence offered in its support be of the like nature. As the allegation must be affirmatively pleaded, so, also, must it affirmatively be proved. The onus lies on the pleader." In *Edwards v. Ry. Co.*, 82 Mo. App. 101, the court says: "A question is made here as to where the burden of proof was on the question of the plaintiff's being an innocent purchaser without notice of the prior unrecorded deed. Ordinarily the burden would be on the party whose case depends on his innocence and lack of notice. Here the plaintiff's claim of title being by a subsequent deed is invalid, unless he can establish that he was an innocent purchaser."

We do not cite these authorities as controlling upon us in the interpretation of our statute, but as stating and applying the general rule in regard to pleading and proof, that he who would avail himself of a fact which is necessary to protect his right or title must aver and prove the fact. The solution of this question depends somewhat upon the phraseology of the statute against fraudulent conveyances, and the decisions of the courts of other states and any rule which may be supposed to have prevailed at common law cannot be safely followed, as our statute is not in all respects like the statutes of other states, or in strict accordance with the common-law principle. The rules of evidence, including the burden of proof, to be applied in the trial of a case, are a part of the law of the remedy, and will be supplied by the *lex fori*, especially when the cause of action is founded upon a local statute. We must follow our own decisions upon the subject. In the case of *Jones v. Simpson*, 116 U. S. 615, 6 Sup. Ct. 538, 29 L. Ed. 742, to which we have been referred, the court followed, as it was bound to do, the decisions of the Supreme Court of Kansas in construing the statute of that state, which by its very

terms implied that the burden of proof should rest upon the creditor or the party attacking the conveyance. The court was not called upon to state the rule as to the burden of proof, except as it had been settled by the courts of that state in construing its statutes. In *Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374, what is said by the court with reference to the burden of proof does not relate to the notice of the fraud, but to the fraud itself; and, of course, the burden to establish the latter was placed upon the contesting creditor. In *Reiger v. Davis*, 67 N. C. 185, *Lassiter v. Davis*, 64 N. C. 498, and the class of cases of which they are the leading representatives, the question as to the burden of proof was not involved. The court decides in those cases merely that the fraudulent conveyance is void unless it appears that the vendee was not a party to the fraud, or purchased without any notice of the fraudulent intent. *Deverles v. Phillips*, 63 N. C. 53.

There was error in placing the burden of proof as to notice upon the plaintiff, for which a new trial is awarded. New trial.

DOUGLAS, J. (dissenting). From reason and authority, it seems to me that the learned judge below was right in saying that, when the purchaser has shown that he has paid a fair price for the goods, the burden then shifts back to the plaintiff to show that the purchaser had knowledge of the fraudulent intent of the vendor. The mere fact that a fair price is paid is in itself the strongest evidence of good faith. It may be said that the vendee knows whether or not he knew of the vendor's fraudulent intent, and that he can disprove such knowledge by his own testimony. This is the only way such a negative can be proved, but is it any easier for the vendee to prove his want of knowledge, than for the plaintiff to prove his knowledge? That the vendee had knowledge might be proved by one witness, but a thousand witnesses could not prove that he had no knowledge. All that they could prove would be that they did not give him any information to put him on notice, and that he had no knowledge as far as they knew. Suppose the vendee should die; ought the widow and orphan child to be deprived of the property, the full value of which had been honestly paid, on the unsupported admission of a self-confessed swindler that he had sold the property with the intent to thereafter fraudulently misapply the proceeds? Who could swear, of his own knowledge, that the deceased vendee had no knowledge of such intent? Do we not effectually deprive a man of his right when we deprive him of all opportunity of asserting that right? It may be said again that "hard cases are the quicksands of the law," but that celebrated expression of Chief Justice Pearson is no authority for creating quicksands. The few remaining hours of the term give me no time for the examination

and citation of authorities, and so I must content myself with a simple statement of my personal views.

(132 N. C. 748)

**MORGAN et al. v. BOSTIC et al.**

(Supreme Court of North Carolina. June 6, 1903.)

**FRAUDULENT CONVEYANCES — BURDEN OF PROOF — LIS PENDENS — PLEADINGS — EFFECT — PURCHASE BEFORE COMPLAINT FILED.**

1. The burden of proving that a conveyance was made with intent to hinder, delay, or defeat creditors of the grantor was on plaintiff, suing to set it aside.

2. Code 1883, § 1545, provides that conveyances made to defraud creditors shall be absolutely void; and section 1548 provides that the preceding section shall not avoid conveyances made in good faith, on a good consideration, to any person not having notice of the fraud. *Held* that, where a purchaser of land, conveyed in fraud of creditors, claimed to be a bona fide purchaser without notice, the burden of proof of such fact was on him.

3. Code 1883, § 229, provides that, in an action affecting the title to real estate, the plaintiff may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby, and from the time of filing, only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer. *Held* that, where the action is pending in the county in which the land is situated, if the pleadings describe the land with reasonable certainty, and contain the names of the parties, the object of the action, etc., the filing thereof constitutes a sufficient lis pendens to impart notice to subsequent purchasers or incumbrancers.

4. Code 1883, § 229, provides that, in an action affecting title to real property, the plaintiff at the time of filing the complaint, or at any time thereafter, may file a lis pendens, and that from the time of filing, only, shall the pendency of the action be constructive notice to the purchaser or incumbrancer of the property affected thereby. *Held* that, since a lis pendens filed prior to the filing of the complaint becomes operative only on the filing of the complaint, a purchaser of the property, without knowledge of the action, after the filing of the lis pendens, but before the filing of the complaint, was not charged with constructive notice thereby.

Appeal from Superior Court, Buncombe County; Council, Judge.

Action by J. P. Morgan and others against J. B. Bostic and others. From a judgment in favor of plaintiffs, defendants appeal. Judgment reversed as to defendant C. H. Yeatman.

Frank Carter and T. H. Cobb, for appellants. Merrimon & Merrimon and Tucker & Murphy, for appellees.

CONNOR, J. This action was brought by the plaintiffs, creditors of the defendant J. B. Bostic, against him and the defendants Miller and Weaver, for the purpose of having the two last named declared trustees for the benefit of plaintiffs in respect to the title of certain real estate. Summons was issued March

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 798, 805.

3, 1898, and served on defendants the same day. The plaintiffs the same day filed in the office of the clerk of the superior court of Buncombe county a notice of lis pendens, in proper form, containing a sufficient description of the land sought to be subjected, and the purpose for which the action was brought; the land being situate in Buncombe county. The original complaint was filed in the office of the clerk of the superior court of Buncombe county February 15, 1899. An answer was filed by the defendants, denying the material allegations of the complaint. At April term, 1902, of said court, plaintiffs secured an order making C. H. Yeatman a party defendant. Summons was duly issued and served upon Yeatman May 16, 1902. Plaintiffs filed an amended complaint, alleging that the defendant Bostic was the beneficial owner of the land described in the complaint, the legal title being in one C. S. Baylis, of New York; that Bostic became entitled to the said land in a trade made between Baylis and himself, but, being insolvent, the legal title remained in Baylis, with the understanding that he was to convey the same to such person as Bostic might direct; that this arrangement was made by the said Bostic with intent to prevent his creditors from reaching the said land, to hinder, delay, and defraud them in the collection of their debts; that the said land was worth about \$5,000; that thereafter the said Bostic entered into an agreement with the defendants Weaver and Miller, in the name of the J. B. Bostic Company, a corporation organized by the said Bostic, by which he agreed to sell the said land to the defendants Weaver and Miller for \$1,250, and to have a deed made therefor by the said Baylis, and with the further agreement that, after the \$1,250 was paid back to Weaver and Miller from the sale of the land, the balance of the proceeds would be equally divided between the Bostic Company and Weaver and Miller; that pursuant to said arrangement the said Baylis conveyed the said land, known as the "Bede Smith Farm," to said defendants; that this arrangement was made and the deed executed with intent to hinder, delay, defeat, and defraud the creditors of Bostic, and the defendants Weaver and Miller had notice thereof; that thereafter, on the 18th of October, 1898, the defendants Weaver and Miller conveyed the land to C. H. Yeatman for the consideration as recited in the deed of \$3,000, and Yeatman had notice at the time of the execution of the deed of the pendency of said action by the lis pendens filed therein; that on the same day, to wit, October 18, 1898, the said Yeatman conveyed to Weaver and Miller certain lots in the city of Asheville for the recited consideration of \$3,000. The plaintiffs allege that, by reason of these facts, they were entitled to have Yeatman declared a trustee for their benefit. The defendants denied the material allegations in the complaint, and, for a further defense, alleged

that the defendants Weaver and Miller purchased the land from the J. B. Bostic Company, a corporation, and that the deed was made to them by Baylis; that at the time of the purchase neither of them knew that Bostic, individually, had any interest in the land, and they, and all of them, denied expressly that he had any such interest. They further denied that the defendants, or either of them, had any knowledge of the insolvency of Bostic; that their purchase of the land was in good faith and for full value.

There was testimony tending to show that, some time during the year 1897, Bostic, being insolvent, negotiated a trade with Baylis, and, as a part of the consideration and pay for his services in the matter, he was to have the title to the Bede Smith farm; that the title was to remain in Baylis, to be conveyed to such person as Bostic might name. It further appeared that some time during the year 1895 Bostic secured a charter for and organized a corporation under the name of J. B. Bostic Co.; that 100 shares of stock were subscribed for, of which 15 were taken by J. B. Bostic, trustee for G. P. Bostic, 35 by B. P. Bostic, and 30 by B. P. Bostic; that J. B. Bostic was elected manager of the corporation, at a salary of \$1,800 per year; that the contract with Baylis was made by the J. B. Bostic Company, and the contract with Weaver and Miller was made by the said company; that the defendant Bostic was the manager of the corporation, and sold the land to the defendants Weaver and Miller, who paid \$1,250 therefor. There was evidence tending to show that the value of the land was in excess of this amount. The defendant Yeatman swore that he had no knowledge or notice of the pendency of this suit at the time he bought the land and took title thereto. The plaintiffs contended that the organization of the J. B. Bostic Company was had with the intent to cover up the property of J. B. Bostic, and remove it from the reach of his creditors, and that it was a fraudulent contrivance for that purpose. The defendants denied that they had any notice or knowledge thereof, and allege that they are bona fide purchasers for value.

The court submitted the following issues to the jury: "(1) Did the defendant J. B. Bostic cause to be executed to his codefendants, Weaver and Miller, the deed set out in the complaint? Yes. (2) Did the J. B. Bostic Company cause to be executed to the defendants Weaver and Miller the deed set out in the complaint? —. (3) Was the deed executed with the intent to hinder, delay, defeat, and defraud the creditors of J. B. Bostic? Yes. (4) Were the defendants Weaver and Miller bona fide purchasers of the land described in said deed, for value, and without notice of or participation in any fraud, if there was any, on the part of J. B. Bostic, or J. B. Bostic Company, to hinder, delay, defeat, and defraud the creditors of said J. B. Bostic? No."

Upon the coming in of the verdict, the court rendered judgment declaring that the defendants Weaver and Miller took title to the land in trust for the creditors of Bostic, and that Yeatman purchased with notice of the pendency of this action, and was fixed with knowledge thereof, and held the title to the said land upon the same trust. There were numerous requests for instructions by both the plaintiff and defendant, many of them becoming immaterial by reason of the finding of the jury upon the first issue. Among other instructions given the jury, his honor charged them, at the request of the defendants, "that the burden of proof is upon the plaintiffs to satisfy the jury that J. B. Bostic caused C. S. Baylis to execute the deed described in the complaint with intent to hinder, delay, defeat, and defraud the creditors of the said J. B. Bostic," and, unless they did so satisfy them, they should answer the third issue "No." He also charged the jury that the burden of the first issue was upon the plaintiffs. Upon the fourth issue he charged the jury that the burden was upon the defendants Weaver and Miller to show that at the time they purchased this land they did it in good faith, without notice of any purpose of Bostic to hinder, delay, defeat, and defraud his creditors, and that they purchased it for value; that if they did satisfy the jury that, at the time they purchased the land, they knew of it and its condition, and that they exercised their best judgment in ascertaining what the land was really worth, and after doing so they considered it not worth more than \$1,250, allowing to themselves what would be a reasonable margin to be made upon the land as an investment, they would be purchasers for value, within the meaning of the law; that, in order to protect themselves against a prior donor or creditor, they must prove a fair consideration; that the court adopted in this connection the language used by the Supreme Court in *Worthy v. Caddell*, 76 N. C. 82, which had been read to the jury and commented upon.

We are of opinion that his honor correctly instructed the jury in regard to the burden of proof. It is well established by decisions of this court that, if one executes a deed or enters into an arrangement for the purpose of defrauding his creditors, the grantee will take the title to the land conveyed subject to the claims of the creditors of his grantor, unless he shall show by a preponderance of evidence that he purchased for full value, and without notice of the fraudulent purpose and intent on the part of his grantor. Section 1545 of the Code of 1883 declares "that all deeds and other conveyances which might be contrived and devised of fraud with the purpose to delay, hinder and defraud creditors and others of their just and lawful actions and debts, shall be deemed and taken to be utterly void and of no effect." Section 1548, Code 1883, declares that nothing contained in the preceding section shall be con-

strued to impeach or make void any conveyance bona fide made, and upon and for good consideration, to any person not having notice of such fraud. This section has been frequently construed, and it would seem to be settled that, if one would take advantage of the provision in favor of bona fide purchasers for value without notice, he must allege and prove such fact as will bring him within the exception. In *Wade v. Saunders*, 70 N. C. 270, Pearson, C. J., says: "The finding of the jury 'that the deed executed by Aaron Saunders to his son Jesse Saunders was not bona fide, but was fraudulent and done with the purpose to defraud his creditors,' disposes of the other points made in the case on the part of the defendants, for how can Romulus F. Saunders, who claims under Jesse, the fraudulent donee, stand upon fairer ground than he does, except as a purchaser for valuable consideration, and without notice of the fraud attempted to be done by the said Jesse and his father, the defendant Aaron? There was no evidence of his being an innocent purchaser." In the same case, upon the appeal by the plaintiffs, the Chief Justice says: "Romulus would be allowed to protect his title by showing that he was a bona fide purchaser for valuable consideration, without notice of the fraud which vitiates the deed to Jesse, but the onus probandi would be on him, and prima facie his title would be affected by the same infirmity." In *Tredwell v. Graham*, 88 N. C. 208, Ruffin, J., says: "When a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor." *Saunders v. Lee*, 101 N. C. 3, 7 S. E. 590. See *Cox v. Wall & Huske* (at this term) 44 S. E. 635.

We think that, upon the whole record, his honor's instructions to the jury are sustained by the authorities.

There is, however, a question presented in the appeal in which we concur with the defendants. There is no evidence that Yeatman had any other notice than such as was given by the filing of the *lis pendens*. No issue was submitted to the jury in that respect, and we do not think it necessary that an issue should have been submitted. The facts in reference to Yeatman's connection with the transaction are undisputed, and present the question, for the first time in this court, whether *lis pendens* should be filed at the time of filing the complaint? Code 1883, § 229, provides: "In an action affecting the title to real property, the plaintiff—at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer, or at any

time afterwards, if the same be intended to affect real property—may file with the clerk of each county, in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby.

\* \* \* From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby." This section was first considered in *Todd v. Outlaw*, 79 N. C. 235, in which Bynum, J., says: "The defendant again insists that the plaintiffs had notice by *lis pendens*, in that they purchased during the pendency of an action by Bond against Vernoy to foreclose the mortgage upon the land now in controversy. The principle of *lis pendens* is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit, duly prosecuted, is notice to a purchaser, so as to bind his interest.

\* \* \* But the law of *lis pendens* has been greatly modified and restricted by the Code of Civil Procedure, § 90 (section 229). That section provides that, in an action affecting the title to real property, the plaintiff, at the time of filing his complaint, or any time afterwards," etc. Referring to the decisions in *Badger v. Daniel*, 77 N. C. 251, and *Rollins v. Henry*, 78 N. C. 342, the learned justice said that, while he is of the opinion that the policy of the law would be better carried out by following the English and New York construction, this court has adopted a different construction by its decisions, from which he does not feel at liberty to dissent. It is there held that, when the action is pending in the county where the property is situated, it has the force and effect of *lis pendens*, and dispenses with the statutory requirements, or, rather, that the statute does not apply to such cases.

There can be no question that if the plaintiffs had filed their complaint, setting forth a description of the property and the purpose of the action, at the time of the issuing of the summons, or at any time prior to the purchase by Yeatman, the pendency of the action would have been notice to the world, and he would have taken title subject to the decree made in the cause. *Baird v. Baird*, 62 N. C. 317; *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455, in which Smith, C. J. says, "No change in the rule is brought about by the statute prescribing how notice of a *lis pendens* shall be given (Code 1883, § 229), when the transaction is in one and the same county, as in the present case, and notice is furnished in the record in the pending action." In *Spencer v. Credle*, 102 N. C. 68, 78, 8 S. E. 901, Avery, J., says: "While strangers to the record are not affected with constructive notice of the pendency of an action involving the title to land lying in a county other than that in which the action

is pending, unless the notice required under section 229 of the Code has been given, even purchasers for a valuable consideration are affected with notice of an action brought in the county where the land lies, if the pleadings describe it with reasonable certainty, and take title subject to the final decree rendered in the action. A different rule has been adopted in some other states where the same statute has been passed, but the law has been settled in this state by the cases of *Todd v. Outlaw*, 79 N. C. 235, and *Badger v. Daniel*, 77 N. C. 251." In *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868, Shepherd, J., discusses the construction of section 229, and the authorities both in this and other states, saying: "We are of the opinion, however, that as to real property there is but one rule of *lis pendens* in North Carolina, and that the provisions of the Code of 1883, § 229, are a substitute for the common-law rule. When the court held in the cases cited that it was not necessary to file a formal notice of *lis pendens* when the action was pending in the county in which the land was situated, we do not understand that it intimated that two rules of *lis pendens*, varying in their extent and operation, prevailed in this state. \* \* \* This consistency can be secured by holding, as we do, that where the action is brought in the county where the land is situated, and the pleadings contain 'the names of the parties, the object of the action, and the description of the property to be affected in that county,' this is a substantial compliance with Code 1883, § 229, as to the filing of notice, and puts in operation all of the provisions of the statute. There is no incongruity in thus holding, as the statute simply provides that the notice shall be filed with the clerk, and the place of filing would naturally be with the pleadings in the action." All of these cases hold that, if the plaintiff would bind purchasers *pendente lite* of lands lying in other counties than that in which the suit is pending, he must file a notice of *lis pendens* in each of such counties. The language of the statute is explicit in requiring such notice to be filed "at the time of filing the complaint, or at any time afterwards"; this court holding that the filing of the complaint, containing sufficient description of the property, operates as a *lis pendens* in respect to land lying in the county in which the action is pending. In *Arrington v. Arrington*, 114 N. C. 151, 159, 19 S. E. 351, Shepherd, C. J., says: "The rule of *lis pendens*, while founded upon principles of public policy, and absolutely necessary to give effect to the decrees of the courts, is nevertheless in many instances very harsh in its operation, and one who relies upon it to defeat a bona fide purchaser must understand that his case is *strictissimi juris*." For a long time, suits in equity were deemed commenced, for the purpose of affecting purchasers *pendente lite*, from the issuing of the subpoena. This rule was so harsh and un-

just in its operation that "in the year 1705 it was provided by an English statute (4 Anne, c. 16, § 22) that no subpoena should issue out of a court of equity until after bill filed, except in case of bill for injunctions to stay waste, or to stay suits at law commenced. Since that enactment, the general rule, both in law and in equity, in the absence of notice of pendency, or equivalent statutes declaring a different date, is that the facts necessary to notice by *lis pendens* must be of record by the filing of the bill, petition, complaint, or equivalent pleading, and jurisdiction obtained by service of process over the defendant from whom the interest is acquired *pendente lite*, before *lis pendens* will commence." 21 Am. & Eng. Enc. 609, 610. "A notice filed before the filing of the complaint will become operative when the complaint is filed, and is an absolute nullity only during the intervening period." *Id.* 615. In *Stern v. O'Connell*, 85 N. Y. 104, Hunt, J., traces the amendments to the statutes in New York. Prior to 1839 the *lis pendens* could be filed at the commencement of the action. By an amendment made in that year, the time of filing was changed to the time of filing the complaint, as in our Code 1883, § 229. The court says: "So marked a change cannot be disregarded. It is evident that the Legislature intended to prescribe a different time or a different occurrence as the regulating point for filing the notice." *Bennett on Lis Pendens*, § 72.

The plaintiffs do not charge that Yeatman had any other notice than that afforded by the filing of the *lis pendens* at the time the summons issued. They concede that he is a purchaser for value, averring that he conveyed to the defendants Weaver and Miller other real estate as a part of the consideration. Yeatman swears that, at the time he purchased and took title, he had no notice or knowledge of the pendency of the action, or infirmity in the title of his grantors. We are therefore of the opinion that he, having purchased prior to the filing of the complaint, is not affected by the *lis pendens*. The judgment of the court below is erroneous in declaring that he holds the title to the land subject to any trust which attached to it in the hands of Weaver and Miller. We do not decide upon the suggestion in plaintiffs' brief that they may follow the land conveyed to Weaver and Miller by Yeatman. The judgment, so far as it affects the defendant Yeatman, must be reversed.

The parties will take such final action in the case as they may be advised. It was not necessary for the defendant Yeatman to ask for any issue in regard to the *lis pendens*. The facts appear in the record. The plaintiffs sought to charge the land in his hands by the *lis pendens*. As we have seen, not having complied with the statute, they cannot do so.

There is error.

(132 N. C. 959)

SMITH v. INGRAM et al.

(Supreme Court of North Carolina. June 11, 1903.)

HUSBAND AND WIFE—CONVEYANCE BY WIFE  
—COVENANT OF WARRANTY—VALIDITY  
—WHAT LAW GOVERNS—ESTOPPEL.

1. The validity of a covenant of warranty in a deed executed by a married woman in South Carolina, conveying land in North Carolina, when considered for the purpose of determining whether it creates an estoppel against the covenantor to claim the land conveyed, must be governed by the law of North Carolina.

2. A married woman, executing in South Carolina a deed with covenant of warranty, conveying her land in North Carolina, in the manner prescribed by the law of South Carolina, but not in compliance with the law of North Carolina, is not estopped from recovering the land.

3. A covenant of warranty in a void deed is of no avail to a remote grantee who has received no assignment thereof.

4. A married woman who permits a grantee under a void deed from her and subsequent grantees to take possession of the land, and make valuable improvements thereon, is not estopped from recovering the land.

Clark, C. J., dissenting.

On petition to rehear. Petition dismissed.

For former opinion, see 40 S. E. 984.

Adams, Jérôme & Armfield, for appellants.  
McIver & Spence, Douglass & Simms, and J. A. Spence, for appellee.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at February term, 1902, and is reported in 130 N. C. 100, 40 S. E. 984.

On the 21st day of January, 1878, the plaintiff, being the owner of the land in controversy, which is situated in this state, joined with her husband in the execution of an unsealed paper writing, by which they professed to convey the said land for a consideration received by her to one Lindsay Hursey, who afterwards conveyed to the defendant A. Leach. The other defendants claim their shares in the land by mesne conveyances from Leach. At the time of executing the paper writing to Hursey, the plaintiff and her husband were citizens of the state of South Carolina, and were domiciled in that state, and Hursey was a citizen of this state, and domiciled therein. The paper writing was proved by witnesses, there being no acknowledgment of it, or privy examination of the wife. There was a general covenant of warranty in the deed. By the Constitution and laws of South Carolina in force at the time the paper writing was executed, a married woman could purchase and convey real property as if she were unmarried, and her deed to the same could be proved by witnesses without privy examination, and, when thus proved and registered, was binding upon her. The plaintiff's husband died since this suit was brought.

It may be assumed that, if the lands had

¶ 4. See *Husband and Wife*, vol. 24, Cent. Dig. § 722.



been situated in South Carolina, the paper writing executed by the plaintiff to Lindsay Hursey was valid and effectual for the purpose of passing the land to the latter, and, further, that the plaintiff, according to the laws of that state, would be bound by the covenant of warranty. But as the land is situated in this state, the transfer of it must be governed by our law. It seems to be conceded that the title to the land did not pass by the mere force and operation of the deed as a conveyance, but the defendants contend that the plaintiff is estopped by the deed, and especially by the covenant of warranty, to claim the land, as her covenant is valid and binding on her under the laws of South Carolina, where she resided and had her domicile at the time she entered into it.

There is a marked difference between the validity of a covenant of warranty where the question is whether the covenantor is liable in damages for a breach of the covenant, treated as a mere personal contract, and its validity for the purpose of creating an estoppel against the covenantor to claim the land which he has sold and conveyed, and the title to which he has warranted. In the one case the remedy is by an action on the covenant, which sounds only in damages; and in the other the covenant is considered, not as passing the estate, if we speak with technical accuracy, but as concluding the party who has affirmed that he had the title at the time of the conveyance, and has agreed to warrant and defend it, from afterwards disputing that fact, or from asserting a title in opposition to the one he professed to convey; but, while the estoppel may not have the legal effect of transferring the title to the covenantor, it indirectly accomplishes that result. Whatever may be the rule with reference to the law governing the validity of a covenant, considered as a personal contract, for the breach of which damages may be recovered—whether it is the law of the place where the property with reference to which the covenant is made is situated, or the law of the place of the contract—we need not decide in this case, for it is sufficient for the purpose of this appeal to hold, as we must, that, if the covenant is to be regarded as an estoppel affecting the title, it must be governed by the law of the state where the property is situated, and in this case by the law of this state. *Minor's Conflict of Laws*, § 185; *Riley v. Burroughs*, 41 Neb. 296, 59 N. W. 929; *Hill v. Shannon*, 68 Ind. 470; *Tillotson v. Pritchard* (Vt.) 14 Atl. 302, 6 Am. St. Rep. 95. Referring to this very question of the effect of a covenant of warranty, the court in *Succession of Larendon*, 39 La. Ann. 952, 3 South. 219, says: "The rights and obligations arising under acts passed in one state, to be executed in another, respecting the transfer of real estate in the latter, are regulated, in point of form, substance, and validity, by the laws of the state in which such acts are to have effect." The rule is said by the court to

apply also to the determination of liability upon the covenant for damages.

If the question of estoppel is to be decided by the law of this state, as we hold it must necessarily be, it follows that it cannot have the effect, either directly by passing the estate, or indirectly by concluding the plaintiff, of preventing her recovery in this case. A ruling which would give to the covenant the force and effect the defendants contend it should have, would be in flagrant violation of the spirit and letter of our law in regard to the transfer of real property by married women. We will always, in comity, enforce the laws of another state, when the rights of the parties should be determined according to the place where the contract was made, or where the transactions out of which those rights arose took place; but we cannot enforce the laws of a foreign jurisdiction when they conflict with our own laws in a matter concerning property situated in this state. If we should say that the covenant works an estoppel which concludes the plaintiff, and thereby divests her of the title to the property, we would decide, in effect, that she had done indirectly what she could not do directly. "The wife cannot subject her separate real estate, or any interest therein, to any lien, except by deed in which the husband joins, with privity examination as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her doing directly." *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. In *Drury v. Foster*, 2 Wall. 34, 17 L. Ed. 780, the court says: "To permit an estoppel to operate against her [a married woman] would be a virtual repeal of the statute which extends to her this protection, and also a denial of the disability of the common law, that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyance of the real property of feme covert."

The defendants cannot avail themselves of the covenant, because it was not made directly with them, but with Hursey, and there has been no assignment of the covenant by him to them. It is true that a covenant of warranty is in the nature of a real covenant, and runs with the land, even though the word "assigns" is not mentioned therein. *Wiggins v. Pender* (at this term) 44 S. E. 362. But the defendants can take nothing by this principle, as the deed of the plaintiff was absolutely void, and the land, or more properly speaking, the title or estate, did not pass; and, of course, the covenant cannot be said to have passed to the defendant with the land. The covenant of warranty is incident to the estate, and, as the defendants acquired no estate, it follows that they derived no advantage in any way from the covenant. *Kercheval v. Triplett*, 1 A. K. Marsh. 493. If it is a binding covenant at all, it is nothing more than a covenant in gross, or one detached from the land, and could not have



passed to the defendants except by an assignment. When the deed of a married woman falls as a conveyance because of the nonjoinder of her husband, or for any other reason, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground for recovery in any subsequent controversy. *Herman on Estoppel*, § 581. In *Lowell v. Daniels*, 68 Mass. 168, 61 Am. Dec. 448, the court, discussing this question, says: "She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seised in her own right, and had full power to convey, such covenant would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate, or that of the husband and children." See, also, *Pierce v. Chase*, 108 Mass. 254. In *Harden v. Darwin*, 77 Ala. 481, it is said by the court: "It has been uniformly held that a married woman is not estopped from asserting the invalidity of a conveyance of her property, not executed in the mode required by the statute, though she has received a valuable consideration, and her vendee has been let into possession, and that a court of equity will not enforce it against her, as an agreement to convey." *Railroad v. Stephens*, 96 Ky. 401, 29 S. W. 14, 49 Am. St. Rep. 303. The covenant binds the covenantor to warrant and defend the title which passes by the deed, and to answer in damages if the title fail or prove defective. It relates to the title or estate of the covenantor, which he undertakes to convey, and not to the validity of the deed by which it is transferred. The purchaser is presumed to know that a married woman is not bound by a deed without her privy examination, and, if he takes a conveyance imperfectly executed or acknowledged by her, it is his own misfortune, if not his fault. *Towles v. Fisher*, 77 N. C. 437. We think the principles laid down in this court in *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706, are conclusive against the defendants in this case. While the precise question we are discussing was not involved in that case, it affords a perfect analogy for our guidance, and is sufficient in all respects to sustain our decision on this rehearing. In the case of *Collins v. Benbury*, 25 N. C. 283, 38 Am. Dec. 722, it was held by this court that a conveyance which failed to pass the land, and was merely void, could not operate as an estoppel, and this must needs be so.

The defendants further contend that plaintiff is estopped by her act in permitting Hursey and the defendants to take possession of the land and make valuable improvements

thereon. We have not been able to find anything in the record upon which they can base this contention, but, if there were facts sufficient for that purpose, we would be unable to agree with the defendants. A married woman is no more estopped by her acts in pais than by her covenant of warranty. This court has said that no one can reasonably rely upon the acts and representations of a married woman—at least, those which are contractual in their nature—as he must know that she is not bound thereby, and "it is only in the case of a pure tort, altogether disconnected with the contract, that an estoppel against her can operate." *Towles v. Fisher*, 77 N. C. 438; *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706; *Railroad v. McCaskill*, 94 N. C. 746.

We have examined with care the authorities to which our attention has been called, and do not think that they support the contention of the petitioners as to the estoppel arising from the covenant of warranty. We make special reference to two of them. In the case of *Railroad v. Conklin*, 29 N. Y. 587, the question as to the valid execution of the deed was not raised, but the point was whether the words of the deed were sufficient to operate as a conveyance of the property; and the court held that, if they were not, resort could be had to the covenant of warranty, as containing sufficient words for that purpose. The grantor was *sui juris*. In *Basford v. Pearson*, 39 Mass. 504, there was no reference to an estoppel, as the action was brought to recover damages for a breach of the covenant. The question in our case is not whether Mrs. Smith is liable for damages upon the covenant, but whether she is estopped from claiming the land.

We have given this case most anxious thought and consideration, not only because of the interesting and important questions involved, but because of the great hardship and apparent injustice the defendants may suffer as the result of our decision, based upon the application of fixed legal principles to their case.

Whether the defendants can have equitable relief is a question not now before us for adjudication. Such relief has been granted in a case closely resembling this in its facts and circumstances. In that case the court fully recognized the invalidity of a deed executed by a married woman, and based its decision upon the ground that the right to equitable relief, or to compensation for improvements, to the extent that they had enhanced the value of the land, did not involve the enforcement of a contract, either directly or indirectly, but simply denied to her the use and enjoyment of property for which she had paid nothing, and which she acquired by the repudiation of her deed. *Preston v. Brown*, 35 Ohio St. 18. Whether this is a correct principle, and the case just cited and others of a like tenor are in accord with

our decisions, and should be followed by us, is a question which, if it should ever arise, we will leave open for future consideration, and entirely free from any expression or even intimation of opinion by us.

However much we may regret the unfortunate situation of the defendants, we cannot grant them any relief, as the matter is now presented, without abrogating well-settled legal principles, and violating the plain provisions of our statute, the enforcement of which is obligatory upon us.

After careful examination of the case, we can find no error in the former decision of this court. Petition dismissed.

CLARK, C. J. (dissenting), refers, without repeating them, to the views expressed in the dissenting opinion at the former hearing (*Smith v. Ingram*, 130 N. C. 108-115, 40 S. E. 984), and to the opinion of the court in *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418, and *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138; also to what is said in the concurring opinion in *Vann v. Edwards*, 128 N. C. 426-435, 39 S. E. 66, and the dissent (concurring in by two members of the court) in *Williams v. Walker*, 111 N. C. 613, 16 S. E. 706. There are some decisions of this court as to the rights of married women which are hard to be reconciled with the liberal provisions of section 6, art. 10, of the Constitution, which has been owing, doubtless, to the fact that the judges who occupied this bench in the years first succeeding its adoption had been thoroughly imbued with the common-law ideas as to the incapacity of married women, and the failure of the Legislature to change the language of one or two provisions in statutes which had been passed in conformity with the former Constitution, but which are repugnant both to the spirit and the letter of the present Constitution. This has not escaped the notice of the court in *Bank v. Howell*, 118 N. C. 273, 23 S. E. 1005, *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890, and other cases, and has been discussed in the dissenting opinion in *Weathers v. Borders*, 124 N. C. 615-619, 32 S. E. 881, and *Walton v. Bristol*, 125 N. C. 426, 432, 34 S. E. 544, to which reference is made without repeating what is there said.

By chapter 78, Laws 1899, the General Assembly took married women out of the class of incompetents, and from the companionship of "infants, idiots, lunatics and convicts," in which they had been placed by the statute of limitations (Code 1883, §§ 148, 163); and a further approximation to the Constitution was made by chapter 617, p. 859, Pub. Laws 1901. *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890. The Constitution (article 10, § 6), in its terms, would take them out of the class of those non sui juris in all respects, as has been done in England, where the conception of these disabilities first arose, and in so many of the states of this Union

—among them, South Carolina, where this contract was made.

The majority of the court being of opinion that the plaintiff should recover back this land, it would seem elementary justice and equity that she should pay for the betterments placed thereon (*Thurber v. La Roque*, 105 N. C. 301), and, indeed, should render compensation for the enhanced value of the land (*Railroad v. McCaskill*, 98 N. C. 526, 4 S. E. 468; *Preston v. Brown*, 35 Ohio St. 18), though these matters are not now before us. Certainly this should be so here, for the plaintiff received the money for the land under a contract made while residing in a state where she was sui juris, and liable upon her contracts as if a feme sole. Upon her repudiation of the conveyance, she should not profit by her breach of contract, but should be held liable for the damage caused thereby, like all others who are sui juris. She sold the land, living where she had full right to do so, and received the agreed price, \$130; her husband joining in the deed. She now wishes to recover the town of Star, which has been built upon it, with all the houses built upon it, and the enhanced value given to the land, upon the technical ground that her privy examination was not taken, when, as a matter of fact, the sale was her free act and deed, and she has acquiesced in such sale since 1878, when it was made. There is not a tittle of evidence, nor any suggestion, even, that she did not understandingly and wittingly make the sale of her own will; and it was the law at the place of contract that she could make this sale even without the consent of her husband, though this was had. Should she recover the land under these circumstances, she should account for betterments and enhanced value, and receive back the land, deducting these additions, and return the \$130. *Burns v. McGregor*, 90 N. C. 222.

(122 N. C. 978)

#### LAMB v. LITTMAN.

(Supreme Court of North Carolina. June 11, 1903.)

SERVANT—INJURIES—VICE PRINCIPAL—AUTHORITY TO HIRE AND DISCHARGE—REPUTATION—EVIDENCE—HARMLESS ERROR.

1. The reputation of a man can be proved only by those who know it, and this applies equally whether it is his general reputation for truth and honesty or any special fitness for any employment for which he may be engaged.

2. The mere fact that a superintendent or boss does not have authority to hire and discharge hands does not necessarily render him a mere fellow servant, and not a vice principal.

3. In an action for injuries to a mill hand, resulting from his being pushed against machinery by defendant's superintendent, defendant testified that the machinery was cased, and other witnesses testified without objection that it was cased and uncased. Held, that plaintiff was properly permitted to testify that it

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. § 445.

was uncased, as explaining the nature of the injury with its attending circumstances.

4. Testimony as to the machinery being new or secondhand was irrelevant, but its admission did not harm defendant, it being just as dangerous to be shoved into new machinery as into old.

Appeal from Superior Court, Rowan County; Shaw, Judge.

Action by W. T. Lamb, by his next friend, against I. Littman to recover for personal injuries received by plaintiff while in defendant's employ. Judgment for plaintiff, and defendant appeals. Affirmed.

Overman & Gregory, for appellant. R. Lee Wright and B. B. Miller, for appellee.

DOUGLAS, J. Every legal question essential to the determination of this case was practically decided in the former opinion of this court, reported in 128 N. C. 361, 38 S. E. 911, 53 L. R. A. 852, which is the law of this case.

The first class of exceptions relied upon by the defendant are to such parts of the evidence and the charge as relate to the character of Burrus among mill hands. The reputation of a man can be proved only by those who know it, and this applies equally whether it is his general reputation for truth and honesty or any special fitness for any employment for which he may be engaged. Mill owners would naturally know more of his reputation as a skilled mechanic or operative, while the operatives themselves would have peculiar facilities for ascertaining his character as a boss with relation to those under him. In its former opinion this court says on page 363, 128 N. C., on page 911, 38 S. E., and 53 L. R. A. 852: "In the case now being considered there is no evidence of the unskillfulness of the boss, Burrus, but the evidence shows that he was unfit and incompetent to perform the duties of supervising children and the help under him by reason of his cruel nature and high temper, demonstrated by his treatment of the plaintiff on the day before as well as on that of the injury, which had become so well known as to establish for him a general reputation extending back for six or more years in the divers mills and towns in which he had worked. It is clear that the master would have been responsible for injuries inflicted upon the servants by him had he (the master) known of such traits of character, and it is equally as clear that he could have obtained the information had he seen fit to inquire, or, having inquired, knowingly and voluntarily assumed the responsibility in employing him and placing him in that responsible position."

The second exception was to the charge of the court relating to the doctrine of fellow servant as applied to Burrus. The effect of our former opinion upon substantially the same facts was to hold that Burrus was a vice principal. He was admittedly the superintendent or boss of the spinning room, where the plaintiff, a 10 year old boy, was employed

as a floor sweeper. The defendant contends that, as he did not have authority to hire and discharge hands, he could not be a vice principal. It is not absolutely necessary for a vice principal to have the authority to hire and discharge. In some exceptional cases the relation might exist without such power, but, in any event, the result is practically the same if it is understood that a disobedience of his orders will lead to a discharge. The mere form of requiring the boss to recommend a discharge, which will follow as a matter of course, does not change the legal effect, where there is no change in the practical result. The rule is thus stated in *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23: "The test of the question whether one in charge of other servants is to be regarded as a fellow servant or a middleman is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged;" citing *Mason v. Railroad*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, 114 N. C. 718, 19 S. E. 362; *Shadd v. Railroad*, 116 N. C. 970, 21 S. E. 554; *Patton v. Railroad*, 96 N. C. 455, 1 S. E. 863; *Logan v. Railroad*, 116 N. C. 940, 951, 21 S. E. 959. In this case it is also expressly held that "it is not essential that it should always appear that such authority is expressly given." If the discharge followed as a matter of course, its formal method would make but little difference to the employé. The efficacy of the principle lies in the coercive power existing where a subordinate depends directly or indirectly upon the will of another for his daily bread. These principles are expressly recognized by the entire court in *Ward v. O'Dell*, 126 N. C. 946, 38 S. E. 194, the division of opinion being entirely upon another point. See, also, *Bailey's Master's Liability*, 341; *McKinney, Fellow Serv't*, § 14.

The third class of exceptions rely upon the contention that Burrus was not acting within the scope of his employment when he injured the plaintiff. This also was decided in favor of the plaintiff upon a similar statement of facts at the former hearing, as will be seen from the above extract from the opinion of the court.

The fourth exception, or rather class, as the exceptions are divided by the defendant into four classes, in accordance with the respective principles upon which they depend, is to the admission of testimony tending to prove that the machine was secondhand, and uncased. The defendant testified that it was cased, and other witnesses testified, without objection, that it was cased and uncased. We see no objection to the plaintiff testifying that the machine was uncased, as explaining the nature of the injury with its attending circumstances. The testimony as to the machinery being new or secondhand was irrelevant, but we cannot see how it

could do any harm, as it would have injured the plaintiff in either event. It is just as dangerous to be shoved into new machinery as into old, and the plaintiff would have been entitled to recover for an injury received by being thrown against anything else.

The other miscellaneous exceptions are without merit, and apparently not relied on by the defendant.

The judgment is affirmed. Affirmed.

(132 N. C. 334)

**BESSENT v. SOUTHERN RY. CO.**

(Supreme Court of North Carolina. June 11, 1903.)

**RAILROADS — PERSONS ON TRACK — DEATH — CONTRIBUTORY NEGLIGENCE — EVIDENCE — NONSUIT — REVIEW.**

1. Where plaintiff submitted to a nonsuit on the intimation of the court against his right to recover, and appealed, the evidence introduced by plaintiff must be taken as true, on appeal, for the purpose of determining whether in any view thereof he would have been entitled to recover.

2. Where, in an action for injuries, the court intimated at the close of plaintiff's evidence that he would charge the jury to answer the first issue as to defendant's negligence in the affirmative, the issue as to plaintiff's contributory negligence also in the affirmative, and the third issue, relative to plaintiff's damages which he was entitled to recover, as "nothing," "if they believed the evidence," whereupon plaintiff took a nonsuit and appealed, the appellate court could not infer from such intimation that the trial court intended to direct a verdict affirmatively for defendant.

3. Plaintiff's intestate was walking along a railroad track with a companion in the daytime, which was commonly used by the people in that vicinity as a footpath. Plaintiff's intestate was warned of a train approaching from the rear, which she could have seen and heard, and answered the warning indicating that she knew of its approach. The whistle was blown and the bell rung, but intestate failed to leave the track, whereupon she was struck and killed. *Held*, that intestate was guilty of contributory negligence as matter of law, which precluded a recovery for her death.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Forsyth County; Neal, Judge.

Action by J. C. Bessent, as administrator of Fanny Scales, deceased, against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This action was brought by the plaintiff to recover damages for the alleged negligent killing of the intestate by the defendant. The plaintiff's intestate, Fanny Scales, was walking along the track of defendant near Winston in the direction of Wilkesboro, accompanied by Will Smith, when an engine, pushing four box cars, approached from the south. There was evidence tending to show that the whistle was sounded twice, and that the intestate could have heard it, and could also have heard the noise of the train, and that she could easily have seen the train in time to have stepped from the track to a place of safety. There was nothing to

prevent her doing so. Persons farther away from the train than the intestate was at the time she was killed both saw and heard it. William Hairston, a witness for the plaintiff, testified: The train coming up through the cut made a great deal of noise, and persons could easily have looked back and seen the train if they had eyes, and could have gotten off if they wanted to. Will Smith had the intestate by the hand or wrist; she was on the sills of the track, and he was walking on the ground beside the sills. They seemed to be walking along, laughing and talking. She could have stepped off on either side of the track. If she had ordinary hearing she was bound to have heard the train. The plaintiff himself testified: When the girl was killed she could easily have gotten from the track, more easily to the left than to the right. Any person could easily have gotten off the track; all they had to do was to step off; they could easily have stepped off and been out of danger; between the two tracks it is level, and she could easily have stepped off. The evidence also tended to show that the intestate was killed near the end of a cut which was directly under the place where Main street was when it ran over the embankment and before the embankment was cut down for the railroad track; but the cut had not been used as a street, though it had been used by pedestrians "as a common footpath" when going from one of the factories to the northwest portion of Winston. In reference to this matter the plaintiff testified: This cut does not pretend to be a street; part of Main street used to be where this cut is, and they have narrowed that street very much, and on the west side of the cut, up on the embankment, there is still a driveway; this street is 35 feet higher than the track; people walk along the track as they do everywhere.

The ordinance of the city of Winston provides that it shall be unlawful for trains and locomotives to run at a greater speed than eight miles an hour, and the intestate was killed within the city limits. The train was running 20 miles an hour when the intestate was killed, and it was in the daytime. There were two men on the end of the front or leading box car, who waved their hands and hallooed to the intestate and her companion as the train approached them. A witness, Ida Douglas, testified that she was on the track and heard the train blow at the south end of the cut; she ran to the switch and got off; as she passed the intestate she said to her, "Fanny, the train is coming," to which the intestate replied, "All right, honey." The intestate remained on the track, and was killed by the train. At the close of the plaintiff's testimony, the defendant moved for judgment of nonsuit under the statute. The court intimated that it would charge adversely to the plaintiff, whereupon he submitted to a nonsuit and appealed.

The plaintiff assigns as errors: (1) That

the court refused to submit the plaintiff's third issue as to the last clear chance of the defendant to avoid the injury, which issue, it is stated in the record, was submitted in apt time. (2) That the court allowed the defendant's motion to nonsuit the plaintiff. (3) That the court directed the jury to answer the second issue "Yes" and the third issue "Nothing."

The issues referred to were: (1) Was plaintiff's intestate injured by the negligence of the defendant? (2) Did plaintiff's intestate contribute to her own injury? (3) What damage, if any, is plaintiff entitled to? And plaintiff's third issue was that, notwithstanding plaintiff's intestate's contributory negligence, could defendant, by proper and due care, have prevented the killing of plaintiff's intestate?

J. S. Grogan, for appellant. Glenn, Manly & Hendren, for appellee.

WALKER, J. (after stating the case). If the court dismissed this action upon the defendant's motion, or if, in deference to an adverse intimation of the court, the plaintiff submitted to a judgment of nonsuit and appealed, this court must consider all the evidence for the plaintiff "as true, and regard it in the most favorable light" for him, as stated by this court in *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65. The rule that, where there is a nonsuit in submission to an intimation of the court against the plaintiff's right to recover, the evidence introduced by the plaintiff must be taken as true for the purpose of deciding whether, in any reasonable view of it, he can recover, has frequently received the sanction of this court. *Spring v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; *Gibbs v. Lyon*, 95 N. C. 146; *Abernathy v. Stowe*, 92 N. C. 217. All of the witnesses in this case were introduced by the plaintiff, and he represented, therefore, that they were credible. The law will not permit him to impeach their credibility, although he could have shown, if he had been disposed and able to do so, that the facts were different from those to which they testified. It is stated in the case that the plaintiff submitted to a nonsuit because the court intimated that it would so charge the jury that they would have to answer the first issue "Yes," the second issue "Yes," and the third issue "Nothing," but it does not clearly appear what particular form the charge of the court would have taken if it had been delivered to the jury. We cannot infer, from the statement in the record, that the court intended to direct a verdict peremptorily for the defendant, and the only inference we can draw from the language is that the court would have charged the jury that if they believed the evidence they should answer the issues as already indicated.

The question, then, is whether, if the evidence is taken as true, there is any reasona-

ble view of it which would entitle the plaintiff to a trial of the issues by a jury, the evidence being considered in the most favorable light for him. In *Neal v. Railroad*, 126 N. C. 641, 36 S. E. 119, 49 L. R. A. 684, the court, referring to facts similar to those we have in this case, says: "The usual rule is to submit the issue to the jury, with the instruction that, if they believe the evidence, they will find the issue 'Yes,' or 'No,' as the case may be. This is usually a good rule, and in many cases saves an appeal to this court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff, and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff, offering the evidence, had vouched for its credit. He could not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that, if the plaintiff had offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe."

All the evidence in this case, as we have stated, was introduced by the plaintiff, and there is no contradiction in it. It is plain, direct, and conclusive in establishing negligence on the part of the plaintiff's intestate, which was the proximate cause of her death. It can make no difference whether he has failed to show negligence of the defendant, or whether, having shown such negligence, he has also shown by his own proof that the intestate's negligence was concurrent, up to the last moment, with that of the defendant, or that, after the defendant was seen or could have been seen to be negligent, the intestate had the last clear chance to avoid the injury. In either case the plaintiff would not be entitled to recover. The case discloses that the situation of the plaintiff's intestate was such as enabled her to see and hear the train, as it approached her, in ample time for her to have left the track and averted the injury which caused her death.

We are unable to distinguish this case from *Neal v. Railroad*, supra. The facts in our case appear to be much stronger for the purpose of establishing contributory negligence than the facts in that case were. A brief statement of the facts will suffice to show that the death of the plaintiff's intestate was caused by her own negligence, and that the case of *Neal v. Railroad*, supra, should apply and control in the decision of this case. The plaintiff's intestate was walking along the defendant's track in the daytime, with nothing, so far as appears, to obstruct her view, and nothing to prevent her hearing the whistle or the noise made by the train. Indeed, she was told by one of the witnesses that the train was coming, and she answered in such a way as to clearly indicate that she was aware of its approach. In order to save herself, there was nothing to do but to step from

the track, a mere matter of a moment. And, besides, it appears that her companion directed her attention to the train, and he stepped off and was not injured. She was not on a public street, if that could make any difference, for it is evident that the cut was not considered as any part of the street, though it was used by the people in the vicinity as a common footpath. If it had been a part of the street, and the duty of sounding the whistle or ringing the bell was imposed upon the defendant for that or any other reason, and the company would have been negligent if it had not given warning of the approach of the train, it is conclusively shown in this case that the whistle was sounded, and that the noise made by the train could easily have been heard by the intestate; and it further appears, as well as that fact can be established by testimony, that she actually did know that the train was coming. Everybody else saw and heard the train and left the track, and why was she not guilty of negligence in not doing what they did, and did easily? She had equal opportunity with them, and her failure to avail herself of it was an omission of duty on her part, which was necessarily the direct and proximate cause of her injury and death. The wrong, therefore, cannot, in any view of the testimony and in contemplation of law, be imputed to the defendant, even though it may have been guilty of negligence.

In Neal's Case the intestate was walking along the track, and was seen by the engineer, but there was no direct evidence that the intestate either saw or heard the engine. In reference to the facts of that case, the court said: "If the plaintiff's intestate was walking upon the defendant's road in open daylight, on a straight piece of road, where he could have seen the defendant's train for 150 yards, and was run over and injured, he was guilty of negligence, and although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing the bell as required by the ordinance, and in not keeping a lookout by its engineer, as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate."

In McAdoo's Case, 105 N. C. 140, 11 S. E. 316, this court held that the plaintiff was guilty of negligence which in law was the proximate cause of his injury, because he stood or walked upon the track with his back towards the engine, and did not see it before he was stricken, and that the speed of the train and the failure to give a signal did not alter the case.

In High's Case, 112 N. C. 385, 17 S. E. 79, the court laid down the principle that the failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to have given the signal, and

that he had the right to assume up to the last moment, when it was too late to prevent the injury, that the person on the track would get out of the way, and that it made no difference how near the person was to the engine or train, or how fast the train was running. It appeared in that case that it was a windy day, that the train was late, and that the plaintiff was wearing a bonnet which obstructed her view; but the court said that those facts could make no difference in the decision of the case, and that, under the facts and circumstances presented by the evidence for the plaintiff, the law referred the injury to her negligence as its proximate cause, and held the company blameless. Many other cases to the same effect have been decided by this court. According to the principle declared in all of them, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff, and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track in reckless disregard of his own safety, the law adjudges any injuries he may have received to be the result of his own carelessness. *Parker v. Railroad*, 86 N. C. 221; *Meredith v. Railroad*, 108 N. C. 616, 13 S. E. 137; *Norwood v. Railroad*, 111 N. C. 236, 16 S. E. 4; *Syme v. Railroad*, 113 N. C. 565, 18 S. E. 114; *Stewart v. Railroad*, 128 N. C. 518, 39 S. E. 51; *Wycoff v. Railroad*, 126 N. C. 1152, 37 S. E. 999; *Sheldon v. Asheville*, 119 N. C. 606, 25 S. E. 781; *Ellerbe v. Railroad*, 118 N. C. 1024, 24 S. E. 808.

But the case of *Lea v. Railroad*, 129 N. C. 459, 40 S. E. 212, is a direct authority in support of the ruling of the court below. In that case it appeared that the defendant, for the purpose of making up a freight train, was moving two cars with an engine between them, one of the cars being drawn, and the other pushed by the engine as in our case. The intestate of the plaintiff was standing on the end of the cross-ties, in the town of Durham, at a place where the track was used by pedestrians. There was no one on the front car to give a signal of the approach of the train, and there was no bell rung or whistle sounded. The ordinance of the town of Durham prohibited the running of trains within its limits at a greater rate of speed than eight miles an hour, and the engine and cars were running at a greater rate of speed than the ordinance allowed. This court held, upon the facts thus stated, that the jury should have been instructed that, "taking the plaintiff's evidence and also the defendant's evidence [there being no conflict in the evidence] as true, and the conclusion could not reasonably be avoided that the plaintiff's intestate by his own negligence contributed to cause the injury." And, further, that, "taking all the evidence together, there was nothing which placed the intestate at a disadvantage as regards avoidance of the in-

jury, and when such is the case no recovery can be had where both parties, that is to say, the intestate and the railroad company, were negligent."

The only difference between Neal's Case and Lea's Case, on the one side, and our case, on the other, is that in those cases the evidence tended strongly to show that the intestate did not see or hear the train, although he could have done so, while in our case the evidence is conclusive that the deceased did know of its approach. The circumstances of themselves are sufficient to show that she did, and, besides, her own words, uttered in reply to a warning from one of the witnesses who was passing her at the time, practically excludes every doubt in regard to the matter. Her death was an unfortunate occurrence, but, upon the undisputed facts of this case, the law does not attach any blame to the defendant, but imputes the wrong or negligence, which caused her death, to her own conduct in not avoiding the injury when she could easily have done so.

In the view we take of the case, it is not necessary to consider the other assignments of error. Judgment affirmed.

DOUGLAS, J. (dissenting). I always regret feeling compelled to dissent from the opinion of the court, and especially so when the case might justly be decided the same way upon grounds in which I could concur. I do not question the right of the court to select the grounds of its opinion, and my remarks are not intended in the slightest degree as a criticism upon the court, but simply in justification of my own conduct. When the opinion of the court forces upon me the determination of an unnecessary question, well knowing my views upon the matter, it compels me to dissent. The court first decides the case upon the following ground: "We cannot infer from the statement in the record that the court intended to direct a verdict peremptorily for the defendant, and the only inference we can draw from the language is that the court would have charged the jury that, 'if they believed the evidence,' they should answer the issue as already indicated." If the opinion had stopped here, it would have ended the case. Under the circumstances of this case, I would not then have felt compelled to dissent, although I am inclined to think the logical result of the adoption of the rule of the prudent man is to abrogate the old rule, that what constitutes negligence is a question of law. This court has said, in *Coley v. Railroad*, 128 N. C. 534 (542), 39 S. E. 43, 46, 57 L. R. A. 817, speaking through Furches, C. J.: "As we understand, the question of prudence, and the ideal prudent man, are always a matter for the jury." The court, however, then proceeds to reopen the "irrepressible conflict" by bringing in the *Neal Case*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684. If the first

ground taken by the court was correct, then the *Neal Case* has no application whatever. The *Lea Case* would have still less. It is proper to state that the court, both in its present opinion and in the *Lea Case*, treat the *Lea Case* as being identical in principle with the *Neal Case*. In other words, it construes the expression, "taking the plaintiff's evidence and also the defendant's evidence," to mean taking the plaintiff's evidence with such of the defendant's evidence as is favorable to the plaintiff. In that case the court says: "So far as we remember, every principle involved in this case is decided in *Neal's Case*, and that case must control this case." While that opinion possessed at least the error of ambiguity, as was pointed out in my dissenting opinion, I presume we must accept this as its proper interpretation. My views were so fully expressed in my dissenting opinion in *Neal's Case*, 126 N. C. 647, 36 S. E. 117, 49 L. R. A. 684, that it is needless to repeat them at length. The principle that the court can never direct an affirmative verdict was clearly enunciated by a unanimous court in *Sprull v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39. This case has never been overruled or even directly questioned. It was accepted by this court as the invariable rule until the decision in *Neal v. Railroad*. Even in that case, it was expressly reaffirmed by this court. So we may consider *Sprull's Case* as correctly laying down the general rule, while *Neal's Case* constitutes merely an exception thereto. A brief reference to a few of the opinions of this court will show their general tenor: In *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, during my first term upon the bench, it is said for a unanimous court: "Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. That the verdict should be directed against the party upon whom rests the burden of proof is the essence of the rule. \* \* \* If the verdict of a jury is, in the opinion of the court, against the weight of evidence, it can be set aside, and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption, without submission to the jury, would infringe upon the exclusive powers of the jury. \* \* \* The rule laid down in some authorities that, wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be under our present Constitution."

In *White v. Railroad*, 121 N. C. 484, 489,

27 S. E. 1002, Justice Furches, speaking for a unanimous court, says: "The court can never find nor direct an affirmative finding for the jury. The most the court can do is to instruct the jury, where there is no conflict of evidence, that if they believe the evidence they should find 'Yes' or 'No,' as the case may be." In *Wood v. Bartholomew*, 122 N. C. 177, 186, 29 S. E. 959, 960, Justice Furches, again speaking for a unanimous court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue, and cannot be found by the court. It must be determined by the jury." In *Bank v. School Com.*, 121 N. C. 109, 28 S. E. 135, the same Justice, speaking for a unanimous court, says: "But no matter how strong and uncontradicted the evidence is in support of the issue, the court cannot withdraw such issue from the jury and direct an affirmative finding." The same words are quoted with approval by Justice Montgomery, speaking for a unanimous court, in *Crews v. Cantwell*, 125 N. C. 516 (519), 34 S. E. 688. In *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848, this court, Chief Justice Faircloth alone dissenting, says: "A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. \* \* \* Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. \* \* \* It is a settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. \* \* \* The burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33, p. 81, of the Laws of 1887. \* \* \* It therefore follows that on a motion for nonsuit the court can consider only the evidence relating to the negligence of the defendant, and, if there is more than a scintilla tending to prove such negligence, the motion must be denied and the case submitted to the jury." In *Bolden v. Railroad*, 123 N. C. 614, 31 S. E. 851, this court, with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden, both of allegation and proof, rests

upon the defendant." In *Cogdell v. R. R.*, 124 N. C. 302, 32 S. E. 706, it is said, by a unanimous court, that "contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit." A large number of other cases might be cited. The cases of *Spruill v. Insurance Co.* and *Cox v. R. R.* have been repeatedly cited with approval by this court both before and after the rendition of its opinion in *Neal's Case*. In *House v. R. R.*, 131 N. C. 103, 42 S. E. 553, Cook, J., speaking for a unanimous court, says: "The principle that the court cannot direct a verdict in favor of a party upon whom rests the burden of proof is now too well settled to admit of discussion. *Cox v. R. R.*, 123 N. C. 604 [31 S. E. 848], and cases there cited." In *Dorsett v. Mfg. Co.*, 131 N. C. 254, 42 S. E. 612, Chief Justice Furches, speaking for a unanimous court, cites *Cox's Case* twice with approval, as well as *Bolden v. R. R.*, 123 N. C. 614, 31 S. E. 851.

The reason for the rule as above laid down is clear. It is there bounded by what may be called natural landmarks, the distinct line of separation between an affirmative and negative finding. Itself the logical deduction from the act of 1887, and depending for its location neither upon metaphysical angles nor artificial stakes, it is in itself capable of accurate definition and intelligent application. For this reason it is constantly recurred to, except in a few cases where the requirements of natural justice, irrespective of the strict rules of law, have seemed to the court to justify a departure therefrom. Hard cases are "the quicksands of the law," and it is not safe to bend the rule too far. Curves may be the lines of beauty, but those of right are usually straight.

CLARK, C. J., concurs in the dissenting opinion.

(132 N. C. 891)

RAY et ux. v. LONG.

(Supreme Court of North Carolina. June 10, 1903.)

EJECTMENT — SUBMISSION OF ISSUES — HUSBAND AND WIFE—PURCHASE OF LANDS—ESTATES BY ENTIRETY—WIFE'S SEPARATE PROPERTY.

1. In ejectment by a husband and wife plaintiffs claimed that the land involved, and which had been sold under execution against the husband, had been purchased by the husband and wife, the money having been furnished equally by each. *Held*, that the submission of an issue as to whether the purchase money was furnished equally by the husband and wife to procure a home for them was sufficient in form and substance as the presentation of an issue controlling the determination of the case.

2. Where an issue as submitted was sufficient in form and substance to present every material fact necessary to a determination of the case, no exception because of the refusal to submit other issues can be sustained.



3. Where a husband and wife, suing in ejectment, claimed that the land involved had been purchased by them, each furnishing a portion of the money, evidence to show the purpose for which a certain sum of money was furnished by the wife, and her accompanying directions, was properly admitted, as tending to prove a material fact.

4. The question whether evidence is clear or convincing is a question as to its weight and effect, which is to be determined solely by the jury, and it is error to instruct as to whether evidence is clear, etc.

5. Where land is purchased by a husband and wife, each furnishing a portion of the purchase money, an estate in entirety is created, and not a joint estate.

6. Const. art. 10, § 6, providing that the property of a married woman shall be her sole and separate estate, subject to conveyance and devise by her as if sole, does not prevent the creation of an estate by entirety, where land is purchased by a husband and wife, each furnishing a portion of the money.

7. Where land was purchased by a husband and wife, each furnishing a portion of the purchase money, an estate by entirety being created, the land was not subject to sale under execution on a judgment against the husband.

Clark, C. J., and Montgomery, J., dissenting.

Appeal from Superior Court, Alamance County; McNeil, Judge.

Action of ejectment by H. M. Ray and wife against Jacob A. Long. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

E. S. Parker, Jr., J. T. Morehead, and R. C. Strudwick, for appellant. John W. Graham, for appellees.

DOUGLAS, J. This case was before us at February term, 1901, and is reported in 128 N. C. 90, 38 S. E. 291. In that opinion the court says: "The marriage having taken place since 1868, he should have said to the jury, as laid down in *Kirkpatrick v. Holmes*, 108 N. C. 206, 12 S. E. 1037, and approved in *Ross v. Hendrix*, 110 N. C. 405, 15 S. E. 4: 'If her separate estate went into the hands of her husband, and he invested it in land, taking title in his own name, in the absence of any agreement to the contrary, a trust would have resulted to her.' In *Brisco v. Norris*, 112 N. C. 676, 16 S. E. 850, it is said this equitable title was 'such as to enable her, upon the strength of it, to recover the land from her husband, or from any one purchasing of him with notice of her rights, or from any one who had bought the land at a sale under execution against her husband, for such person would acquire only such title as her husband had.'" That remains the law of this case, to be modified in its application in so far only as the further development of the facts may require. The following is the only issue submitted: "Was purchase money paid for the land in controversy furnished equally by Elizabeth A. Ray from her separate estate and by H. M. Ray, to procure a home for said H. M. Ray and wife?" It was answered in the affirmative.

This issue was objected to as insufficient by the defendant, who tendered seven different issues. We think that the issue as submitted was sufficient in form and substance to present every material fact necessary to a determination of this case. When this is true, no exception thereto can be sustained. *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368; *Pretzfelder v. Ins. Co.*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424. In *Denmark v. Railroad*, 107 N. C. 185, 12 S. E. 54, this court laid down the following rules governing the submission of issues: "(1) Only issues of fact raised by the pleadings must be submitted to the jury. (2) The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment. (3) Of the issues raised by the pleadings, the judge who tries the case may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence, through the medium of pertinent instructions on some issue passed upon." This is in entire consonance with the rule laid down in *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45, relied on by the defendant's counsel, to the effect "that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this court will remand the case for a new trial." *Mitchell v. Railroad*, 124 N. C., at page 245, 32 S. E. 673, 44 L. R. A. 515. Nor does it conflict with what is said in *Cox v. Railroad*, 126 N. C. 103, 35 S. E. 237, and *Thomas v. Railroad*, 129 N. C. 392, 40 S. E. 201 (at page 396, 129 N. C., and page 202, 40 S. E.), as to the propriety of submitting separate issues in cases of negligence and others of kindred nature, where the material facts cannot be directly presented in one issue or found therein except inferentially by reference to the charge of the court. The issues tendered by the defendant were unnecessary, while some of them presented merely evidentiary facts. In *Timmons v. Westmoreland*, 72 N. C. 587, it was held that "it is error to submit to the jury issues which involve matters of evidence only tending to establish or deny the main issue." The motion to dismiss was properly refused, as there was evidence tending to prove the plaintiffs' contentions.

We see no objection to the evidence offered by the plaintiffs to show the purpose for which the \$600 was furnished by the feme plaintiff, and her accompanying directions. It was competent evidence tending to prove a material fact.

We find no error either in the charge or refusal to charge. Among other prayers, the

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 73, 74.

defendant requested the court to charge, in substance, that the evidence offered by the plaintiffs was not clear, cogent, and convincing. This prayer was properly refused under the authority of *Lehew v. Hewett*, 130 N. C. 22, 40 S. E. 769, where it was held that whether evidence was clear, strong, and convincing was a question of weight and effect, to be determined solely by the jury.

We come now to the legal effect of the verdict. The jury have found upon competent evidence and under proper instructions that the purchase money for the land in question was furnished equally by the plaintiffs, who are husband and wife, for the purpose of procuring a home for them. When the case was here before it was held that, with or without an agreement, if the wife's money went into the purchase of the land, a resulting trust was created whereby the husband became a trustee for his wife to the extent of her interest. Under the facts as now found, the wife had a right to demand a conveyance jointly to herself and her husband; and she would now have a right to have the deed reformed so as to give full force and effect to her equities. This is the practical result of the judgment in this case, certainly as between the parties. The effect will be to create an estate in entirety, in which the parties will hold, in the ancient language of the law, "*per tout et non per my*." This estate is fully recognized by our law, and has not been impaired by section 6 of article 10 of the Constitution. Whether it arises directly from the marital relation or from a presumption of intention, is immaterial, so long as it exists. In *Motley v. Whittemore*, 19 N. C. 537, it is said (by Gaston, J.): "When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entirety. Being in law but one person, they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor. This was settled at least as far back as the reign of Edward III, as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by Lord Coke, 1 Inst. 187a." This case has been repeatedly cited with approval since the adoption of the present Constitution. In *Bruce v. Nicholson*, 109 N. C. 204, 13 S. E. 790, 28 Am. St. Rep. 562, the court says (through Merrimon, C. J.): "The defendants, husband and wife, held the small tract of land conveyed to them, not as joint tenants or tenants in common, but by entirety. In contemplation of law, they were for such purpose but one person, and each had the whole estate as one person, and when one of them should die the whole estate would continue in a survivor. They, by reason of their relations to each other, could not take the fee-simple estate conveyed to them by moieties, but both were seised of the entirety *per tout et non per my*. This is so by the common law, and is the settled law of this state"—citing numerous authorities.

"The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both. The whole must remain to the survivor. The husband cannot convey, incumber, or at all prejudice such estate to any greater extent than if it rested in the wife exclusively in her own right. He has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person and the ownership of the estate by that person prevent the disposition of it otherwise than jointly. As a consequence, neither the interest of the husband nor that of the wife can be sold under execution so as to pass away title during their joint lives, or as against the survivor after the death of one of them." "Indeed, it seems that the estate is not that of the husband or wife. It belongs to that third person recognized by the law, the husband and the wife." Among the numerous cases that might be cited, the following will serve to exemplify the principle: *Todd v. Zachary*, 45 N. C. 286; *Woodford v. Higly*, 60 N. C. 237; *Long v. Barnes*, 87 N. C. 329; *Jones v. Potter*, 89 N. C. 220; *Simonton v. Cornelius*, 98 N. C. 433, 4 S. E. 38; *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57; *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318; *Spruill v. Mfg. Co.*, 130 N. C. 42, 40 S. E. 824.

It is unnecessary to discuss the nature and effect of a resulting trust, as that point was decided, as far as it affects this case, in our former opinion; but a further discussion of the principle can be found in *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85.

While the action in this case is neither for the reconveyance of land nor for the reformation of the deed, yet we think it comes within the essential principal of *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20. There the contract was to reconvey the land to H. H. and Anna Stamper, and it was held that the widow was entitled to specific performance. In the opinion it is said: "We must now consider the quantity of interest to be conveyed, which we think is the entire estate in the land acquired by Milton Stamper under the deed. The covenant was to reconvey to H. H. and Anna Stamper. They, being husband and wife, held their equitable interest, the right to demand a reconveyance upon breach of the covenant, in entirety, with the right of survivorship."

The judgment of the court below is affirmed.

**MONTGOMERY, J. (dissenting).** In the original complaint it was alleged that the feme plaintiff, wife of the other plaintiff, had furnished one-half of the purchase money—\$600—toward the purchase money of a tract of land of 154 acres which was conveyed by Thos. H. Long to the husband, and that the plaintiffs were entitled each to a deed for

one-half of the 154 acres; "that of the tract of 154 acres 59.15 acres were conveyed by the plaintiffs to a son of the husband by a former marriage upon an agreement that the wife should have a larger interest in the remaining 94.85 acres, and her interest in said 94.85 acres has thus been raised from half, which it was originally, to six-sevenths, as stated in the first article of this complaint in regard to the 60 acres therein described"; and that the defendant, Long, is in the unlawful possession of the same, having purchased it at execution sale, the execution having been issued against the husband. The prayer for judgment is in the following words: "Wherefore the plaintiffs demand judgment that the feme plaintiff, Elizabeth A. Ray, is entitled to six-sevenths of said land, and that the said H. M. Ray be declared to have held the same as a trustee for her, and that her interest could not be sold under execution, and that the said defendant could not acquire the interest which said Elizabeth A. Ray had in said land, and that, she forbidding the sale, the defendant took subject to all equities which she had in said land, and for such other and further relief," etc. An amended complaint was afterwards filed, as follows: "(1) That at the time of the purchase of the 154 acres it was expressly agreed that the deed should be made to both the plaintiffs, H. M. Ray and Elizabeth Ray, and their heirs, by Thos. H. Long, but that through mistake the deed was made to H. M. Ray and his heirs; that said Elizabeth A. Ray, having paid \$600 toward the purchase money under the agreement, was entitled to have had said deed made to said H. M. Ray and Elizabeth and their heirs. (2) That, the equitable title to said land at the time of the sale under execution of the 60 acres described in the complaint being in said H. M. Ray and Elizabeth and their heirs, the sheriff had no right to sell under execution the contingent remainder of H. M. Ray, and nothing passed to the defendant by said sale and the deed of the sheriff thereunder, and the said plaintiffs are still the owners of the said tract of 60 acres, and entitled to the possession thereof." There was the usual prayer for relief in such cases. It will be seen from a reading of the plaintiff's complaint that the original cause of action was based on the allegation that the plaintiff had furnished one-half of the purchase money of the land, and that, the same having been applied by her husband to the purchase, she was entitled to have him convey to her and her heirs one-half of the tract of land, he having taken the deed to the entire tract in his own name. In the amended complaint she alleged that she bought the land, together with her husband, under an agreement that the deed should be made to them and their heirs, and that by mistake the deed was made to the husband alone. According to the first complaint, the feme plaintiff furnished a part of the purchase money, and for that she was

to have an equivalent in land conveyed to her and her heirs. According to the amended complaint, she furnished the money jointly with her husband, who furnished an equal amount, and the deed was to be made to them and their heirs and assigns, by which an estate in entirety was created. The defendant requested the court to submit, amongst others, two issues—one whether or not the feme plaintiff had paid the \$600 of the purchase money, and the other whether at or before the time of the purchase by Henry M. Ray of the 154 acres from Thos. H. Long it was expressly agreed that the deed should be made to Henry M. Ray and wife jointly. His honor refused the issues, and submitted one in these words: "Was the purchase money paid for the land in controversy furnished equally by Elizabeth A. Ray from her separate estate, and by Henry M. Ray, to procure a home for said Henry M. Ray and wife?" Upon the pleadings the defendant, in my opinion, was certainly entitled to have the issues which he tendered submitted to the jury. After the evidence was all in, however, it was unnecessary to submit the last one, for the reason that there was no evidence whatever tending to show that the deed was executed under a mistake, or that it was ever agreed, up to the time the deed was executed to H. M. Ray, the husband, that the deed was to have been made to him and his wife. Therefore, under the issue which his honor did submit, the jury having found that the feme plaintiff paid one-half of the purchase money of the land, his honor should have held as a matter of law that a resulting trust was created by the deed to the husband in favor of the feme plaintiff for one-half of the tract of land, and that a judgment to that effect should have been rendered, according to the request for judgment made by defendant. The defendant, in his answer, denied that any part of the land had been conveyed to the son of the husband, and there was no evidence offered on that question.

In my opinion, there was error.

CLARK, C. J., concurs in the dissenting opinion.

(132 N. C. 947)

#### HALLYBURTON et ux. v. SLAGLE

(Supreme Court of North Carolina. June 11, 1903.)

CURTESY — CONSTITUTIONAL LAW — WIFE'S SEPARATE PROPERTY — MARRIAGE — VESTED RIGHTS — FRAUDULENT CONVEYANCE — SUBSEQUENT PURCHASE BY GRANTOR.

1. By a marriage prior to the ratification of the Constitution of 1868, providing that the property of a female shall remain her separate estate, and may be conveyed and devised by her as if sole, the husband acquired no vested right in lands acquired by the wife after the ratification, so as to prevent the application of the constitutional provision to his right to curtesy.

2. A landowner, with intent to defraud his creditors, gave a deed, with warranty of title,

in trust for the benefit of his wife for life, and her children after her death. Subsequently he was adjudged a voluntary bankrupt, and purchased the land from one claiming under a sale thereof by the assignee in bankruptcy. Held that, as against the children of his deceased wife, he was estopped from claiming title under the deed to him from the one claiming under the assignee's deed.

On rehearing. Petition dismissed.

For former opinion, see 41 S. E. 877.

Merrimon & Merrimon and Shepherd & Shepherd, for appellant. Chas. A. Moore, Zeb Weaver, and Locke Craig, for appellees.

**WALKER, J.** This is a petition to rehear the above-entitled case, which was decided at the February term, 1902, and is reported in 130 N. C. 482, 41 S. E. 877.

The assignment of error in regard to the defendant's claim for an estate by the curtesy in tract No. 2, known as the "Chunn Land," cannot be sustained. As the parties were married before 1868, and the land was acquired in 1877, the defendant was entitled to an estate by the curtesy at the death of his wife, provided she had died intestate, or had not disposed of the property by her will to some one else. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127. It appears in this case that Mrs. Slagle died, leaving a will, in which she devised the said property to the plaintiff. When a marriage has taken place prior to the dower act of 1867 (Laws 1866-67, p. 71, c. 54), and the husband has acquired land after its passage, the wife is entitled to dower, because, as soon as the land is acquired, the right of dower attaches to it. *O'Kelly v. Williams*, 84 N. C. 281. So, when the marriage has taken place before the date of the ratification of the Constitution of 1868, and the wife has acquired property after that date, the provisions of the Constitution in regard to the separate estate of the wife and her power to devise her property immediately become operative, and affect all of the rights in the property thus acquired; and the husband's estate by the curtesy, unlike that which existed prior to August, 1868, only becomes consummate upon the death of the wife intestate. *Holliday v. McMillan*, 79 N. C. 815; *Morris v. Morris*, 94 N. C. 613; *Kirkman v. Bank*, 77 N. C. 394. By the marriage before August, 1868, the husband acquired no such vested right in the future acquisitions of the wife as to prevent the application of the provisions of the Constitution and statutes to his right of curtesy. A mere expectancy or possibility of future acquisitions is not a vested right. *Holliday v. McMillan*, supra. Property is always acquired subject to the laws existing and in force at the time. *O'Kelly v. Williams*, supra.

The principal question in the case, and, indeed, the only one discussed before us, relates to the estoppel which plaintiff alleges arose out of a deed to Mr. Woodfin, and was fed by the title acquired by the defendant under the deed of Reynolds, assignee in bank-

ruptcy, to him, whereby the plaintiff's title to the land was made good and perfect as against the defendant. The defendant, for a nominal consideration, and with intent to defraud his creditors, made a deed for the land to Mr. Woodfin in trust for the use and benefit of his wife for life, and after her death for the use and benefit of her children; and in May, 1868, upon his own petition, he was adjudged a bankrupt. His assignee sold the land, and it was bought by one Lang for the defendant, and the assignee afterwards conveyed it to the latter with the consent of Lang. Defendant's counsel contend that there was no estoppel arising out of the deed, because (1) plaintiffs cannot maintain an action upon the warranty in the deed to Woodfin; and (2) because by the acts of the assignee the land has been devoted to the satisfaction of the claims of creditors to whom it rightfully belonged, the covenant being "void and of no effect" as to them.

While the deed of Slagle to Woodfin was void as to creditors and as to their representative, the assignee in bankruptcy, if either of them should seek to set it aside, it was yet good and valid as between the parties to it; and the title to the land passed to Woodfin, as trustee, subject to be divested by any creditors who might seek to subject it to the payment of their claims. The defect in the title to the land was caused by the defendant's own wrongful act in making the deed with a fraudulent intent, and it would be strange indeed if the law should permit him afterwards to acquire a title through the creditors or their representative, the assignee in bankruptcy; and hold it in hostility to the one he conveyed and warranted. We do not think that the law will permit him to do so. It is not denied that, when a good and indefeasible title is transferred by deed, the vendor may afterwards acquire an independent title—such, for example, as a title by adverse possession under color—and hold it against his vendee, but the title so acquired must be consistent with the provisions of his own deed, and his covenants therein contained. *Cuthrell v. Hawkins*, 98 N. C. 203, 3 S. E. 672; *Johnson v. Farlow*, 35 N. C. 84; *Edleman v. Carpenter*, 52 N. C. 616. But when by his deed the grantor conveys without any of the usual covenants of title, or when by the form or nature of the conveyance he affirms, either expressly or impliedly, that he has a good and perfect title to the land, though in fact he has a defective or imperfect title, and he subsequently acquires a good title thereto, such after-acquired title will inure to the benefit of his grantee by estoppel. *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 708; *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. 918, 84 L. Ed. 447; 11 Am. & Eng. Enc. (2d Ed.) p. 403; *Hagensick v. Castor*, 53 Neb. 495, 78 N. W. 932; *French v. Spencer*, 21 How. 240, 18 L. Ed. 97. In *Van Rensselaer v. Kearney* it is said: "If the

deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded on that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance." The proposition may be stated another way: "Where one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a conflicting title, and turn his grantor over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the law in breaking the assurance which his covenants have given." *Smith v. Williams*, 44 Mich. 240, 6 N. W. 602. The general rule is that, when the deed contains no covenant of warranty, or other covenant sufficient to estop him, the grantor can set up an after-acquired title, unless he has either expressly or impliedly affirmed in the deed that he has a good title, in which case he will be estopped to set up the after-acquired title. This rule accords with common honesty and fair dealing. The covenant of warranty works an estoppel not only to prevent the circuitry of action, which is sometimes given as the reason for it, but for other good and valid reasons. The grantor should not be permitted to impeach and nullify his solemn deed and act by alleging his own fraud and iniquity, as by claiming and setting up a title against his grantee which could not have existed but for his own fraudulent act and intent. It would be contrary to equity and good morals to allow him to take any advantage from the newly acquired title in such a way. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317. The principle would seem to be so clear and just as not to require a further discussion or citation of authority.

In this case it is apparent, we think, upon the face of the deed, that the defendant intended to affirm, impliedly, at least, that he had a good title to the land. It was his purpose to convey the fee, which should be held by Woodfin for the use, benefit, and enjoyment of his wife and children; and this could not well be done, unless the title was not only good at the time he transferred it, but remained good, so far as any act of the

grantor could affect it. He agrees to warrant and defend the title of the lot to the trustee and his heirs forever, for the uses and purposes set forth in the deed. The word "warranty" is defined as an assurance of title to property sold, and a stipulation by an express covenant that the title of the grantor shall be good, and his possession undisturbed. *Black's Law Dict.* p. 1233. Indeed, it has been said to have been fully established as a principle by the best authority that the doctrine of estoppel applies to conveyances without warranty, where it appears by the deed that the parties intended to deal with and convey a title in fee simple. *Graham v. Meek*, 1 Or. 325; 1 *Greenleaf on Ev.* § 24. And if this is not true, the estoppel certainly arises when the conveyance of the land is coupled with a covenant of warranty. Mr. Greenleaf says: "A covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant."

It was contended, though, by defendant's counsel, in his able and ingenious argument, that there could be no rebutter or estoppel unless there could be a recovery upon the warranty, or unless the deed failed to pass an estate to the grantee. It is said in *Bush v. Cooper*, 18 How. 82, 15 L. Ed. 273, that "there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom," and the court was then speaking with reference to the discharge of the covenantor in bankruptcy. "Such estoppels," says the court, "do not depend upon personal liability for damages. This is apparent when we remember that estoppels bind not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel." The defendant undertook to sell and convey to Woodfin, as trustee, not a bad or defective title, but a good and perfect title; and the estoppel operates at law to pass the legal estate, and in equity to conclude him from asserting the existence of a title inconsistent with what he undertook to sell and convey. *Bush v. Cooper*, supra. In the case of *Dunbar v. McFall*, 9 Humph. 505, the facts were very much like those in the case at bar. "It is supposed," says the court, "that as these negroes had been taken in execution as the property of Lemmy Williams after the period of this fraudulent sale, and had been sold, and were afterwards held by persons against whom the bill of sale of Lemmy Williams to William K. Williams would have been void, that when they were repurchased by Lemmy Williams he took them and held them in right of the creditor and that his title against the fraudulent sale was as good as that of the creditor. This position is untenable, for several reasons: (1) Because, however Lemmy Williams may have obtained the negroes after the execu-

tion sale, still this defense is an allegation of his own turpitude in the sale to W. K. Williams, which he is not permitted to make, to avoid his own deed, for, as between himself and William K. Williams, the fraudulent sale was good. (2) But in the bill of sale to William K. Williams there is a warranty of title. Now, as this bill of sale was good between the parties, the moment the vendor repurchased the negroes, and obtained them again, free from liability on account of the fraud, such title inured to the benefit of the fraudulent vendee, and vested in him a good title. Lemmy Williams is estopped, therefore, by his covenant, to resist the title of his vendee." See, also, *Nance's Lessee v. Thompson*, 1 Sneed, 327. If the title conveyed by the defendant's deed to Woodfin was defective on account of any fraud or wrong committed by him which invalidated the deed, it was his duty to remove the defect, and whatever was afterwards done by him which perfected the title will be considered as done in discharge of this plain duty and obligation. *Frank v. Caruthers*, 108 Mo. 573, 18 S. W. 927; *Johnson v. Foster* (Tex. Civ. App.) 34 S. W. 821; *Hannah v. Collins*, 94 Ind. 201. In the case first cited the court says: "The law would be justly 'chargeable with connivance at fraud and dishonesty,' to permit the grantor to take advantage of his own delinquency for the purpose of wresting from his grantees the property already conveyed to them." In the case of *Gibbs v. Thayer*, 6 Cush. 30, it appeared that a husband, having an estate for his own life in land of his wife, conveyed his interest therein, in trust for her benefit, by a deed fraudulent and void as against creditors, and which contained a warranty against all claims of the grantor or his heirs, or of any other person claiming under him or them; and having subsequently taken advantage of the insolvent law, and himself become the purchaser and received a conveyance of the assignee's interest in the land, it was held that he was estopped by his covenant to set up against his grantee the title so acquired. "If at the time of such conveyance and warranty the estate conveyed was liable to be taken by the grantor's creditors to satisfy his debts, this liability was an incumbrance, by reason of a subsisting right of creditors to take and hold the estate under him, and was at that time, therefore, a paramount, subsisting claim, within the qualified warranty, and the taking of the estate by the creditors would be a breach of that warranty." In that case the court draws the distinction between a title acquired by the grantor under a sale made in behalf of creditors against whom the fraudulent deed is void, and an independent title acquired by the grantor. Mr. Bigelow cites this case with approval, and says: "It was immaterial whether or not the original conveyance was fraudulent against creditors. If it was not, then the

property did not pass to the assignee, and the plaintiff took no title under it. If it was fraudulent, it was by reason of acts done by him which had given rights to creditors to reclaim the land and hold it, and was an incumbrance against which he had warranted. In this case the purchase of the interest was only an extinguishment of the incumbrance, and, by the doctrine of estoppel, this purchase of the outstanding right of creditors inured to the benefit of the plaintiff's grantee." *Bigelow on Estoppel* (5th Ed.) p. 407. The same doctrine is recognized in *Bank v. Glenn*, 68 N. C. 36, where it is said that when the title proposed to be conveyed is defective, and the grantor afterwards perfects the title by buying in the adverse claim, and removing the cloud or defect from the title he undertook to convey, the subsequently acquired title will inure to his grantee by estoppel. And so in *Taylor v. Shufford*, 11 N. C. 131, 15 Am. Dec. 512, the court, after stating that the estoppel affects the estate conveyed by the deed, proceeds as follows: "The breach is not that no estate passed, but that an estate did pass, but that the title to that estate was not good, and that he was disturbed in the enjoyment of that estate by one having title. In fact, the very idea of annexing a warranty or covenant presupposes an estate to pass, for, without the estate passes, there can be no warranty, which is a dependent covenant, as is a covenant for quiet enjoyment, although by the phraseology there may be an independent covenant, but it is not attached in law to the estate. This very clearly proves what is affirmed, and what estoppels arise out of a bargain and sale." In *Cuthrell v. Hawkins*, 98 N. C. 205, 3 S. E. 672, this court, citing *Moore v. Willis*, 9 N. C. 559, says: "If A. sell to B. by indenture, he thereby affirms that he has title when he makes his deed; and if he did not, and afterwards acquire one, in an action by him against B. the title of the latter prevails, not because A. passes to him any title, because he had not any then to pass, but because he is precluded from showing the fact." We have shown that it makes no difference in the application of the rule whether the vendor had no title at the time of his conveyance, or only a defective title. The principle of law, therefore, which governs the two cases, must be the same, as the reason is the same. We do not think the case of *Moore v. Willis*, 9 N. C. 559, which was cited to us by the defendant's counsel, sustains his position. In that case the property fraudulently conveyed had been transferred by the vendor and delivered to his creditors to pay their debts, and the court simply held that the latter could retain the property, as against the fraudulent vendee, because the original transfer was void as to them, and they had received only what the law gives them. The controversy was not between the vendee and the fraudulent

vendor, as in our case, and no estoppel, therefore, could arise.

There is no force in the objection that the estoppel must be pleaded in order to avail the plaintiffs. The same point was made in *Bank v. Glenn*, supra, and this court held, that the estoppel, being part of the title, may be given in evidence without being pleaded. Besides, this objection comes too late.

While the other assignments of error were not pressed in the argument before us, we have carefully examined them, and think that they are without any merit.

The former decision of the court is correct, and cannot, therefore, be disturbed. Petition dismissed.

(132 N. C. 957)

**HALLYBURTON et ux. v. SLAGLE.**

(Supreme Court of North Carolina. June 11, 1903.)

**IMPROVEMENTS—RIGHT TO COMPENSATION.**

1. The finding of the jury, in an action for the recovery of land, that defendant acted with a fraudulent purpose in purchasing the same, could be considered on his application for the allowance of the value of the improvements made by him, though for various reasons the issue was immaterial in the action itself.

2. One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a bona fide "holder of the premises under a color of title believed by him to be good," within Clark's Code, § 473, and is therefore not entitled to the value of improvements placed thereon by him while holding it under such sale.

Appeal from Superior Court, Buncombe County; Council, Judge.

Action for the recovery of land, brought by W. E. Hallyburton and wife against J. L. L. Slagle. Judgment went for plaintiffs. From an order denying the application of the defendant Slagle for the allowance of the value of improvements made by him on the land, the said defendant appeals. Affirmed.

Merrimon & Merrimon and Shepherd & Shepherd, for appellant. Charles A. Moore, Locke Craig, and Zeb Weaver, for appellees.

**WALKER, J.** This is an application by the defendant to be allowed the value of certain improvements alleged to have been made by him on the property which the plaintiffs have recovered in the action. The jury have found and the court has adjudged that the defendant conveyed the land to Woodfin in trust for his wife and children, with intent to defraud his creditors, and that he was afterwards adjudged a bankrupt on his own petition, and the land was sold by his assignee in bankruptcy for the reason that, being fraudulent, the deed of the defendant to Woodfin was void as to creditors. The defendant bought at the assignee's

sale. The jury found in the principal case, under an issue submitted to them, that the defendant procured the sale to be made and purchased at the same, for the fraudulent purpose of defeating the rights of his wife and children under his deed to them. It is true that the defendant objected to the submission of this issue to the jury, and while it was not material to inquire in the main suit as to the intent of the defendant in procuring title by purchase at the assignee's sale, as the defendant was estopped to take any benefit from the said purchase and the deed of the assignee, and the title thus acquired fed the estoppel created by his deed, without any regard to his intent, yet we think that the defendant has no legal ground to complain of the action of the court. It did him no harm, in contemplation of law, in the trial of the issues involving the title to the land. But the finding of the jury may be considered upon this application, as the defendant's right to the relief he seeks depends upon his good faith in claiming the land. We do not think he comes into this court of equity with very clean hands.

But apart from these considerations, the court below, as the record shows, was not satisfied of the probable truth of the allegations of the defendant's petition, and this is a preliminary fact necessary to be found before the court is required to impanel a jury to ascertain the value of the improvements. Clark's Code (3d Ed.) § 473. The court found against the defendant as to this fact, and this is sufficient to defeat his claim for the value of the improvements. *Merritt v. Scott*, 81 N. C. 385; *Johnston v. Pate*, 95 N. C. 68.

We do not think, upon a careful review and consideration of the facts as disclosed by the record, that the defendant was such a bona fide "holder of the premises under a color of title believed by him to be good," within the meaning of the provisions of the statute, or within any equitable principle, as entitles him to the aid of the court in the manner now invoked by him. He bought with full knowledge of the rights of his wife and children, and, if he made any improvements with his own funds on the land, which alleged fact is stoutly contested by the plaintiffs, he must, under the facts and circumstances of this case, bear the consequent loss.

We find no error in the judgment of the court below. No error.

(132 N. C. 925)

**GWALTNEY et ux. v. PROVIDENT SAV. LIFE ASSUR. SOC.**

(Supreme Court of North Carolina. May 11, 1903.)

**LIFE INSURANCE—FRAUD OF AGENT—RECOVERY OF PREMIUMS—GENERAL AGENT—POWER TO WAIVE CLAUSE IN POLICY—WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED AGENT—PAROL EVIDENCE—EXCEPTIONS TO CHARGE.**

1. The rule that parol agreements are merged in a written contract has no application where

it is averred that the written contract was by fraud or mistake executed differently from the terms of said agreement.

2. Promise by the general agent of an insurance company that the premiums on plaintiff's policy should not be raised was not an unreasonable one, on which plaintiff should have refused to rely, where the policy itself, which was not on the level premium plan, contained a note that, unless there was an unforeseen mortality, the company expected to maintain the level rate.

3. Code, § 590, which forbids a party to an action testifying as to a personal transaction or communication with a decedent from whom he derives his interest, does not preclude plaintiff suing to recover premiums paid on a life policy, on the ground that he was induced by the fraudulent representations of a deceased agent to accept a policy different from that agreed on, from testifying as to the agreement and conversations had by him with the agent.

4. A general agent of an insurance company can waive any stipulation in the policy, notwithstanding a clause in the policy forbidding it.

5. Code, § 550, requires each exception to a charge to be "stated separately in articles numbered." *Held*, that it was not a compliance with the statute to divide a charge into four sections, each containing many propositions and divers paragraphs, and to except seriatim to each of those four subsections of the charge.

6. Where a life policy was wrongfully canceled by the company, the insured was entitled to recover the premiums paid, with interest on each from the date of payment.

Montgomery, J., dissenting.

Appeal from Superior Court, Catawba County; Long, Judge.

Action by W. R. Gwaltney and wife against the Provident Savings Life Assurance Society. Judgment for plaintiffs, and defendant appeals. Affirmed.

Maxwell & Keerans, for appellant. T. M. Hufham and E. B. Cline, for appellees.

CLARK, C. J. This action was brought to recover the premiums, with interest thereon, paid on a life insurance policy issued to the plaintiff by the defendant in 1899, through its general agent in this state. The complaint alleges that said agent, in soliciting the application, agreed to issue to the plaintiff a level rate policy, whereas the one issued increased the premiums with age. The application on its face is for a policy "upon the annual renewable plan, with surplus applied to keeping premiums level, participating premiums payable quarterly," and the policy provides for "payment of the annual renewal premium for the actual age attained, in accordance with schedule printed on next page of this policy for each \$1,000, except as reduced by the application of the surplus and guaranty fund," and at the foot of said table in the policy is the following: "Note. Provided the mortality in this society shall be as favorable in the future as it has been in the past in the largest and best of the other companies (thus far it has been more favorable), this insurance will be extended and renewed during the whole expectation or probable lifetime of the insured at the rate of pre-

mium charged for the first year only of the policy."

There were 13 issues submitted to the jury, which, with the responses thereto, establish the following state of facts: "That one Jones was the general agent in this state of the defendant at the time the application was made and the policy issued; that as such general agent of the defendant, by false and fraudulent representations, he induced the plaintiff to make the application and take out the policy of insurance upon an agreement made at and before the delivery of the policy that the premiums per quarter should be \$22.41 for the life of the assured, and no more, and thereby induced the plaintiff to accept the policy; that the application was filled out by the defendant's general agent (Jones), and the plaintiff was induced to accept the policy and pay \$22.41 per quarter, and was misled and prevented from examining the terms of the policy at the time of delivery and till demand of increase of premium by reason of false, deceitful, and fraudulent representations of said Jones at and before the delivery of the policy; that the defendant received the premiums from the plaintiff at the rate of \$22.41 for nine years, and then demanded an increase of premiums to \$28.01 per quarter, which the plaintiff paid, but under protest, for two years, when the amount demanded was raised to \$41.73 per quarter, and, upon the plaintiff's refusal to pay the same, the defendant discontinued the policy, and held all the premiums paid to that date; that, after the execution and delivery of the policy, the defendant, through its general agent, agreed to continue the policy upon the payment of \$22.41 per quarter during the life of the plaintiff, waiving the provisions in the policy which permitted an increase in the premiums; that the defendant at the time of issuing the policy had notice of the special contract with the plaintiff, made by Jones, that the policy was not issued in accordance with the aforesaid verbal contract with the defendant's general agent; that the increase in rates was contrary to said agreement, though permitted by the terms of the policy, which the plaintiff had retained in his possession from its delivery to him." There were allegations and evidence justifying the above verdict, if the jury believed the evidence.

The defendant objected to the evidence by the plaintiff of the conversations and agreements between him and the defendant's general agent before or contemporaneous with the delivery of the policy, because such verbal agreements were merged in the written application and policy, and also under the Code, § 590, because the said general agent, Jones, was dead at the time of the trial. The rule that parol agreements are merged in a written contract has no application, when, as here, the allegation is that the written contract was by fraud (or mistake) executed differently from the terms of said agreement.

¶ 4. See Insurance, vol. 28, Cent. Dig. § 953.



*Powell v. Hepinstall*, 79 N. C. 207; *McLeod v. Bullard*, 84 N. C. 527; *Bank v. McElwee*, 104 N. C. 305, 10 S. E. 295. The plaintiff's testimony is substantially set out in his complaint, which is summarized in the opinion in this case, 130 N. C., at page 630, 41 S. E. 795. It appeared in the plaintiff's evidence (if believed) that the plaintiff was ignorant of the terms and provisions of life insurance policies, and that the agent put him off his guard by agreeing in advance that the policy should be for level premiums, and hence the plaintiff, relying on said agent's representations, did not scrutinize the policy, but the agent handed it to him on the street, when there was no opportunity to examine it, telling him, "Here is your policy," from which the plaintiff understood it was the policy agreed on. The receipt of the policy under circumstances similar to these, without reading, was held not binding on the assured. *Fitchner v. Fidelity Ass'n*, 108 Iowa, citing numerous cases, at page 279, 72 N. W. 530; *Kister v. Ins. Co. (Pa.)* 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696; *McMaster v. Ins. Co.*, 183 U. S. 37, 22 Sup. Ct. 10, 46 L. Ed. 64. A deed under such circumstances can be avoided between the parties. *Medlin v. Buford*, 115 N. C. 260, 20 S. E. 463. The premiums were collected on the level of \$22.41 per quarter for nine years, and not till the plaintiff was too old to obtain insurance in any other company was the premium raised to \$28.01, which he paid for two years under protest (thus reserving his rights), and then suddenly the premium was jumped to \$41.73 per quarter, being very nearly double the original rate, which the plaintiff testified and the jury find the general agent promised him should not be raised. Such promise was not such an unreasonable one that the plaintiff, as an ordinarily prudent man, should have refused to rely upon it, for the table annexed to the policy and referred to therein contained the note above set out that, unless there was unforeseen mortality, the company expected to maintain the level rate of the first premium in all cases. The plaintiff testified that his policy was taken out on an express agreement that this level rate should be maintained in his case.

The testimony of the agreement and conversations of the plaintiff with the defendant's agent was competent, notwithstanding the death of the agent. *Roberts v. Railroad*, 100 N. C. 670, 14 S. E. 106; *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701.

The plaintiff further testified, and the jury found, that in December, 1890, after the policy was issued, the defendant, through its general agent, agreed to renew and extend the policy for the term of the plaintiff's life at a level premium of \$22.41, "and waived the conditions of said policy providing for an increase of the rate of premium for age attained." The authorities are numerous that a general agent can waive any stipulation in the policy notwithstanding a clause

in the policy forbidding it, for he can waive that clause as well as any other. A party cannot bind himself not to agree to modifications in a contract, and a corporation acts through its agents in the scope of their agency, and the agency here was a general agency. *Wood v. Ins. Co.*, 149 N. Y. 385, 44 N. E. 80, 52 Am. St. Rep. 733; *Insurance Co. v. Gray*, 43 Kan. 504, 23 Pac. 637; *Railroad v. Insurance Co.*, 105 Mass. 570; 1 May on Ins. (4th Ed.) § 151; *Renier v. Ins. Co.*, 74 Wis. 98, 42 N. W. 208; *Ins. Co. v. Johnson*, 4 Kan. App. 10, 45 Pac. 722; *Ins. Co. v. Wilkinson*, 13 Wall. 234, 20 L. Ed. 617; *Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653. The issues submitted arose upon the pleadings, and, as every phase of the controversy could be presented thereon, they were not objectionable. *Clark's Code* (3d Ed.) pp. 474-476; *Patterson v. Mills*, 121 N. C. 266, 28 S. E. 368.

What has been already said disposes of the exceptions for refusal of instructions and refusal to nonsuit the plaintiff upon the evidence.

The exceptions to the charge are without merit, but we must further say that they are not properly presented for consideration. Each exception to the charge is required by the statute (Code § 550) to be "stated separately in articles numbered," and no exception should contain more than one proposition, else it is not "specific," and must be disregarded. *Clark's Code* (3d Ed.) pp. 513, 514, 773, and numerous cases there cited. It is not a compliance with the statute to divide the charge (as here) into four sections, each containing many propositions and divers paragraphs, and to except seriatim to each of those four subsections of the charge. The object of the statute is to give the appellee information as to the errors by specific exceptions, so that he may prepare himself to meet them on the argument here.

The policy having been wrongfully canceled, the amount of the recovery is the return of the premiums, with interest on each from the date of payment. *Braswell v. Ins. Co.*, 75 N. C. 8; *Lovick v. Life Ass'n*, 110 N. C. 93, 14 S. E. 506; *Burrus v. Ins. Co.*, 124 N. C. 9, 32 S. E. 323; *Hollowell v. Ins. Co.*, 126 N. C. 398, 35 S. E. 616; *Strauss v. Life Ass'n*, 126 N. C. 976, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; s. c. 128 N. C. 468, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699. Affirmed.

DOUGLAS, J. (concurring). I cannot dissent from the opinion of the court, because it is sustained by the law and the verdict of the jury, but, like by Brother MONTGOMERY, I am deeply impressed with the fact that the agent Jones is dead, and that the plaintiff alone is left to tell the story of what occurred between them. So much is assumed that is left unsaid in ordinary conversations that misunderstandings frequently occur between men both of whom are honest

and truthful. We have all doubtless noticed contradictions in testimony between men of equal reputation, and apparently of equal knowledge. The only way I can account for this is that men are unconsciously swearing to legal conclusions. For instance, A. and B. have a long conversation, of which the exact words are probably remembered by neither. A. swears that B. agreed to do a certain thing, while B. swears he did not. A., who is probably swearing, not to B.'s words, but to the effect produced on his own mind by the conversation, thinks there was a legal contract; while B., who perhaps regarded the entire conversation as an unclosed negotiation, is equally positive that there was no contract. Under such circumstances the jury alone can determine the question. Where one party is dead, and the uncontradicted evidence comes alone from the other side, the jury is almost compelled to find for the survivor. To remedy this hardship, the Legislature passed an act known as "Section 590 of the Code." If Jones' estate, or any one claiming under him, were a party to this action, the plaintiff would not be permitted to testify as to any transaction with Jones, but, as his estate has no pecuniary interest in the suit, which is against the insurance company alone, such testimony is competent. That the moral interest of the deceased and his family cannot be considered is one of the hardships of the law which we are powerless to remedy. It is but just to the plaintiff to say that the terms of the policy itself were apt to mislead him, and I am surprised that the defendant company should make even a conditional representation which is apparently so utterly incapable of fulfillment.

MONTGOMERY, J. (dissenting). The first issue submitted to the jury was in these words, "Was Jones the general agent of the defendant company at the time alleged in the complaint?" I think the judge erred when he refused to charge the jury, as he was requested to do by the defendant, that, if they believed the evidence, they should answer the issue in the negative. From the deposition of William E. Stevens, secretary of the defendant company, it appears that the agent Jones at Greensboro was authorized to receive applications for insurance, to deliver policies to applicants after their issuance by the society, and to collect and report premiums on the same; that Jones had no authority or power to issue policies, or to change, waive, or alter their terms in any way; and that in this particular instance he had nothing to do with the issuance of the policy, except to deliver it to the plaintiff after it had been sent to him (Jones) from the New York office. It appeared also from the evidence of J. N. Ballentine, assistant secretary of the company, that the agent Jones was appointed to solicit applications and to deliver policies that would be written, to

collect the premiums required thereon, and to appoint local agents, and that he had no other powers; that all policies were issued from the New York office, where the applications were passed upon, and were then sent out to the agent for delivery by them to the insured; that the term "general agent" was merely an office distinction between a territorial and local agent, and that a general agent had no different powers from a local agent about writing policies and sending on applications. The evidence of the plaintiff on this point was that he knew no limitations of the authority of Jones, and supposed he had full power to act for the company, and that Jones held himself out as the general agent of the company. In *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548, there was a change by the general agents in a material matter in the policy, and the company was held to have waived that condition of the policy. But it is affirmatively stated in that case that the agents "were general agents, having authority to make contracts without reference to the home office, and their power to waive conditions in the policy was coexistent with that of the company itself." The plaintiff in this case well knew that Jones did not intend to issue the policy himself, but, on the contrary, he knew that it had to be issued at New York, the home of the company, and sent back to Jones at Greensboro, to be delivered to the plaintiff. *Berry v. Ins. Co.*, supra, was quoted by this court in *Grabbs v. Ins. Co.*, 125 N. C. 389, 34 S. E. 503, and the court said, in connection with it: "It is needless to say that the expression 'general agent' occurring in the above opinion was used in its legal sense as implying general powers, and not in the geographical sense in which it is usually employed by insurance companies." The reputation of the agent Jones was destroyed upon evidence submitted to the jury after he was in his grave, and his family, if he left one, are to bear the reproach, although Jones' statement of the matter was not before the court. If the evidence of the plaintiff himself, who testified also that up to the trouble about the policy he knew nothing about Jones except what was good, and that of A. A. Shuford, and the language of the note attached to the policy, be considered together, it might be concluded, without injury to the character of either, that there was a mutual misunderstanding between the plaintiff and Jones, the agent, on the question involved in this litigation. That note was in these words: "Provided the mortality in this society shall be as favorable in the future as it has been in the past in the largest and best of the other companies (thus far it has been more favorable), this insurance will be extended and renewed during the whole expectation or probable lifetime of the insured at the rate of premium for the first year only of the policy."

(132 N. C. 819)

## SMITH v. ATLANTA &amp; C. AIR LINE R. CO.

(Supreme Court of North Carolina. June 6, 1903.)

INJURIES TO SERVANT—RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RULES—VIOLATION OF RULES—CITY ORDINANCES—EXCESSIVE SPEED—EVIDENCE OF NEGLIGENCE—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY—INSTRUCTIONS.

1. In an action against a railroad for injuries sustained by a servant by being run into by an engine while he was painting a switch target, evidence considered, and *held* that it was a question for the jury whether defendant was negligent.

2. In an action against a railroad for injuries to a servant, owing to his having been run into by a locomotive while painting a switch target, evidence considered, and *held* that it was a question for the jury whether plaintiff was guilty of contributory negligence.

3. Evidence considered, and *held* that it was a question for the jury whether, if plaintiff's negligence contributed to his injury, defendant, by the exercise of ordinary care, could have avoided the injury.

4. In an action against a railroad company for injuries, the fact that an engineer was running at a greater speed than allowed by ordinance was evidence of negligence.

5. It is the duty of a locomotive engineer to ring the bell while moving his engine in the yard, and use all reasonable efforts to avoid injuring servants engaged in work in the yard.

6. It is the duty of a railroad engineer moving an engine in the yard to observe the rules of the company relative to warnings to persons in dangerous situations, and relative to the means to be employed to avoid the infliction of injuries.

7. In an action against a railroad for injuries sustained by a servant by being run into by an engine while he was painting a switch target, the burden was on plaintiff to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care.

8. If the servant had negligently placed himself in dangerous proximity to the track, and so worked with his head down, unaware of the approach of the engine, and the rules required those in charge of trains, when they saw a person in such a position, to sound the alarm whistle, and the employees saw or could have seen the servant in time to avoid injury before running into him, defendant was guilty of negligence.

9. If, as soon as those in charge of the engine saw that defendant was in a dangerous position, they did all they could to avoid injury, defendant was not guilty of negligence.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by Fred Smith against the Atlanta & Charlotte Air Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. F. Bason, for appellant. Burwell & Cansler, for appellee.

CONNOR, J. The plaintiff, being in the employment of the lessee of the defendant, was, on the date of the injury complained of, sent to paint switch targets, and at the time of the injury was painting a target, the cen-

ter of which was 4 feet from the center of the west rail of the defendant's track. The flange of the switch target extended from the center of the target toward the rail 6 inches. The engine extended over the track and towards the switch target as follows: Tender frame, 23½ inches; punch pole, 24 inches; the step between the engine and tender, 29 inches; and the cylinder, 26 inches. While engaged in painting the target, the plaintiff set his bucket, containing paint, down near the rail. A shifting engine and tender were passing back and forth over the tracks, and, just before this engine reached the point where the plaintiff was at work, he reached over to put his brush in the bucket, and was instantly stricken by the shifting engine, which was backing up towards him.

The plaintiff put in evidence certain rules of the defendant company, Rule W being: "Whenever any person, animal or other obstruction appears upon the track, or so close thereto, as to be in danger, then instantly the following precautions must be observed: First, the alarm whistle must be sounded; second, the brakes must be applied; third, every other possible means must be employed to stop the train and prevent the accident. If there is time, all of these requirements must be complied with. If by reason of the speed of the train, or the suddenness of the obstruction, only a part of these precautions can be observed, then such of them, as under the particular facts of each case are best calculated to prevent a possible accident, must be observed." "Rule 66. The unnecessary use of the whistle is prohibited. When necessary in shifting at stations and in yards, the engine bell shall be rung, and the whistle used only when required by rule or law or when necessary to prevent accident." "Rule 121. In all cases of doubt or uncertainty, take the safe course and run no risks." The plaintiff testified: That he was familiar with these rules, and that the switch engine was moving backward and forward in the yard of the defendant's tracks. That he went to work, and put his bucket right down beside the switch, and started to paint the target. Had been engaged in the work about 10 or 15 minutes when the engine came and knocked him down. That is the last he remembers. That he heard no bell ringing, or any whistle blown, or any warning of any kind given. That he was stricken about half an inch from the left temple on the forehead, going across the top of his head, and the bone on the left eye was broken or injured, and he was thrown on the right side of his shoulder, and was stricken across the breast, and suffered from his chest for a long time afterwards. Witness illustrated to the jury his position, and that of the target and of the engine. Said he was relying on the rules, of which he knew, for his protection. That it was impossible for him to do the work well, and at the same time keep a constant lookout for the movements of the engine. That,

¶ 4. See Master and Servant, vol. 34, Cent. Dig. § 368.

if he put his whole attention on the painting, he could not be on the lookout all the time. When he looked down, he looked both ways. Looked down, and did not see any engine. Thought he could get through painting before the engine came out of the coachyard, and, if it did come out, he expected it to ring the bell or blow the whistle to give him warning. It was necessary for him to keep his eye on the target while he was painting, because there were two colors. Had been employed by the defendant company for about three years. Says he did not hear the bell ring. That he put his bucket over next to the rail; illustrating the position in which he stood, and the point at which he put his bucket, by means of photographs offered in evidence. The track was pretty fair, level and straight. On redirect examination, plaintiff stated that, when he was doing this work in the manner he had shown the jury, he was relying upon the rules of the company and the ordinance of the city of Charlotte for his protection. Would not say that he had nothing else in mind. Thought, if the engine came, it would give some signal to get out of the way.

Plaintiff introduced Sherman Ludwick, who testified that he was a short block from where the plaintiff was painting. Saw him painting the target. When the train passed up the track and struck Mr. Smith, the witness heard them "holler." Saw the engine. Heard no bell ringing. No bell was ringing. Could have heard it if it had been. The train was running 25 or 30 miles an hour.

The plaintiff introduced Kerry Reynolds, who testified that he was about 100 feet from the plaintiff at the time of the injury. The train was running 30 miles an hour. He says he saw that the plaintiff was in danger, and "hollered" at him twice to look out, and about that time it struck him.

Thomas Robinson, introduced by the plaintiff, says: That he was working 15 or 20 feet from the plaintiff. That the switch engine was coming from the depot with a sleeper, and when it went down the main line it came in the coachyard. The witness was busy wiping off the coach. The plaintiff was painting. The last witness saw the plaintiff, the engine was as far as from "here to the middle of the street," and the witness heard Grant Wallace "hollow," "I think we have struck Mr. Smith." "I looked around at the engine, and saw Grant pull the bell cord, and saw the plaintiff. Did not hear bell ring until after the plaintiff was struck. Could have heard it ring. The train was moving 20 or 25 miles an hour. The engineer was on the opposite side from the plaintiff. Saw nobody on the left-hand side. The fireman did not seem to be in his place."

M. L. Harris, witness for the plaintiff, testified that the train was running 10 to 15 miles an hour. Heard no bell. Could have heard it if it had been ringing. Heard no whistle blow.

The defendant introduced the engineer, who testified: That he saw the plaintiff painting, and passed him several times—"I reckon, a dozen times;" that he was not in his way, and, if he had stayed where he was when the witness saw him, he was perfectly safe. He was perfectly safe where he was painting, as long as he stayed there. The tender obscured his view about 60 feet before he reached the plaintiff. Engine was backing. The bell was ringing. That he was about 400 feet from the plaintiff when he first saw him. If there had been any danger, could have stopped. A man could stand between the target and the rail and let an engine pass. "I have seen it done. No part of the engine struck him. It was the corner of the tender—what is called the 'pole socket.'"

The defendant introduced J. F. Boyd, who stated that he was painting targets on the morning of the injury, and that it required no skill to do so. Witness was about 100 feet from the plaintiff. Witness illustrated how he would paint a switch target without any danger to himself.

There were several other witnesses whose testimony tended to sustain the contentions of the plaintiff and the defendant.

The plaintiff offered in evidence section 299 of the ordinances of the city of Charlotte, prohibiting the running of trains at a greater rate of speed than four miles an hour in the corporate limits of the city. At the close of the plaintiff's testimony, the defendant made a motion to nonsuit, which was denied. At the close of the whole evidence, the motion to nonsuit was renewed and overruled, and the defendant excepted. We concur with his honor in his ruling upon this motion. There was evidence sufficient and competent to be submitted to the jury upon the issues raised by the pleadings. He submitted the following issues: "(1) Was the plaintiff injured by the negligence of the defendant's lessee, as alleged in the complaint? (2) Did the plaintiff by his own negligence contribute to his injury, as alleged? (3) If the plaintiff's negligence contributed to his injury, could the defendant's lessee, notwithstanding the said negligence of the plaintiff, have avoided the injury to him by the exercise of ordinary care? (4) What damages, if any, is the plaintiff entitled to recover?"

The defendant requested the court to charge the jury that, if they believed the evidence, the answer to the first issue must be "No." The instruction was refused, and the defendant excepted. There was no error in refusing this instruction.

The court stated the contentions of the parties, charged the jury at length, explaining to them the law applicable to the testimony, and charged them that if they found that there was an ordinance in force in the city of Charlotte forbidding the running of an engine in the corporate limits at a speed greater than four miles an hour, and the en-

gineer was running at a greater rate of speed than four miles an hour within the corporate limits, in violation of the town ordinance, it would be evidence of negligence on the part of the defendant, to be considered by them in connection with the other testimony. He also instructed them that it was the duty of the defendant's engineer to ring the bell while moving his engine in the yard, and to use all proper and reasonable efforts to avoid injuring the servants of the defendant engaged in work on the yard. He also instructed the jury in regard to the duty of the engineer to observe the rules laid down by the defendant. We think his honor's instructions are fully sustained by the authorities prescribing the duty of the defendant under the circumstances testified to. In *Erickson v. Railroad* (Minn.) 43 N. W. 332, 5 L. R. A. 786, the plaintiff was lawfully at work as a section hand in close proximity to the defendant's track, where he was liable to be stricken by passing trains. It was held that, as the plaintiff occupied his position rightfully as an employé of the defendant, he was not required to look out for passing engines, as in case of trespassers and licensees, and that the company owed him the duty of "active vigilance" in giving proper signals and warnings of the approach of engines and trains, and that the plaintiff had the right to rely on the continued performance of this duty, without the necessity, while engrossed in his work, of keeping constant lookout for approaching trains. In *Schulz v. Railroad* (Minn.) 59 N. W. 192, the court held that, without regard to any custom or any rule of the company as to ringing the bell or giving other warnings, the defendant is required to give some signal of the approach of an engine, and that the failure to ring the bell or give warning was not a risk assumed by the plaintiff. In *Kelly v. Railroad* (Mo.) 8 S. W. 420, the plaintiff was an experienced track repairer, and was fastening a fish plate to a T rail in the yard of the defendant at 12 o'clock in the day, and cars were frequently passing over the track where he was at work. A train was permitted to approach him without the ringing of the bell or other warning, and without having any one posted on the car to give proper signals. The plaintiff, being absorbed in his work, did not hear the noise of the train until he looked up, but too late to avoid being struck by the car. It was held that the plaintiff was lawfully and rightfully on the track, and if no person was placed on the car to give warning, or if, being placed there, he failed to warn the plaintiff, and no other signal was given, then the company was liable. "This rule," says the court, "is humane, conservative of human life, and consonant with public policy, and that when the person is lawfully and rightfully on the track, or in the way of passing trains, and apparently unmindful of approaching trains, the duty to give signals is imperative." In *Railroad v. Hinzle* (Tex.)

18 S. W. 681, the plaintiff was employed in painting a car on the defendant's track, and while engrossed in his work a switch engine, attached to cars, was moved onto this track without any signal or warning to the plaintiff, and he was injured. The court held that he was entitled to recover, and, after stating that it is the duty of the defendant to establish rules and regulations to warn workmen on its track, proceeded as follows: "It is true, also, that the cars would probably at any moment be switched on to the side track on which he was at work; but this would not necessarily, or even probably, import that he knew that the appellant would neglect to give him adequate warning of their approach, and that it was hence unsafe for him to perform the work in obedience to his orders. The mere fact that he knew that cars would probably be switched in upon the side track would not preclude a recovery by him, unless he also knew that it was unsafe to continue his labor; and this was a question for the jury." In *Felice v. Railroad* (Sup.) 43 N. Y. Supp. 922, it is said: "It is the duty of the master to use reasonable care to provide for the servant, so far as the work in which he is engaged will permit, a reasonably safe and proper place in which to do his work, and, to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard himself against them." In *Promer v. Railroad* (Wis.) 63 N. W. 90, 48 Am. St. Rep. 905, the court used the following language: "But the employé does not assume the risk of those dangers which are known by, or can be obviated or avoided by the exercise of reasonable care and caution on the part of, the company. The company is bound to take reasonable care and caution to protect those working in its yards from such dangers, and it would be liable for damages sustained by any employé in consequence of its neglect or failure to discharge its duty in that regard. The duty is one arising from the relation of master and servant, and the servant has a right to assume, until he has knowledge to the contrary, that the master has taken and will adopt such reasonable measures as are within his power to protect him against such dangers while engaged in his work. The master is required to furnish the servant with a safe and proper place in which to perform his work, and while requiring the performance of work by a servant at a place which may or has become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger; that is to say, such as may be avoided

by the exercise of reasonable care and caution on the part of the master."

The plaintiff swears that he knew the rule requiring the ringing of the bell, and that he was relying on that for his protection; that it was impossible for him to do the work well, and at the same time keep a constant lookout for the movements of the engine; that, if he put his whole attention on the painting, he could not be on the lookout all the time. There was evidence proper to be submitted to the jury that the bell was not ringing, and that the engine was moving at a dangerous rate of speed. We think there was ample evidence, if believed by the jury, to sustain their finding upon the first issue, and we find no error in the instruction to the jury as to the measure of duty which the defendant owed to the plaintiff.

The jury having found the second issue in favor of the defendant, it becomes unnecessary to examine the charge of the court in respect thereto.

His honor instructed the jury that the burden was on the plaintiff, upon the third issue, to show that, notwithstanding his negligence, the defendant could have avoided injuring him by the exercise of ordinary care, and if they found that the plaintiff had negligently placed himself in dangerous proximity to the defendant's track, and he was engaged in his work with his head down, and was unaware of the approach of the train, and if they further found that the defendant's rules required its agents in charge of its trains, whenever they saw a person in such position, to sound the alarm whistle, when necessary, and if they further found that the defendant's employé saw, or by the exercise of reasonable care could have seen, that the plaintiff was in a dangerous position in time to avoid injury, and ran the train on down the track without proper signal of the approach of the train, or stopping it, and that this was the proximate cause of the plaintiff's injury, they should answer the third issue "Yes"; that the defendant contended that the plaintiff was not in a dangerous position until a second before the train struck him, and that, after the defendant company discovered that he was in a dangerous position, they did all they could to avoid the injury, and that it was impossible for them to avoid it; that as soon as he placed himself in that dangerous position, warning was given, and the brakes applied at the same instant he was struck; that if they found from the evidence that the plaintiff was in a place of safety up to the time he leaned over to get paint on his brush, and if they found that he did this, and it took him less than a second, and that he was stricken instantly upon leaning over, they would answer this issue "No," but it was the duty of the plaintiff to establish his contention as to this issue by a preponderance of the evidence. There was no exception to this charge, and we think that there was evidence to be submitted to the jury to sustain

that finding. Upon a careful examination of the entire record, we think that his honor's instructions are sustained by both authority and reason. See, also, *McLamb v. Railroad*, 122 N. C. 875, 29 S. E. 894; *Andreson v. Railroad (Utah)* 30 Pac. 305; *Beach on Cont. Neg. (Ed. 1899)* § 67.

Judgment affirmed.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

(113 N. C. 904)

#### LEWIS v. CLYDE S. S. CO.

(Supreme Court of North Carolina. June 10, 1903.)

**SALVAGE — CONTRACTS — EVIDENCE — SUFFICIENCY — CORPORATIONS — ULTRA VIRES ACTS — PLEADING.**

1. In the consideration of testimony on a motion for nonsuit, it must be taken as true, and considered in the light most favorable to plaintiff.

2. Evidence examined, and held not to sufficiently sustain plaintiff's allegation that the defendant company made an express contract with him for services to be rendered at its request in saving and floating a stranded vessel to take the issue to the jury.

3. A corporation must plead the defense of ultra vires by way of confession and avoidance if it wishes to avail itself thereof.

Clark, C. J., and Douglas, J., dissenting.

On petition to rehear. Petition allowed.

For former opinion, see 42 S. E. 969.

This case was heard and determined at September term, 1902, of this court. 131 N. C. 652, 42 S. E. 969. It is now before us upon a petition filed by the defendant to rehear.

The action was brought for the recovery by the plaintiff of \$2,444.74, alleged to be due by the defendant company for money expended and services rendered in "caring for, floating, and saving a steamship named 'The City of Jacksonville,'" which plaintiff alleged was on the 19th day of September owned and operated by the defendant, and was stranded on the North Carolina coast. Plaintiff averred that the said money was expended and services rendered at the request of defendant, and with its knowledge, approval, consent, and ratification, for which defendant promised and agreed to pay a reasonable value. Plaintiff further alleged that "by reason of his skill, ability, and superior knowledge of the business of caring for, handling, and floating wrecked and stranded vessels, and as a result of his said efforts, work, and services, which were attended with great hardship, exposure, and danger, said steamer was eventually floated and saved, and the defendant saved property of the value of a great many thousands of dollars thereby." The defendant denied that it owned or operated the steamship the City of Jacksonville on said date or at any other time. It denied the material averments of the complaint in regard to the alleged contract. The defend-

¶ 2. See Corporations, vol. 12, Cent. Dig. § 2032.

ant asked for the removal of the case into the Circuit Court of the United States for the Eastern District of North Carolina. This motion was denied, and upon defendant's appeal the action of the court below was affirmed. We have considered the contention of the defendant upon this point, and think that it is correctly decided. We do not deem it necessary to set out the facts in regard to this phase of the case.

Upon the trial below the following issues were submitted: "(1) Did the Clyde Steamship Company own the steamer City of Jacksonville between September 1, 1899, and June 1, 1900? Ans. No. (2) Did the plaintiff contract with the defendant to render the services set out in the complaint? Ans. Yes. (3) In what sum is the defendant indebted to the plaintiff for such services, if they were rendered? Ans. \$2,000. (4) Was the contract between the plaintiff and defendant in writing? Ans. No."

Plaintiff testified: That he was 46 years old, and had lived in Beaufort all of his life. That he was a seafaring man for eight or ten years. That he had been a marine underwriter's agent since 1890, and that he was one at the time the steamship stranded. That he had had great experience with wrecks, and he had been to a great many vessels. That he knew the Clyde Steamship Company. Went to sea once in their ship. That its office is No. 5 Bowling Green, New York. That the City of Jacksonville wore the Clyde colors. There was a "G" on the flag fastened to the staff. The life preservers and buckets were branded "C. S. C.," and also all the bedclothes, sheets, and blankets, counterpanes, tableware, and four boats. That he found the City of Jacksonville on Whalebone Inlet beach, Carteret county. She was stranded. Pipes were leaky. Reef was cut away. That he telegraphed the underwriters and the Clyde Steamship Company at New York. That a telegram was brought him from the secretary of the Boston Board of Marine Underwriters, saying: "Twenty-five thousand dollar hull, value thirty thousand. Protect. Advise me." He went to ship. Sent Roberts and Mason there. That he went to New York to see Mr. Clyde. He saw Theodore Eger and Marshall Clyde. They told him to sit down and wait until Frank Clyde came. Frank Clyde is president of the Clyde Line. He had a conversation with Marshall Clyde. Theodore Eger is general manager. Talked with Eger. Marshall Clyde asked for a report of ship. He made the report, and had a conversation about it. "I said, 'I am going back tonight.' Marshall Clyde said he wanted me to see Uncle Frank and his men, and asked me, did I want any money. I told him 'No.' They told me to come in at nine o'clock next morning. Went next morning. Eger was present. I was told to sit down and be comfortable. The insurance people came in, and the two Clydes—Marshall and Frank—Eger and Math-

er were all there. I explained the condition of the ship, and they gave me a sheet of paper, and I drew a map on it. They said, 'On what you say, we are going to get this vessel.' Went in office, and Marshall Clyde and Eger were present. Marshall Clyde asked when I was going to leave, and I said, 'To-night.' Asked me if I wanted any money, and I told him: 'No; I've got money, and don't want it.' Eger said: 'We want you to go down there and get the ship off. We care nothing for the framework, but want the hull and machinery.'" Plaintiff told them the people they contracted with could not get it; that they were fresh-water wreckers. Plaintiff said to Marshall Clyde: "You are sending me with bare hands. I can't save it that way. Persons there say I bother them. I will go there and advise with the master, and keep you posted." Marshall Clyde said to plaintiff to "spend what was needed, and, when the ship is out, we will see you handsomely rewarded, outside of what the underwriters pay you." Plaintiff went to and came from the ship. Was engaged, in all, 230 days. Services are worth \$10 per day and expenses. Expenses were \$444.74. Paid out that amount of money, and has not been paid back, except \$25. Plaintiff does not state who paid him the \$25. On cross-examination the plaintiff said he was the underwriter's agent. His first orders came from the Boston Board of Underwriters. He was employed by them. The ship did not go into the hands of underwriters, but he made out a bill against the underwriters and owners, and forwarded it to the Boston board. That is the way it has to go. Eger was present at all conversations. He and Clyde both said that the contract for saving the vessel had been made with the Atlantic Wrecking Company. He had a contract with the Clyde Steamship Company. The writing was to W. P. Clyde & Co. He has written them. Cannot say that all letters were so addressed. When he works for the underwriters, it is for the owners. He had expected to get his pay of the underwriters. He brought suit in Philadelphia, and in his complaint stated that the underwriters owed him. He signed the paper. He swore to this. Mather is Clyde's insurance adjuster and Clyde's agent, and made contract with the Atlantic Wrecking Company. When the ship was abandoned by the overseer the underwriters took charge. Plaintiff was sent there by the underwriters. It is the general custom of the ship to have her own furniture marked in the name of the ship, and not in the name of the owner. Plaintiff rested, and defendant moved to dismiss the complaint. Motion denied, and defendant excepted. Defendant then introduced the deposition of A. J. Wilkinson, enrollment and license clerk in the customhouse of United States in New York. He produced a deed duly enrolled from the De Bary Merchants' Line of New York of the said City of Jacksonville to the De Bary Merchants' Line of

New York City. He also introduced certificate of enrollment of said steamship by Marshall Clyde, of New York, president. Defendant again moved the court for judgment of nonsuit. Motion denied, and defendant excepted.

Rountree & Carr, for appellant. Simmons & Ward, D. L. Ward, and C. L. Abernethy, for appellee.

CONNOR, J. (after stating the case). In the view which we take of the case, it is not necessary to set out the defendant's prayers for instruction. The court charged the jury that they must find, by the greater weight of the evidence, that the defendant company employed the plaintiff, and engaged his services to look after this wreck in their interest; that the contract to bind the company, must have been made with some one authorized to speak for it; that some officer engaged to look after its ships engaged the services of the plaintiff; that a general manager would have such authority, but it must be the Clyde Steamship Company's officer, and not that of some other company or corporation; that they were not to give a verdict for the plaintiff because he rendered services to the City of Jacksonville, but he must have done so under contract or appointment with the defendant company; and that the burden was on the plaintiff to show by a preponderance of the evidence that the defendant employed him. The defendant assigned as error the refusal of the court to nonsuit the plaintiff, and to the charge as given.

The only question thus presented for our consideration is whether there was, from a legal standpoint, any sufficient testimony to be submitted to the jury to sustain the plaintiff's allegation that the defendant company made a special contract with him for services to be rendered at its request in saving and floating the steamship. The finding of the jury upon the first issue eliminates from the controversy any right of the plaintiff to recover as upon a quantum meruit, based upon an implied promise to pay for services rendered, of which it received the benefit. So far as the testimony shows, the defendant company had no interest in the said steamship, nor did it receive any benefit whatever from the services of the plaintiff in saving and floating her. The plaintiff averred that the "defendant owned and operated the ship," but, in the issue submitted to the jury, the question is confined to the ownership. If the issue in regard to the ownership of the steamship by the defendant company had been answered in the affirmative, by reason whereof any benefit accrued to it from the services of the plaintiff, it would have been liable for such services.

We are thus brought to the consideration of the single question whether there was any testimony fit to be submitted to the jury to establish an express contract of employ-

ment. In considering the case from this point of view upon the defendant's motion for nonsuit, the testimony must be taken as true, and considered in the light most favorable to the plaintiff. It will be well to keep in mind that so much of the testimony as referred to the steamship carrying the Clyde colors, and of the life preservers and other property thereon being marked "C. S. C.," is eliminated from our consideration. This testimony was competent only upon the question of ownership, which has been negatived by the verdict. The testimony in regard to the contract is indefinite and unsatisfactory. If, however, tested by the rules laid down by this court, it is of that character which the law denominates evidence, and not merely speculative or conjectural testimony, which is declared to be a mere scintilla, it was the duty of the judge to submit it to the jury, and their peculiar and sole province to pass upon it. There is probably no more delicate duty imposed upon the judiciary than the application of the well-settled rules and principles which have been adopted, in which it is sought to define the line which distinguishes testimony which should be submitted to the jury and that which should not. Gaston, J., in *Cobb v. Fogalman*, 23 N. C. 440, says: "Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture of a fact never can amount to evidence of it." Rodman, J., in *Wittkowsky v. Wasson*, 71 N. C. 451, in discussing this question, quoting the language of the English courts, says: "It is not enough to say that there was some evidence. A scintilla of evidence would not justify the judge in leaving the case to the jury. There must be evidence from which they might reasonably and properly conclude that there was negligence," that being the fact to be established. And in *State v. Vinson*, 63 N. C. 335, the same learned justice says: "It is easy enough to express in general terms a rule of law, \* \* \* but it is confessedly difficult to draw the line between evidence which is very slight and that which, as having no bearing on the fact to be proved, is, in relation to that fact, no evidence at all. We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." Battle, J., in discussing and applying this principle in *Sutton v. Madre*, 47 N. C. 320, gives this illustration: "Suppose a plaintiff in a case was bound to show the existence of a fact within 20 years, and the only testimony he offered was that of a witness who stated that it existed either 19 or 21 years, and he could not remember which. Could the judge leave that isolated statement to the jury, as testimony from which they were at liberty to find the issue in favor of



the plaintiff? Certainly not." Faircloth, C. J., in *Young v. Railroad*, 116 N. C. 932, 21 S. E. 177, says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the parties having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." In *State v. Satterfield*, 121 N. C. 558, 28 S. E. 491, the same judge says: "The duty of drawing the line between a scintilla and evidence fit for the jury is sometimes difficult and delicate, but it is important, and the court must assume the responsibility. It is a preliminary question for the court, who must find, not that there is absolutely no evidence, but that the evidence is such as would justify a jury in proceeding to a verdict—such as will reasonably satisfy an impartial mind." See, also, *Sprull v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39; *Bank v. School*, etc., 121 N. C. 107, 28 S. E. 134. *Merrimon, J.*, in *State v. Powell*, 94 N. C. 968, says: "Legal evidence is not such as merely raises a suspicion, and leaves the matter in question to conjecture. As said above, it is such as, in some just and reasonable view of it—taking all the facts, whether they be many or few—will warrant a verdict of guilty." Citing *Cobb v. Fogelman*, 23 N. C. 440, and other authorities.

The difference between the province of the jury to pass upon the weight of the testimony when there is conflict, and to draw legal conclusions from testimony in respect to which there is no conflict, must be kept in mind. The question in this case is simply whether there is, admitting every word of the testimony to be true, any evidence upon which, as a matter of law, the jury could, under the instruction of the court, draw the conclusion that the plaintiff had shown an express contract to perform the services for and on behalf of the defendant corporation. There is no question in this case in regard to the weight of the testimony. Applying this principle to the testimony in this case, we think that it was not sufficient to be submitted to the jury. A natural person becomes liable contractually when a proposition is made upon one side, and accepted upon the other, or when a request is made for the performance of service, and pursuant thereto the service is rendered. We are not now discussing the question of consideration, as no such question is presented in this case; nor are we discussing the question of ratification, for the same reason. It is elementary that a contract upon which a civil action may be founded must be the result of the concurrence or coming together of the minds of the contracting parties—a corporation, of course, speaking and acting through its authorized agents. The plaintiff says that his testimony establishes this condition: The City of Jacksonville was stranded upon the coast of North Carolina. For the purpose of

this discussion, she was not the property of the defendant company, but was the property of the De Bary Company. The plaintiff resided in Beaufort, N. C., and, being a marine underwriter's agent, telegraphed the underwriters and the defendant steamship company at New York. In response thereto, he received a telegram from the secretary of the Boston Board of Underwriters, stating the value of the vessel, and using the words: "Protect. Advise me." He sent persons to Hatteras, and says: "I went to New York to see Mr. Clyde. I saw Theodore Eger and Marshall Clyde. They told me to wait until Frank Clyde came in. He is the president of the company." He then had a conversation with Marshall Clyde, who is the president of the De Bary Bay Company. This conversation was in the place of business of the defendant company. Marshall Clyde asked for a report of the ship, which the plaintiff made, and had a conversation about it. He asked the plaintiff if he wanted any money. Eger was present. He was the general manager of the defendant company. The next morning the plaintiff again met the two Clydes, with Eger and Mather; the latter being Clyde's insurance adjuster and agent. It seems from the testimony that there was a partnership known as W. P. Clyde & Co. They said, "On what you say, we are going to get this vessel." Marshall Clyde asked him when he was going to leave, and the plaintiff said "To-night." He asked him if he wanted any money, and the plaintiff answered "No." Eger said: "We want you to go down there and get the ship off. We care nothing for the framework, but we want the hull and machinery." Marshall Clyde told him to go, and "spend what is needed, and when the ship is out we will see you handsomely rewarded, outside of what the underwriters pay you." This was clearly contractual language. There can be no mistake as to its purport and legal significance. Marshall Clyde had no connection, so far as the testimony shows, with the defendant company. The plaintiff further said: "My first orders came from the Boston Board of Underwriters and owners. I forwarded bill to the Boston board. Eger and Clyde both said that the contract of saving the vessel had been made with the Atlantic Wrecking Company. I have a contract with the Clyde Steamship Company. The writing was to W. P. Clyde & Co. I have written them. I cannot say that all letters were so addressed. I did expect to get my pay from the underwriters. I brought suit in Philadelphia. In my complaint I think I said that the underwriters owed me. I signed the paper." In this condition of the testimony, we think it impossible, from a legal standpoint, for a jury reasonably to conclude that the plaintiff had shown a contract between the defendant company and himself.

The court instructed the jury that "a general manager would have such authority";

that is, authority to make this contract. The only testimony is that of the plaintiff, who says that Eger was the general manager. It is by no means clear that this instruction is correct.

We base our conclusion, however, upon the proposition that the testimony, measured by the rules laid down by this court, is not sufficient to be submitted to the jury to sustain the plaintiff's contention. In the opinion rendered by this court at the last term, the learned justice, speaking for the majority of the court, said: "He [the plaintiff] further testified that the vessel in question wore the Clyde colors; that there was a large 'C' on the flag fastened to the flagstaff; that the life preservers, etc., were all marked 'C. S. C.' He also stated that he had some correspondence with the Clyde Steamship Company, the defendant in this action. This, at least, was some evidence tending to prove that the plaintiff made a contract with the defendant as alleged, and that the defendant had some substantial interest in the vessel." With great deference for the opinion of the learned justice, we think that the testimony to which he refers, in the light of the finding of the jury upon the issue of ownership, should not have been considered by the jury as tending to prove that the plaintiff made a contract with the defendant. The plaintiff testified that "the writing was to W. T. Clyde & Co. I have written them. I cannot say that all letters were so addressed." It is true that he used the words "have a contract with the Clyde Steamship Company." We are unable to see whether this language referred to the alleged contract in controversy, or some other contract. If the former, it was a conclusion drawn by the plaintiff, rather than the statement of a fact. The plaintiff himself appears to have regarded his employment as being by the Boston Board of Underwriters. He so expressly states. He says that he made out his account against them, and brought suit in Philadelphia, and that he was sent there by the underwriters, all of which is inconsistent with the allegation that he was acting under a contract with the defendant company.

There is no evidence in the record as to when or what company employed the persons who performed the service of saving and floating the steamship, or who or what company took possession of her after she was floated. The plaintiff should undoubtedly be paid for his services, but we do not think that he produced sufficient testimony to be submitted to the jury that he made a contract with the defendant company to render the service. We can well understand that in the office of the defendant company in New York, in a conversation in which the president of the defendant company, the president of the company owning the steamship, and the superintendent of the defendant company all joined, there should be uncertainty as to which corporation was dealing with the

plaintiff, and that there should be some confusion in his mind. It would seem that good faith and fair dealing would have suggested to the several parties to explain to the plaintiff with whom and with what corporation he was dealing and being employed. It is this very uncertainty which surrounds the testimony that, in our opinion, makes it conjectural and speculative, and not sufficient to be the basis of a verdict. It may be that in another trial both parties will be able to make a fuller disclosure of the facts which are within their knowledge. Courts should be, and we think are, careful not to trespass upon the "ancient mode of trial by jury"; but they must be equally careful to preserve the symmetry of the judicial system which has come to us as the result of the wisdom and experience of the centuries, by firmly preserving the rights, duties, and powers of the judge in the trial of causes at law. Verdicts must be founded upon evidence, and the court must say what is evidence. The weight, credibility, and conclusions of fact to be drawn from it are the province of the jury.

The defendant contended before us that the contract, if made, was ultra vires, and not binding upon the corporation. This defense is not raised by or set up in the answer. The majority of this court were of the opinion on the former hearing that this defense could only be made by way of a plea of confession and avoidance. The former Chief Justice and Mr. Justice Montgomery thought otherwise, as set forth in the dissenting opinion. The authorities sustain the view of the majority of the court. It is said in 5 Enc. Pl. & Pr. p. 95: "In an action against a corporation, the plaintiff need not set out in his complaint or declaration the capacity of the corporation to make the contract sued on. When the defense of ultra vires is allowable to a corporation, the corporation must specially plead it." In the text-books the plea is always spoken of as a "defense." 1 Clark & M. Corp. § 174; 1 Thomp. Corp. § 5967. The defendant will pursue such course in this respect as it may be advised.

Petition allowed.

DOUGLAS, J. (dissenting). Taking the opinion of the court in its regular order, my first objection is to the vague and indefinite manner in which a well-established doctrine is therein stated. The possibility of bilateral construction is always a dangerous defect in the definition of a principle. In any event, it tends to weaken the principle, and may become the entering wedge in its eventual destruction. During the recent floods in the Mississippi river, I was much impressed at the published statement that 500 men were at work on the Waterloo Levee, attempting to stop up what was originally only a crawfish hole. We may well learn a lesson from the laws of nature, and hence I sometimes dissent more on account of what the opinion

may lead to, than from what it actually decides.

The opinion says: "The only question thus presented for our consideration is whether there was any *sufficient* testimony to be submitted to the jury to sustain the plaintiff's allegation," etc. I have italicized the word "*sufficient*," as also some other words quoted in this opinion, in order to emphasize my objective point. The proposition would have been complete without this word, as a mere scintilla is not considered as evidence. Even as it stands, the word has been so often defined as meaning anything more than a scintilla that it might not be objectionable, were it not for other expressions in the opinion that tend to misconstruction. Further on the opinion says: "In this condition of the testimony, we think it impossible, from a legal standpoint, for a jury reasonably to conclude that the plaintiff had shown a contract between the defendant company and himself." This can only mean that in the opinion of this court the preponderance or greater weight of the evidence was against the plaintiff. What have we to do with deciding where lay the greater weight of the evidence? That matter is exclusively within the province of the jury. This is clearly set forth in *Wittkowsky v. Wasson*, 71 N. C. 451, the leading case upon the subject, and the one on which the court now principally relies. The court in that opinion says, in express words: "Where there is *any* evidence to support a plaintiff's claim, it is the duty of the judge to submit the question to the jury, who are the exclusive judges of its weight." And again: "Whether there be *any* evidence is a question for the judge. Whether *sufficient* evidence is for the jury." It is true the court then proceeds to use expressions which are capable of a different construction—so much so that it felt it necessary to expressly disclaim any intention to "extend or alter any rule of practice or evidence heretofore recognized in this state." Judge Reade assented to the decision, "upon the explanation therein that it was not to be interpreted as an innovation upon the established rule that the jury are the sole judges of the weight of evidence, without any intimation of opinion on the part of the judge." Judge Bynum, while concurring in the opinion of the court that there was no evidence to go to the jury, dissented from the opinion as introducing a *new and dangerous* proposition. It is remarkable that in this celebrated case the difficulty with the court lay not in determining the merits of the controversy, but in arriving at the true meaning and tendency of the opinion. Time has more than justified the dissent of the great jurist, whose opinion stands as a monument to one who seems to have joined the instinct of the seer to the wisdom of the sage. In *Cobb v. Fogelman*, 23 N. C. 440, cited by the court,

Judge Gaston clearly draws the distinction between a defect of evidence and evidence confessedly slight, and properly decides the case on the ground that there was *no* evidence of a fraudulent intent. This appears from the evidence, and is distinctly stated in the concluding paragraph, which is as follows:

"We feel ourselves constrained to hold that there was error in leaving it to the jury to infer from the testimony a fraudulent intent in the defendant, when *no evidence* had been given from which such an intent could be inferred."

There is no intimation in that opinion that this court can pass upon the sufficiency of the testimony. I am aware that the term "*sufficient evidence*" has been frequently used by this court, but I respectfully submit that, taken in connection with the context of those opinions, or at least with contemporaneous opinions by the same judges, it clearly appears that the term means simply that the evidence must amount to something more than a mere scintilla. A few examples will suffice: In *State v. Allen*, 48 N. C. 258, in an able opinion delivered by Judge Pearson, the court says: "An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected both by the Constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect or *entire absence of evidence*, it is his duty so to instruct the jury; but if there be *any* competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that any one will exclaim, 'Certainly no jury will find the fact upon such insufficient evidence!' Still the judge has no right to put his opinion in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent them from being misled by the arguments of counsel or their own want of apprehension." This opinion will well repay a careful perusal, and will clearly show that the great chief justice would never have concurred in *Wittkowsky v. Wasson*, but for the positive assurance that it did not change or modify the existing rule that the jury were the sole judges of the *weight* of the evidence. In *State v. Cardwell*, 44 N. C. 245, the court, by Battle, J., says: "Hence it is settled that, if there be *no* testimony sufficient to establish a fact, it is the duty of the judge to say so; but, if there be *any* testimony *tending* to prove the fact, he must leave its weight to be determined by the jury." The italics were by the court.

In the case at bar the opinion of the court quotes the language of Chief Justice Faircloth in *Young v. Railroad*, 116 N. C. 932, 21 S. E. 177; but in the same case, immediately after the words quoted by the court, on page 937, 116 N. C., page 178, 21 S. E., come the following: "There is or may be in every case a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a *scintilla* of evidence upon which the jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed." The court also cites the oft-cited case of *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39. It would seem that the opinion, taken in its entirety, is free from ambiguity; but in *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848, decided by the same court, and written by the same judge, appears the following unequivocal enunciation of the principle: "It is well settled that, if there is *more than a mere scintilla of evidence tending to prove* the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence." See, also, *Moore v. St. Ry.*, 128 N. C. 455, 39 S. E. 57; *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202; *Dorsett v. Mfg. Co.*, 131 N. C., at page 263, 42 S. E. 612, where *Cox's Case* is cited with approval by Chief Justice Furches, speaking for a unanimous court. Further on, the opinion of the court says: "If, however, tested by the rules laid down by this court, it [the testimony] is of that character which the law denominates evidence, and not merely speculative or conjectural, which is declared to be a mere *scintilla*, it was the duty of the judge to submit it to the jury and their peculiar and sole province to pass upon it." With great respect for the learned judge that wrote the opinion, I am compelled to say that this sentence conveys no definite meaning to my mind. The word "*scintilla*" has a fixed and definite meaning, both in law and in English. Webster says that it is "a spark; an iota; tittle." Black says that *scintilla* of evidence is "the doctrine that where there is any evidence, however slight, *tending to support a material issue*, the case must go to the jury, since they are the exclusive judges of the weight of the evidence." The italics are those of the learned author. This definition is supported by the uniform current of authorities in this state, unless changed by the opinion in the case at bar. Does the court mean to say that it intends changing the meaning of the rule by changing the definition of a word? Surely not, but why the constant reiteration of the phrase? My own views will be frankly stated. I adhere to the principle as stated in *Cox v. Railroad*, *supra*, as the settled rule in this court. If the court intends to decide, directly or indirectly, in terms or by judicial intimation, that where there is *any* evidence, more than a *scintilla*, *tending to prove a material issue*,

the court can withdraw the case from the jury and direct a nonsuit on the ground that, in the opinion of the court, the evidence is not sufficient to justify a verdict, then I most respectfully but earnestly dissent from a proposition so new and dangerous, which, in my opinion, is without just foundation in authority, and in violation of the Constitution and laws of the state. Large numbers of cases might be cited in support of my views. Those in this state are too well known to need citation, and I will cite but one case from the Supreme Court of the United States, where the rule is less strict than in this state. In *Railroad v. Egeland*, 163 U. S. 93, 98, 16 Sup. Ct. 975, 41 L. Ed. 82, the court holds that, before the question can be withdrawn from the jury, the inference from the fact must be "*so plain as to be a legal conclusion.*"

The former court, affirming the court below, held that there was evidence to go to the jury. The present court think otherwise, and bases its opinion upon the "uncertainty which surrounds the testimony." This very uncertainty seems to me a conclusive reason why it should have been left to the jury. In *Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33, Chief Justice Faircloth, speaking for the court, says: "The defendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be taken as true, and taken in the most favorable light for him. An appellate court, reviewing a judgment of nonsuit, will assume every fact proved, necessary to be proved, when the evidence *tends to prove it.*" See, also, *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, and cases therein cited. In *Railroad v. Lowell*, 151 U. S. 209, 217, 14 Sup. Ct. 281, 284, 38 L. Ed. 181, the court says: "In determining whether the plaintiff was so guilty of contributory negligence as to entitle the defendant to a verdict, we are bound to put upon the testimony the construction most favorable to him." Can there be any doubt that under such a rule the case should have gone to the jury?

The opinion of the court also seems to lay great stress upon the absence of "contractual words." Such words are not required to make a contract binding, and are rarely used in the ordinary affairs of life. If a person says to a merchant, "Send me up a bag of flour," or "Give me a pound of sugar," can there be any doubt that he is bound for the price? If a corporation, through its general manager, says to a professional salvor, "We want you to go down there and get the ship off," why is it not equally liable? The evidence referred to in the former opinion of the court, relating to the ship wearing the Clyde colors, flying the Clyde flag, and using furniture marked "C. S. C.," was cited as tending to show that, while the defendant may not have had the legal title to the ship, it may

have had in it at least what is equivalent to an insurable interest.

For some reason, in writing the former opinion of the court, I omitted to cite authorities in support of the proposition that the plea of *ultra vires* is a defense in the nature of confession and avoidance, with the burden of allegation and proof resting upon the party seeking its protection. 5 Thomp. Corp. § 5967; 1 Clark & M. Corp. § 174; 5 Pl. & Pr. 96; Elliott, Pr. Corp. 57; 2 Spelling, §§ 780, 848, 937.

I deeply regret being compelled to dissent so often and at such length, as I am aware that the time thus spent might well be given to the preparation of the opinions of the court; but when great principles are at stake, that have exercised a dominating sway over my judicial life, I feel compelled to give them what support I can, trusting to a generous profession for the appreciation of my motives, and to time for the vindication of my convictions.

CLARK, C. J. (concurring in dissent). I concur in what is so clearly and forcibly said by Mr. Justice DOUGLAS, and I regret that I cannot add emphasis to the views stated by him and by Judge Bynum in *Wittkowsky v. Wasson*. "Juries are the sole and exclusive judges of the facts," and judges have no right to intrude into that province. The maintenance of this principle of the law inviolate is guaranteed by the Constitution, and its preservation is as necessary now as at any time in the history of our race for the protection of the liberty and the property of the humblest citizen. The act of 1796 (now Code 1883, § 413) forbidding the trial judges to intimate any opinion upon the weight of the evidence is worse than useless, if the appellate court can weigh the evidence. The trial judge, who at least sees the bearing and demeanor of the witnesses upon the stand, and knows the surrounding circumstances (advantages which are denied to us), can far better judge of the weight and sufficiency of the evidence than an appellate court. Why deny him so rigorously an expression of opinion which the jury is not compelled to accept, if the appellate court can weigh the evidence, and hold it insufficient to justify the conclusion at which the jury have arrived, and in a case, too, in which the trial judge has not thought he ought to exercise his undoubted prerogative to set the verdict aside, as he would have done if he deemed it contrary to justice? If the trial judge sets the verdict aside, the very same evidence may be submitted to another jury for its consideration, whereas, if the appellate court adjudges the evidence insufficient, the appellee not only loses his verdict, but all opportunity to try his cause by a jury at all, unless he can get additional evidence. Because there is no power anywhere to review the action of an appellate court in holding that there was not sufficient evidence to justify a verdict

which has been rendered, is an additional and the strongest reason why an appellate court should never so hold. So important a matter is this that the Court of Appeals is expressly forbidden by the Constitution of New York to set aside a verdict, even on the ground that there is no evidence, when the court below is unanimous that there was evidence; and our superior court must be unanimous, there being only one judge. The time-honored limitation in this state within which an appellate court can set aside a verdict is when "there is no evidence beyond a scintilla."

(132 N. C. 939)

MOORE v. PALMER et al.

(Supreme Court of North Carolina. June 11, 1903.)

EVIDENCE—TRANSACTIONS WITH DECEASED PERSONS—TRIAL—ERRONEOUS ADMISSION OF TESTIMONY—ATTEMPTED CURE BY INSTRUCTIONS.

1. In an action for goods sold and delivered to a firm where one of the partners was dead, testimony given by the other partner, who had admitted his liability, as to the partnership agreement with deceased, and the sale and delivery of goods to the firm, was incompetent against deceased's executor.

2. Error in admitting the testimony was not cured by a charge instructing the jury that it was possible error to have admitted such testimony, and excluding it as to the deceased partner's estate, leaving it to be considered only against the partner giving the evidence.

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; McNeill, Judge.

Action by D. W. Moore against James Palmer and another. W. H. Ragan afterwards became party plaintiff by leave of court. From a judgment for plaintiffs, defendants appeal. Reversed.

John A. Barringer, for appellants. King & Kimball, for appellees.

MONTGOMERY, J. The plaintiff alleged in his complaint that the defendants James Palmer and John Eudy, the testator of the other defendant, were partners, and that at the death of Eudy the partnership owed to the plaintiff a balance of about \$235 for goods sold and delivered to them. On the trial the defendant Palmer was allowed to testify over the objection of the other defendant "that he and the testator, Eudy, had entered into a copartnership for the purpose of cleaning out and putting in proper shape and condition and selling the Lindsay mine; that they were to bear all expenses incident thereto equally, and, after paying the same, divide the profits on the same basis; that the work of cleaning out the mine commenced the latter part of November, 1896, and ran up to the time of Eudy's death, the 15th June, 1897; that the goods, the price of which was sued for, were furnished by the plaintiff on his order for the firm of Palmer & Eudy in the main, but some was for tools, etc., used about the mine." In his instructions to the jury

his honor said in reference to that testimony: "Now, I have to say to you that it was possibly error to have admitted the testimony of Palmer as to transactions with the deceased man Eudy, and those statements are excluded from your consideration as against such party; but they may be considered as against Palmer only, the man making them. I exclude from your consideration all transactions and communications as against Eudy." The evidence was clearly incompetent. *Fertilizer Co. v. Rippy*, 123 N. C. 656, 31 S. E. 879. And the question that presents itself is, was the effect of the attempted correction of the error in his honor's instruction to put the defendant in the same condition as if the evidence had not been received? We think it did not. The jury should have been instructed not to consider any part of the witness' evidence except that part in which he stated that the plaintiff furnished the goods on his (witness') order, and not to consider his testimony of the alleged partnership, even in connection with the witness himself. It may have been that the jury would not have believed the testimony of the other witnesses concerning the partnership if Palmer's testimony on that question (allowed, it is true, only against himself) had not been given in. His testimony may have given more weight to the testimony of the other witnesses concerning the alleged partnership than it would have carried without it. His honor should have held that all that the witness Palmer could testify to was that he had ordered the goods, and that he was, therefore, liable for the price. He should not have submitted to the jury, on Palmer's evidence, anything concerning the alleged partnership to hold even Palmer himself on the partnership liability. If there had been a partnership existing between himself and Eudy at the time Palmer ordered the goods, and if they were used for the partnership benefit, those matters should have been proved by other witnesses.

Error.

**WALKER, J. (concurring).** This action was brought to recover the amount of an account for goods alleged to have been sold and delivered by the plaintiffs to the firm of Palmer & Eudy. The defendant Palmer filed no answer, and did not deny his individual liability, but the defendant Moon, administrator of Eudy, did answer, and deny the partnership, and also denied that any goods had been sold or delivered to his intestate as a member of said firm or otherwise. The plaintiffs, in order to establish their claim, introduced as a witness the plaintiff Moore, who, on his examination, was asked to state to whom plaintiffs sold the goods. The defendants objected to this question, the objection was overruled, and the defendant excepted, the court holding at the time "that anything the witness might say about the intestate, Eudy, being connected with the business, or any transaction between him and the

plaintiffs, would be incompetent, and should not be considered by the jury, but that the witness might state to whom he sold the goods as affecting and bearing upon the liability of the defendant Palmer." Thereupon the witness testified "that he had repeatedly seen the intestate, Eudy, about the mine which was being cleared up; that he had repeatedly heard him giving orders to the employes there working under the defendant Palmer; that he had repeatedly carried Eudy there, and had gone with him from his home, where Eudy boarded, to the mine; that the bill sued on was for goods furnished to laborers working for Palmer and Eudy, and were furnished upon the order of Palmer; that the balance due plaintiffs April 7, 1897, was \$935.63, and that no part of the same was paid, but the whole was still due and owing; that the mine being cleaned up was the Lindsay mine; that the account originally was for a sum between three and four hundred dollars; that \$50 had been paid thereon in December, 1896, and \$44 in the spring of 1897; that Eudy died June 15, 1897." It is conceded that the court may admit testimony which is competent against one of the parties to the suit and not against another, for the purpose of charging with liability the party against whom it is competent. The rule is well settled, but I do not think it is applicable to this case. The testimony may be admitted and restricted to one of the parties, but it should not be admitted in such a form as is calculated to prejudice the other party, if this can be avoided. Why it was necessary to show the liability of Palmer, when he had not denied it, and was not disputing the plaintiffs' claim, I cannot understand. It will be observed that, while the court ruled that Moore might state "to whom he sold the goods as affecting and bearing upon the liability of the defendant Palmer," the testimony elicited from the witness Moore almost wholly related to dealings, transactions, and communications with Eudy. It is true that the court, in its charge, told the jury that, so far as the testimony of Moore "tended to bear upon the question of partnership between Palmer and Eudy, or any contract with Eudy and the witness, or any conversation or transaction between the witness and Eudy, it was excluded, and his testimony was only binding upon the defendant Palmer"; but I do not think that this caution was sufficient, or that the evidence, under the circumstances of the case, should have been admitted. Why do the vain thing of proving the admitted liability of Palmer, and what effect could the testimony have had but to prejudice the administrator of Eudy? It was either relevant for the purpose of charging the administrator of Eudy, or it was not relevant at all. The court thought it was incompetent, and in a general way told the jury to disregard it except as to Palmer, but did not tell them which part of it was competent as to Palmer and incompetent as to Eudy's

administrator. How could the jury be expected to make the discrimination? But the chief error was in submitting the testimony to the jury at all, as it was not necessary to show Palmer's liability, and the testimony might have influenced, and no doubt did influence, the jury in returning a verdict against Eudy's administrator.

The court below permitted the witness Palmer to testify that the goods were furnished by the plaintiffs, on his order, for the firm of Palmer & Eudy. The jury were afterwards instructed that the testimony could only be considered as against Palmer for the purpose of fixing him with liability. What I have said as to the testimony of the witness Moore is equally applicable to the testimony of Palmer. He was alleged to be a member of the firm composed of himself and Eudy, and was interested in the event of the action, as a recovery against Eudy would diminish his liability to the plaintiffs by one-half. *Fertilizer Co. v. Rippey*, 123 N. C. 656, 31 S. E. 879; *Lyon v. Pender*, 118 N. C. 150, 24 S. E. 744. As I have said, no answer was filed by Palmer, and there was no denial of or dispute as to his liability. The jury may, therefore, have been misled by the admission of his testimony. They could not very well consider it as to Palmer, for he did not deny his liability, and it is impossible to tell what influence it may have had upon the jury in passing upon the real issue involved as to the liability of Eudy's estate, notwithstanding the caution of the court. If Palmer had denied his liability, it would have been sufficient to establish it for the plaintiffs to have shown by him that he ordered the goods without requiring him to state for whom he ordered them. In this case the judge could have admitted the testimony in a way so as to have charged Palmer, if he had denied his liability, and it was necessary to charge him without at the same time injuriously affecting Eudy's estate. The proof of a partnership as against Palmer so as to charge him as a member of the firm would necessarily involve the finding by the jury that there was a partnership between Palmer and Eudy, and in this way the estate of Eudy may have been prejudiced. The proof should have been so confined as to have related solely to Palmer's individual liability. If Palmer ordered and received the goods, he was liable whether he was a partner or not. It is apparent, I think, that the testimony of Moore and Palmer was not admitted merely to show a delivery of the goods to Palmer and the value thereof.

If the jury did not base their verdict on the testimony of the witnesses Moore and Palmer, I do not see upon what testimony they found that the goods had been sold to Palmer and Eudy. The testimony of Charles Palmer, the only other witness in the case except Rogan, who testified about an entirely different matter, related to the partnership, and not to the sale and delivery of the

goods. The judge ruled out all of the testimony of the witnesses Moore and Palmer, so far as it tended to charge Eudy's estate with liability, and, having done so, no testimony remained upon which to base a verdict as to the sale and delivery of the goods to the firm; Charles Palmer, as we have said, testifying only to the partnership. It follows, therefore, that there was no evidence of the sale and delivery of the goods, so far as Eudy was concerned, and it would seem that the motion of the defendants in the court below to dismiss the complaint under the statute should have been granted, and there was error in not doing so, for which a new trial should be awarded.

DOUGLAS, J., concurs in the concurring opinion of WALKER, J.

CLARK, C. J. (dissenting). This is an action to recover \$235.63 for goods and merchandise sold to the defendants James Palmer and John Eudy (the testator of defendant Moon) trading and doing business as partners. One Charles Palmer testified without objection that he knew Eudy, and had on many occasions gone with him from his home to the Lindsay mine, where his father (the other defendant) was cleaning out the same; there were engaged in cleaning out the mine 10 or a dozen laborers; that several times Eudy had stated to him that he and defendant James Palmer were partners in opening up and developing the Lindsay mine for sale, and that they were to bear the expenses equally, and share the profits on the same basis; that Eudy did not want to be known in the transaction; that he had often heard the testator, Eudy, giving instructions to parties working in and around the mine as to what to do and how to do it. The plaintiff testified, without exception, that he had repeatedly seen the testator, Eudy, about the (Lindsay) mine which was being cleaned out; that he had repeatedly heard him giving orders to the employees there working under defendant Palmer; that he had repeatedly carried Eudy there, gone with him from his home, where Eudy boarded, to the mine; that the bill sued on was for goods furnished to laborers working for Palmer and Eudy, and were furnished upon the order of Palmer; that the balance due, deducting payment, was \$235.63, with interest from April, 1897. None of these things were "transactions or communications" between the plaintiff and deceased. *Gray v. Cooper*, 65 N. C. 183; *Cowan v. Layburn*, 116 N. C. 526, 21 S. E. 175; *Johnson v. Rich*, 118 N. C. 270, 23 S. E. 1007. The evidence was competent. And the judge further told the jury they could only consider the evidence as to whom he sold the goods as affecting the liability of Palmer. It is true that the first assignment of error recites the admission of other evidence which would be objectionable, but such recital goes for naught unless the "case

on appeal" as settled sets out that such evidence was in fact admitted. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364; *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573. Otherwise a party could always get a new trial by reciting as facts matters which do not appear in the "case on appeal." *State v. Dixon*, 131 N. C. 813, 42 S. E. 944; *Patterson v. Mills*, 121 N. C. 268, 28 S. E. 368.

Upon the above evidence there was certainly more than a scintilla to show that Palmer and Eudy were partners, and that the plaintiff sold the goods to Palmer to be used in the business in which, as Charles Palmer testified, Eudy admitted he was a partner. It was, therefore, not error to refuse to nonsuit the plaintiff.

James Palmer, defendant, testified that he and Eudy were partners, and that the plaintiff furnished the goods on his order, to be used by the firm in cleaning out the mine. The judge subsequently withdrew this evidence from the jury, and told them not to consider it as affecting Eudy's estate, "or in any way bearing upon the question whether he was a partner of Palmer, and should be excluded, and should be considered by them only so far as it affected the defendant Palmer himself." The decisions are numerous and recent that, if incompetent evidence is admitted, the error can be cured by withdrawing the evidence and telling the jury not to consider it. *Wilson v. Mfg. Co.*, 120 N. C. 94, 26 S. E. 629, and cases there collected; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810; *State v. Apple*, 121 N. C. 584, 28 S. E. 469; *Waters v. Waters*, 125 N. C. 591, 34 S. E. 548; *State v. Ellsworth*, 130 N. C. 691, 41 S. E. 548.

It is contended, however, that as Palmer had not answered, this evidence was unnecessary as to him, but the court restricted it to him, and, if unnecessary, the other defendant could not complain. In fact, it was not unnecessary as to Palmer, for, though he had filed no answer, the plaintiff still had to prove the delivery and value of the articles as against him, for at most the plaintiff could only have taken judgment by default and inquiry against him for failure to file answer. Nothing is more usual than when there are two or more defendants for evidence to be admitted against one or more, which evidence the jury are told not to consider against the other defendants; and this is true both in criminal and civil cases. The admissions of one defendant are admissible to show a partnership as against himself "to prove his own membership, who were his copartners, and the scope of business," though incompetent against others alleged to be partners in the same action. *Abbott*, Trial Ev. 259 (14); 2 *Rice* on Ev. § 450, citing numerous cases; 2 *Greenleaf*, Ev. (16th Ed.) § 484. Even in joint trials for fornication and adultery it is held that the admissions of one party are competent against that person "where the

jury are instructed that such admissions can only be considered upon the guilt of the party making them." *State v. Rinehart*, 106 N. C. 787, 11 S. E. 512; *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. So in murder, riot, and other offenses, when two or more are on trial, the admissions or confessions of one that he and the others named committed the act charged have always been admitted against him, though the jury are instructed not to consider the evidence against the other defendants. The evidence of Palmer was competent to show the partnership as against himself, though the judge properly withdrew it from the jury, and told them not to consider it against Eudy. *Fertilizer Co. v. Rippey*, 123 N. C. 656, 31 S. E. 879; *Id.*, 124 N. C. 651, 32 S. E. 980.

On cross-examination James Palmer testified that Brown, Eudy's executor (since deceased), had said he was going to pay the account sued on, and the defendant excepted. This was not a transaction or communication with one deceased to fix his estate with any liability, and was competent to rebut the plea of the statute of limitations. Brown's personal representative is not a party to this action.

The other exceptions are without merit, and require no discussion.

(123 N. C. 791)

#### PATTON et al. v. COOPER et al.

(Supreme Court of North Carolina. June 6, 1903.)

#### JUDGMENT—APPARENT SATISFACTION OF RECORD—OTHER RECITALS PUTTING ON INQUIRY—EFFECT.

1. Defendant and A. were indorsers on a note. Judgment was afterwards obtained against them and against the makers of the note. The judgment docket disclosed the receipt thereafter from defendant and A. of a sum sufficient to have satisfied the judgment. Following this entry was an assignment of the judgment to a third person in trust for defendant and A. Neither the note, judgment, nor record disclosed the fact that defendant and A. indorsed the note as sureties for the makers, but such was the fact, as reasonable inquiry would have disclosed. The payments made by them were with the distinct understanding with the judgment creditor that the judgment should be assigned to a trustee for their benefit. The entry of the payments on the docket by the judgment creditor's attorney were made without their knowledge, and without any intent on the part of the attorney to discharge the judgment. *Held*, that while the payments entered on the docket, unexplained, would have constituted a satisfaction of the judgment, the subsequent assignment of the judgment in trust for defendant and A. was sufficient to put subsequent mortgagees of land belonging to one of the makers of the note on inquiry as to the rights of defendant and A., and as, on inquiry, they would have ascertained the facts, they took the property subject to the lien of defendant and A.

Appeal from Superior Court, Transylvania County; Council, Judge.

Action by T. T. Patton and others against M. D. Cooper and others to restrain a sale under an execution. From a judgment in



favor of plaintiffs, defendant Cooper appeals. Reversed.

By consent the judge found the facts, those material to this appeal being as follows: In November, 1896, the defendant M. D. Cooper and W. L. Aiken indorsed a note as sureties for the makers thereof, J. R. Zachary and M. G. Jones (the latter now deceased), payable to W. H. Faulkner 12 months after date. Said Faulkner, soon after its execution, indorsed said note to a bank, which, upon failure to pay the note at maturity, obtained judgment thereon against Zachary, Aiken, Cooper, and the administratrix of Jones in the superior court of Transylvania in April, 1898, and the judgment was duly docketed April 19, 1898, for \$357.57 and costs, of which \$330 was principal money. The following entries appear on the judgment docket: "Received on this judgment from M. D. Cooper \$186.20. This 27 Oct., 1898. W. B. Duckworth, Atty." "Received on this judgment \$185.72 from W. L. Aiken. This 27 December, 1898. W. B. Duckworth, Atty. for Plaintiff." (And at same time the clerk receipted for the costs.) "We hereby assign this judgment in case of State Bank of Commerce against Omega Jones, administratrix of M. G. Jones, J. R. Zachary et al., to Z. W. Nichols, as trustee, for collection for the benefit of M. D. Cooper and W. L. Aiken, without any recourse on us either in law or equity. This 23 Feb'y., 1899. State Bank of Commerce, per J. A. Maddrey, Cashier." "Received of M. D. Cooper \$3.00, being balance due on this judgment. This 18 March, 1899. W. B. Duckworth, Atty." On August 25, 1899, appears on the docket an assignment by W. L. Aiken to M. D. Cooper of all his "right, title, and interest" in said judgment. Execution was issued October, 1899, again in November, 1899 (which was returned uncollected, homestead laid off, report of appraisers filed), and in June, 1900. The judge further finds as facts that "M. D. Cooper and W. L. Aiken paid said judgment to W. B. Duckworth, attorney for State Bank of Commerce, at the times and in the amounts shown by said record, with the distinct understanding and agreement with said Duckworth, attorney for said bank, and also with the officers of said bank, that said judgment should be assigned to a trustee for the use and benefit of said Cooper and Aiken as sureties, and that no part of the money paid by Cooper and Aiken on the said judgment has ever been repaid to them by Zachary, or the administratrix of Jones (the makers of the note), or any one else." In April, 1900, J. R. Zachary executed to the plaintiff T. T. Patton a mortgage for \$1,133.35 on a certain tract of land of 18 acres in Transylvania county, and in the same month a trust deed to W. A. Smith, trustee for R. H. Lowndes (Zachary's wife joining in), to secure \$825 money then borrowed; this last mortgage covering the homestead of said Zachary and other lands not included in the homestead. J. R. Zachary was seised in fee

of all of the lands embraced in both mortgages at the time of the docketing of aforesaid judgment and continuously since. Before taking said mortgage and trust deed, said Patton, Lowndes, and Smith caused the judgment docket to be examined by counsel, and aforesaid entries thereon were reported to them, and they had full knowledge thereof, and their counsel advised them that the judgment was satisfied. The judge further finds that W. B. Duckworth, attorney for said bank, entered aforesaid receipts on the docket without the knowledge of Cooper and Aiken, and without any intention of said Duckworth to discharge said judgment, but intending, when the said judgment was paid in full, to have the same transferred to a trustee for the benefit of said Cooper and Aiken pursuant to his agreement. Neither the note, judgment, nor record disclosed the fact that Cooper and Aiken indorsed the note as sureties, but such was the fact. Said Cooper caused the execution issued in June, 1900, to be levied on the lands of J. R. Zachary not set apart as his homestead, and also on the excess of the homestead tract outside of the homestead, the lands so levied upon being embraced in aforesaid mortgage to Patton and trust deed to Smith, trustee for Lowndes. This action is brought to restrain a sale under aforesaid execution, and upon the facts found his honor granted a perpetual injunction, from which order M. D. Cooper appealed.

Geo. A. Shuford and W. J. Peele, for appellant.

CLARK, C. J. (after stating the facts). The receipts entered on docket October 27 and December 27, 1898, unexplained, would have been a satisfaction of the judgment except as to the \$3 afterwards paid and entered March 18, 1899. But the subsequent purchasers, the mortgagees of the judgment debtor, who are the plaintiffs herein, were fixed with notice of any facts appearing further upon the judgment docket, or of which they were put upon inquiry by such entries. Their mortgage and trust deed were not taken till April, 1900, and they found—for they properly had the judgment docket searched—that on February 23, 1899, the plaintiff in the judgment had assigned said judgment to Z. W. Nichols, in trust for collection for the benefit of M. D. Cooper and W. L. Aiken without recourse. The judgment roll, if examined, would have shown that these were indorsers on the note upon which the judgment had been taken, and reasonable inquiry would have elicited the fact that they were sureties; that said assignment had been made to a trustee to keep the judgment lien alive for their benefit (*Rice v. Hearn*, 109 N. C. 150, 13 S. E. 895); and that the previous receipts entered on the docket by Duckworth, attorney for plaintiff, had been made by inadvertence, and contrary to the agreement made between the bank and

said sureties, who were not responsible for Duckworth's erroneous entry. Had the plaintiffs herein been purchasers for value or mortgagees, with no other notice than said entries of payment, they would have taken a good title. But subsequent to such entries the assignment of the judgment by the bank to a trustee for the benefit of the sureties had been entered on the docket, and they took with full knowledge, and were thus put on inquiry as to the nature of the payment and the relation of Cooper and Aiken to the liability. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173, 44 Am. St. Rep. 429. Upon the facts found, the injunction should have been dissolved.

The judgment below is reversed.

(132 N. C. 810)

### CONE v. HYATT,

(Supreme Court of North Carolina. June 6, 1903.)

**MORTGAGES—FORECLOSURE BY EXERCISE OF POWER OF SALE—STATUTE OF LIMITATIONS—APPLICABILITY—WAIVER—PARTIAL PAYMENT—EFFECT.**

1. Limitations do not apply to a power of sale contained in a mortgage or deed of trust where the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale.

2. The defense that the remedy is barred by limitations may be waived by failing to set it up.

3. A deed of trust provided that the debtor might have one year in which to pay one half of the debt, and if that one half was paid at maturity then another year to pay the other half. *Held*, that the creditor might elect to wait until the end of the two years for payment of the entire amount, and the statute of limitations, even if applicable at all to a proceeding by the trustee to sell the land under the power in the deed, would not begin to run until the end of the two years.

4. A partial payment to stop the running of limitations must be made by some one authorized to make it.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Yancey County; Hoke, Judge.

Action by Moses H. Cone against Jason L. Hyatt. Judgment for defendant. Plaintiff appeals. Reversed.

This action was brought by the plaintiff against the defendant to recover certain lands described in the pleadings. All of the parties claimed under J. W. Young, who, with his wife, on the 8th day of September, 1883, executed a deed of trust to C. E. Graham for the land to secure a debt due to the plaintiff of \$1,800, which was evidenced by two notes, one for \$800, payable in 12 months, and the other for \$1,000, payable in 18 months, after said date, with power of sale to be exercised if the defendant failed to pay the said notes or any part thereof at maturity, the proceeds of sale to be applied to the payment of the notes, whether both are due at the time of

sale or not. Young having failed to pay the said notes when they became due, and the debt remaining unpaid on May 14, 1884, he executed on that date to said Graham another deed of trust conveying the same land and an additional tract, reciting the nonpayment of the notes and the agreement of the plaintiff to forbear the enforcement of the trust and allow Young one year from said date to pay one-half of the indebtedness, and, if one-half should be paid at the end of the year, then another year within which to pay the remaining part of the debt. It was further provided in the deed that if there should be default in the payment of one half of the debt at the end of the first year, or if that one half was paid at maturity and there should be default in the other half at maturity, then the trustee should be authorized to sell the land and apply the proceeds to the payment of said debt. Young failed to pay either one of the notes, and the trustee, some time before December 16, 1900, advertised the land for sale on January 14, 1901, and sold it on that day, under the power contained in the deed, to the plaintiff, and executed a deed to him. There was evidence tending to show that on February 27, 1888, Young paid \$100 on the debt, and on December 16, 1900, the proceeds of the sale of part of the land which was sold under the power were applied to the debt by the trustee. The amount bid at the sale by the plaintiff was paid by him on January 14, 1901, and also credited by the trustee on the debt, leaving a balance of \$2,600 or more due the plaintiff on the notes.

The plaintiff requested the court to charge the jury that the right of the trustee to sell under the power was not barred by the statute of limitations until May 4, 1901, and further that the plaintiff and trustee, if there was default in the payment of the first half of the debt, could elect to wait until the maturity of the second note before selling under the power, and, they having elected to sell after the latter date, the statute did not begin to run until May 4, 1891. The court refused the instruction, and charged the jury that upon the evidence the plaintiff was barred by the statute, and that they should answer "No" to the second and third issues, which were as follows: "(2) Is the plaintiff the owner of the land sued for and described in the complaint? (3) Is the defendant in the wrongful possession of said land?" The jury answered the issues accordingly. The plaintiff in apt time excepted to the rulings and charge of the court, and appealed from the judgment rendered upon the verdict.

Justice & Pless, for appellant. J. S. Adams, for appellee.

WALKER, J. (after stating the case). We have held at this term, in *Menzel v. Hinton*, 44 S. E. 385, that the statute of limitations does not apply to a power of sale contained

¶ 1. See Limitation of Actions, vol. 23, Cent. Dig. § 672.

in a mortgage or deed of trust when the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale. The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute, it was held that "a proceeding to foreclose a mortgage by advertisement is not a suit; such a proceeding is merely the act of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court." *Hall v. Bartlett*, 9 Barb. 300. In *Williams v. Mullis*, 87 N. C. 159, it appeared that a sale had been made under an execution issued upon a judgment which was barred by the statute, and a motion was made to set aside the sale on this account. This court held that the statute could not be availed of except by answer, and, in the opinion of the court, Ashe, J., clearly sets forth the reason for the decision, in the following language: "If, then, the statute applies only to the remedy, it cannot operate to extinguish the judgment after the expiration of the ten years, until an action or proceeding in the nature of *scire facias* is brought to revive it, when the statutory bar may be set up by answer as a defense to the action; and this is the only mode prescribed in the Code of Civil Procedure by which a defendant can avail himself of such a defense." It is needless to pursue the discussion of this branch of the case any further, as the matter is fully examined, and the principles which govern in such cases are fully set forth, in *Menzel v. Hinton*, supra.

This ruling is perhaps sufficient to dispose of this appeal, but if the statute had applied to the case presented it could do so only by analogy, that is, by treating the proceeding taken out of court by the trustee in the execution of the power as substantially the same as a suit or action to foreclose the trust, and if this is done the analogy must be complete, and the same principles which would apply to the suit or action should be extended throughout to the proceeding for the execution of the power. The argument advanced to show that the statute does apply to the execution of the power by the trustee must proceed upon the assumption that there is such an analogy, for it must be conceded, in view of so many decisions by this and other courts which establish the proposition, that the debt is not extinguished by the running of the statute, and the latter affects only the remedy. The argument cannot be sustained upon the idea that the debt is gone and there is nothing, therefore, to support or justify the execution of the power. This court has said that the statute of limitations is a statute of repose. It suspends the

remedy, but does not cancel the debt. *Capehart v. Dettrick*, 91 N. C. 351, 352.

If this supposed analogy between a proceeding to foreclose a deed of trust by advertisement and sale and a suit in court for that purpose does exist, and the principles which govern a suit in court upon a cause of action which is barred are applied to the facts of this case, we find that no attempt was ever made by the defendants to plead the statute before the sale or otherwise to obtain the benefit of it, and the case, therefore, must stand, if the analogy is carried out to its legitimate consequences, just as if a suit had been brought, judgment of foreclosure rendered, and a sale made and confirmed, so that the matter is finally closed and at an end, without the interposition in due time of any plea of the statute. Can it be said that a party under such circumstances may avail himself of the statute? While a party must be diligent in prosecuting his action in order to enforce his rights, or else be barred when sufficient time has elapsed for that purpose after the cause of action accrued, the other party who seeks to avail himself of this lapse of time must be equally diligent in bringing forward his plea, or he will be deemed to have waived it. We do not mean to imply that there is any way known to the law by which a mortgagor or trustor can avail himself of the statute as against a mortgagee or trustee who is attempting to execute the power under the deed of trust by what have been called "proceedings in pais," instead of resorting to a suit in court. Indeed, such a right in the mortgagor or trustor to benefit by the statute under such circumstances has been held not to exist. In *Grant v. Burr*, 54 Cal. 298, the court decides that the running of the statute for the full period of limitation "does not operate as an extinguishment or payment," and, when the legal title to land has been conveyed to a trustee to secure a debt, the power and title of the trustee are not affected by the expiration of the time prescribed to bar the debt, and a court of equity will not interpose to enjoin a sale under the deed. The statute of limitations is to be employed as a shield, and not as a sword; as a weapon of defense, not a weapon of attack. In other words, the statute of limitations, by the very language of our Code, is made the subject of a defensive plea only, and is required, therefore, to be specifically set up in that way in an action on the debt or deed of trust. "The objection that the action was not commenced within the time limited can only be taken by answer." *Clark's Code* (2d Ed.) § 138, and cases cited. It is never the proper basis of an action in which affirmative relief is sought. 19 Am. & Eng. Enc. (2d Ed.) p. 178; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879. It is true a title to property may be acquired by adverse possession, but that is by express provision of the statute, and the

statute is not then pleaded *eo nomine*, but the title or ownership is asserted or denied, as the case may be, and proof of a sufficient adverse possession may be offered to sustain the allegation or denial. The plea of the statute is not proper in such a case. *Mfg. Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456; *Cheatham v. Young*, 118 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617.

It has been suggested that the principle upon which such statutes are founded is the one taken from the civil law, by which a presumption of payment or release arises from the lapse of time. Mr. Wood, in discussing this question, says: "Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose was, and is, to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised, either as to payment or otherwise, from the mere lapse of the statutory period, more than would naturally arise as to any stale demand." 1 Wood on Limitations (1893) § 5. The statute of presumptions has been repealed, and for it has been substituted the statute of limitations, as a statute of repose, which bars the remedy only.

But there is another reason why the statute cannot avail the defendant either directly or indirectly: It is provided in the deed of trust that the debtor may have one year within which to pay one half of the debt, and if that one half is paid at maturity, then another year to pay the other half. The provision is not in principle unlike the one in the deed which was construed in *Capehart v. Dettrick*, supra. In that case it appeared that a series of notes had been given and secured by a deed of trust in which it was provided that, if the debtor failed to pay any one of the series, all the notes should become immediately due and payable, and this court held that it was optional with the creditor whether or not he would avail himself of the right to accelerate the payment of the notes not actually due by their terms. The same principle was declared in *Barbee v. Scoggins*, 121 N. C. 135, 28 S. E. 259, and in that case it was further held that the failure of the creditor to exercise the option did not set the statute in motion. So, in our case, while the extension of payment of half of the debt for two years was made to depend upon the payment of the other half at the expiration of the first year, the plaintiff could waive the benefit of the condition, or the payment of the first half of the debt, and elect to wait until the end of the two years for the payment of the entire amount. The case of *Parker v. Banks*, 79 N. C. 481, 488, would seem to be directly in point. In that case the court (Bynum, J.) says: "The condition of the mortgage was a continuing one—to pay in in-

stalments, at several times—and the mortgagee could await the maturity of the last note before an entry and sale, or elect to treat the nonpayment of the first or any subsequent note at maturity as a forfeiture of the mortgage. \* \* \* This doctrine of election to waive or enforce a forfeiture is discussed in *Towle v. Ayer*, 8 N. H. 57, and in *Angell on Limitations*, 470, and notes. The exercise of the right of election was a matter within the sound discretion of the mortgagee, to be determined by a prudent consideration of the interests of the parties to the trust, and his action is binding upon a mere volunteer claiming as a purchaser with full notice." In *Capehart v. Dettrick* and *Barbee v. Scoggins*, supra, the court held that the mortgagee or trustee had an option to sell, though, by the terms of the deeds, the entire debt was matured by the failure to pay any part of it. In *Cox v. Kille*, 50 N. J. Eq. 176, 24 Atl. 1032, the court says: "It is urged that, because the bond provides that in case interest remains due and unpaid for the space of thirty days, then the principal shall become instantly due and payable, without saying that it shall become so payable at the option of the holder of the bond, the obligor may consider the principal as due and discharge the bond." In other words, the claim is that the obligor, by means of his own default, may exercise the option, which most evidently the parties intended to give only to the obligee. Authorities need not be cited in support of the general doctrine that equity will not permit a party to take advantage of his own wrong. The principle, however, has frequently been applied when courts have been called upon to determine the rights between landlords and tenants, under similar circumstances. It is entirely optional with the lessor whether he will avail himself of this right of re-entry or not, although, by the terms of the proviso, the term is to cease or become void for the nonperformance of the covenants; and, if the lessor does not avail himself of it, the term will continue, for the lessee cannot elect that it shall cease or be void."

In construing a similar provision in a mortgage, the court, in *Lowenstein v. Phelan*, 17 Neb. 430, 22 N. W. 561, said: "The provision, however, is for the benefit of the mortgagee, to enable him to procure the money loaned at the time it was agreed to be paid. If the mortgagee so desires, he may institute an action upon default to foreclose, and, upon obtaining a decree, have the premises sold. He need not do so, however. The stipulation being made for his benefit, he may waive it without putting himself in default."

It follows, therefore, that, if the statute of limitations applies in this case, the right to foreclose was not barred until May 4, 1901, which was after the date of the sale under the power. There was no error in the ruling of the court as to the payments which the plaintiff alleged prevented the running of the

statute. The reason why a part payment is allowed to prevent the bar of the statute is that it is deemed an admission of a subsisting liability, from which a promise, as of the date of the payment, to pay the balance of the debt will be implied, but in order to raise this implication there must be a voluntary payment by the debtor or by some one authorized to make the payment for him. The trustee was not so authorized in this case. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177. Our conclusion is that in no view of the case was the plaintiff's right to recover affected by the statute of limitations, and the court below erred in holding that the plaintiff's cause of action is barred, and in instructing the jury to answer the second and third issues "No."

New trial.

CLARK, C. J., and DOUGLAS, J., dissent on grounds stated in their dissenting opinion in *Menzel v. Hinton*, supra.

(132 N. C. 839)

**SOUTHERN FINISHING & WAREHOUSE CO. v. OZMENT.**

(Supreme Court of North Carolina. June 6, 1903.)

**REFORMATION OF DEED—EVIDENCE—ISSUES—NEGLIGENCE.**

1. Equity will reform a deed for mutual mistake where the mistake is admitted or is distinctly proven.

2. Evidence examined in a suit to reform a deed for mutual mistake, and held to be sufficiently strong and convincing to warrant the relief asked.

3. A deed from plaintiff to defendant conveyed 50 feet by 150 feet, instead of 50 by 116, as intended; thereby including, by mistake, 34 feet of a lot occupied by C. In a suit to reform the deed, the court submitted the issue, "Was the 34 feet of the C. lot included in the deed from the plaintiff to the defendant by mutual mistake of the parties?" Held to be sufficiently comprehensive, and other issues tendered by defendant were properly refused.

4. In a suit to reform a deed, testimony of the grantor's secretary and treasurer as to what was intended to be conveyed was admissible.

5. The mere fact that a tract of land intended to be conveyed was described in the deed as 50 by 150 feet, whereas it in fact contained only 50 by 116 feet, was not evidence of negligence on the part of the grantor, such as to deprive him of the right to reformation.

6. Negligence on the part of the grantor in a deed will not necessarily preclude him from obtaining its reformation, if the other party has not been prejudiced thereby.

Appeal from Superior Court, Guilford County; McNeill, Judge.

Action by the Southern Finishing & Warehouse Company against W. R. Ozment. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action to reform a deed. Plaintiff, being the owner of a large parcel of land at the southwest intersection of Bessemer avenue and Carolina street, in the city

of Greensboro, on which it had erected several buildings in close proximity to each other, the defendant applied to plaintiff for the purchase of a part of said land, known as the "Storehouse Lot," which was then, and had been for some time, occupied by the defendant as tenant of the plaintiff, and which was immediately east of the Combs lot, which also belonged to the plaintiff, and which was and had been occupied for some time by one Combs as tenant of the plaintiff. The storehouse lot, according to its true dimensions, fronted 50 feet on Carolina street, and extended back with that width westwardly along Bessemer avenue 116 feet, to a point just east of a flower house or pit, which stood upon the adjoining lot, known as the "Combs Lot," and was used with it. On March 19, 1901, plaintiff executed a deed to the defendant for a part of said land so owned by it, which was described in the deed as fronting 50 feet on Carolina street, and extending with that width westwardly along Bessemer avenue 150 feet, which boundaries would include not only the flower house or pit, but nearly one-half of the dwelling house on the Combs lot. There was no reference in the deed to the storehouse lot by that name. Neither of the parties knew the size of the storehouse lot at the time the deed was executed, but there was evidence introduced by the plaintiff which tended strongly to establish that defendant intended to buy, and the plaintiff to sell, no more of the land of the plaintiff than was embraced within the actual boundaries of the lot then occupied by the defendant. The plaintiff sold and the defendant bought that lot, and nothing more. After the deed was made, the defendant never attempted to occupy or use any part of the Combs lot, and never made any claim or demand for any part thereof, but the same continued to be occupied and used by Mr. Combs and his family. About three weeks after the deed was executed, the plaintiff learned of the mistake in the deed through one Lindau, its secretary and treasurer, who had negotiated the sale and conducted the entire transaction in its behalf. Lindau, having heard it reported that the deed, by mistake, had been drawn so as to cover a part of the Combs lot, went to see the defendant, who admitted that the parties had both made a mistake in drawing the deed, and that it really embraced more land than he had bought, or that was intended to be conveyed. Defendant further admitted that the deed included 34 feet of the Combs lot, which was not purchased by him, and that the correct dimensions of the storehouse lot, which was all that he bought, were 50 feet on Carolina street by 116 feet on Bessemer avenue, and that he was willing that the deed should be corrected so as to convey to him only the storehouse lot, but that he did not know whether his wife would consent to do so unless she was paid something for the change in the deed. He promised to see his wife, and let Lindau know what she

said about it. Shortly afterwards Lindau saw defendant, and he told him his wife wanted \$100 as a consideration for her joiner in the corrected deed. Plaintiff declined to pay this amount, but its president, Moses H. Cone, went to see the defendant and proposed to him that the plaintiff would pay back the consideration (\$700), and whatever sum defendant had paid out for improvements and betterments on the property, or, if defendant preferred, he could keep the storehouse lot, and the deed could be reformed. Defendant declined the proposition, but admitted in the interview that he had not bought any of the Combs lot, and that he had only bought the storehouse as then occupied by himself. He also stated to Mr. Cone that the western boundary of the storehouse lot was just east of the flower pit on the Combs lot, but "he insisted" that, as his deed covered 150 feet, he was going to hold onto it, as he had been advised that he could do so, if he desired to be "contrary," unless the plaintiff would give him the \$100. One of plaintiff's witnesses (Miss Combs) testified that defendant stated to Moses H. Cone, in her presence and hearing, "that he did not think he was getting any part of the Combs house or lot, but he did not know how far it ran; that he did not think the lot he was getting was farther west than the flower pit." He further testified that the flower pit was on the lot occupied by her father. There was testimony tending to show that the storehouse lot was a well-defined lot, with visible marks and boundaries, and it could be well seen to what division line the occupants of the respective lots had used them. There were outhouses on the lots, which clearly indicated the boundaries, and a survey showed that the storehouse lot was 50 by 116 feet, and that the boundaries, as set forth in the deed, would take in one-half of the Combs lot. The defendant, in his answer, denied the plaintiff's allegation as to the mistake. He testified in his own behalf as follows: "That on March 9, 1900, he went to the office of the plaintiff, and there met the witness Lindau, who asked him what he could do for him, and that he answered, 'I understand that you want to sell the storehouse and lot,' and he asked me to make him a price—what I would give—and I said, 'I am not pricing your property.' I made him an offer of \$700 for 50 feet on Carolina street and 150 on Bessemer avenue. This proposition was in writing. On the 19th March thereafter, or about that time, the deed was handed me, and I paid the \$700. That the witness had been renting the storehouse and lot for some two or three years before the transaction. That J. H. Combs occupied the house and lot immediately west of the storehouse lot. That the witness did not use any part of the lot west of the east end of the flower pit. That he did not use any part of the Combs house and lot, nor was any part

of either rented by him. That he saw the Combs family using the flower pit. That witness had not used any part of the Combs house since making the deed, and never made any claim to any part till after the bringing of this suit by the plaintiff; and then it was, or soon thereafter, he instituted the suit in the justice's court, claiming part of the rents of the Combs house and lot. That when he bought and took the deed in controversy he was simply buying the storehouse and lot. That he did not know how large the storehouse lot was when he proposed to Mr. Lindau to buy the same, but that Lindau told him it was 50 by 150 feet. The witness had never measured the lot, and did not know its size at the time he bought. That the first time he claimed any part of the Combs house and lot was after he had taken a deed, and the lot was measured according to the distances given in the deed, and it was found that the deed covered a part of the Combs house and lot. Witness would not say positively that he did not say to Mr. Cone in his interview that he did not think his lot extended back to the flower pit." The witness Lindau, over the objection of the defendant, testified as follows: "We intended [to sell] the storehouse and lot, which the defendant had been using for several years." Lindau had testified just before this that he (defendant) never expected to get more than the place he had originally rented, and that he intended to buy to a point just east of the flower pit.

Defendant moved at the close of the testimony to dismiss the complaint, or for judgment as in case of nonsuit. The motion was refused, and defendant excepted. He then tendered the following issues: "(1) Was the deed set forth in the complaint made by mutual mistake of both plaintiff and defendant? (2) Were the facts as to the location and description of the land conveyed by plaintiff to defendant equally known to both parties? (3) Were the facts as to the location and description of the land conveyed by the plaintiff to defendant unknown to both parties? (4) Did the plaintiff and defendant each have adequate means of information to ascertain the true location and description of the land conveyed?" The court refused to accept these issues, and instead thereof submitted the following issue to the jury: "Was the 34 feet of the Combs lot included in the deed from the plaintiff to the defendant by mutual mistake of the parties?" At the close of the evidence, the defendant requested the court to give the following instructions to the jury: "(1) If, in a contract for the purchase of land, either party fails to avail himself of those sources of information readily within his reach, and fails to do so in the absence of any fraud or fraudulent representation made by the other party, the maxim of caveat emptor applies, as it does to personal property, and the courts will not aid the purchas-

er who desires to rescind the contract. (2) A contract made under mistake or ignorance of a material fact is not voidable where the facts are equally known or were unknown to both parties, or where each has equal and adequate means of information, if the party complained of has acted in good faith. (3) That there is no evidence to go to the jury of a mutual mistake between the plaintiff and defendant in this case." The court refused to give these instructions, and the defendant excepted. The charge of the court was full, and in all respects correct, and covered the controverted questions, and there was no exception to it. Defendant assigned the following errors: (1) Refusal of his honor to submit issues tendered by defendant. (2) Admission of Lindau's testimony that he intended to convey only 116 feet. (3) Refusal of his honor at conclusion of plaintiff's testimony to dismiss the action under the Hinesdale act. (4) Refusal of his honor at the close of all the testimony to dismiss the action under the Hinesdale act. (5) Refusal of his honor to give the instructions as asked for by the defendant. (6) The judgment of the court.

The jury answered the issue "Yes," and judgment was entered for the plaintiff upon the verdict. The defendant excepted and appealed.

John A. Barringer and Chas. M. Stedman, for appellant. King & Kimball and W. P. Bynum, Jr., for appellee.

WALKER, J. (after stating the case). The case made out by the plaintiff, and re-enforced by the testimony of the defendant, appeals strongly to the conscience of the court, and it would be strange indeed if any principle of equity could be successfully invoked which would cause us to withhold from the plaintiff the relief which he seeks in this action, and enable the defendant to retain a part of the Combs lot which it clearly appears he did not buy, and for which, of course, he has paid nothing. He is insisting upon his strict legal right, and the advantage which he has gained by the miscarriage of the parties in writing their real agreement in the deed. It is true that the defendant starts in the case with a technical advantage, for the law always presumes, nothing else appearing, that a deed has been correctly written, and that it is the true expression of the intention and agreement of the parties, and it must stand as it was prepared and executed by the parties, unless this presumption of the law is in some way rebutted in an action brought to reform the deed; the burden being upon him who seeks to correct it to show by strong and convincing proof, and in the clearest and most satisfactory manner, that there was a mutual mistake, and that the alleged intention of the parties, to which he desires it to be con-

formed, continued concurrently in the minds of both of them down to the time of its execution, and he must also show precisely the form to which the deed ought to be brought. This is a familiar principle. Bispham's Eq. § 469. It has been said that this rule is founded upon the salutary principle that the parties have agreed upon the writing as the evidence of the contract between them, and as the memorial of their agreement if any dispute should arise as to its terms, and that the law will not change it "until, by a weight of proof greater than itself, a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it." *Ely v. Early*, 94 N. C. 8. Mr. Adams, in referring to this jurisdiction of a court of equity, says: "In the second case, where the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake, for then there is clear evidence in the instrument itself that it operates beyond its real intent. If, however, there is no recital of any agreement, but a mistake is alleged, and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are more difficult to define. The prima facie presumption of law is that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be inconsistent with that contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent, or if it is admitted or proved that an instrument intended by both parties to be prepared in one form has, by reason of some undesigned insertion or omission, been prepared and executed in another." Adams, Eq. p. 343, star page 169. But when the party who seeks to rectify the instrument produces evidence of any material mistake which is clear, strong, and convincing, there is no good reason, and surely there ought not to be any, why a court of equity should not exercise its powers according to established principles in the correction of the mistake. The remedy by reformation is obviously one which is necessary to the complete and exact administration of justice, and which, moreover, can be attained by equitable procedure alone. "Equity will reform a written contract or other instrument inter vivos where, through mutual mistake, or the mistake of one of the parties, induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties." *Eaton on Eq.* § 618. In the case of *Newsom v. Buf-ferlow*, 16 N. C. 381, this court recognized and enforced the right to have a deed corrected upon the ground that it was an executed contract, and the plaintiff, therefore, had no

remedy at law, as he might have in the case of some executory contracts, and further that, unless a court of equity gave relief, the plaintiff would have no redress, and the remedy will be applied where a clause is either inserted in a deed, or is omitted, through fraud or mistake. In that case the court refers with approval to *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, in which it appeared that a deed was executed by mistake for 250 acres of land, when it ought to have been for 200 acres only. The court permitted parol evidence to prove the mistake, although it had been positively denied in the answer. It is needless to pursue this discussion further, for this court has repeatedly held that the jurisdiction of a court of equity to correct mutual mistakes in deeds and like instruments, when such mistake is admitted or distinctly proven, is clear and unquestionable. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418.

In this connection we will consider the third and fourth assignments of error; that is, the refusal of the court to dismiss the complaint, under the statute, at the close of the evidence, and the refusal to charge that there was no evidence of mistake. The court properly refused both requests. The evidence is abundantly sufficient to sustain plaintiff's allegation of a mistake. It was clear, strong, and convincing in character; and the court, in its charge, instructed the jury that plaintiff must have satisfied them by that kind of evidence of the mistake, and, unless it had done so, the jury should answer the issue "No." How could the evidence be less than strong, clear, and convincing, when the plaintiff's witnesses testified positively to the mistake, and also to the admissions of the mistake by the defendant, which admissions he would not deny when he took the stand as a witness and testified in his own behalf?

But the defendant complains that the court did not submit the proper issues, although requested to do so. We think the issue submitted was sufficiently comprehensive in its scope to enable the defendant to present his defense in all its aspects, and it seems that by appropriate prayers for instructions he fully availed himself of this opportunity and privilege, and he suffered no prejudice by the action of the court. *Ratliff v. Ratliff*, 131 N. C. 435, 42 S. E. 887. The prayers for instructions were refused, to be sure, but not because they did not come within the scope of the issue submitted to the jury, but because they were not proper in themselves, and were not applicable to the peculiar facts of the case. Besides, the second, third, and fourth issues, as tendered by the defendant, should not have been submitted, because they were irrelevant to the facts of the case. The first issue tendered was not broad enough, and, as far as it did go, was embraced

within the issue submitted by the court. The testimony of Lindau as to the intention of the parties was clearly competent. The question in dispute was as to the intention of the parties in making the deed, and any testimony tending to show what it was, especially when it came from one of the parties to the transaction, who must have known that intention, was admissible to show what the parties intended to do, and that the deed did not correctly express the agreement, which was the very fact in issue.

The defendant's first and third prayers for instruction were given by the court, and the second and fourth refused. We can see no error in this ruling. This is not a case where the principle invoked by these prayers has any application. Both parties were laboring under a wrong impression as to the dimensions of the storehouse lot. It is clearly established that the parties intended to convey that lot with reference to its particular boundaries, and no more land than it embraced, and we do not think the mere fact that it was described as containing 50 by 150 feet was any evidence of negligence on the part of the plaintiff which is sufficient to deprive him of equitable relief by the correction of the mistake. It is just that kind of a case where the parties have been thrown off their guard, and for that reason have failed to inform themselves, by a clear misapprehension of both of them as to the dimensions or the boundaries of a lot which was sold by one and bought by the other. The case of *Pugh v. Brittain*, 17 N. C. 37, it seems to us, effectually disposes of this exception. In that case the deed described the land conveyed by metes and bounds, and, by mutual mistake of the parties, it covered land which the vendor did not intend to sell, nor the vendee to buy. In reference to the plaintiff's right to a correction of the deed, the court said: "It is therefore the opinion of the defendant that the plaintiff conveyed land to him which neither he nor his brother believed was included in the boundaries set forth in the deed, and which they both knew belonged to another person. The bill is filed to rectify the mistake. But the defendant insists that as the parties were ignorant of the lines, and had not the means of ascertaining them by a survey, the vendor meant to sell, and he to purchase, all the land described in the deed to the elder Pugh, grandfather of the plaintiff; that he looked to the paper title only. If a person was purchasing another's interest in land in no respect located, there might be some ground for such a claim. But in this case the parties had a knowledge of the land sold, but not of its particular boundaries, for the defendant describes it as low, flat land, uncleared, and covered with water in the winter. And neither party ever dreamed that Chamberland's land was part of it. For it seems that Bartlett, who claimed under Chamberland, was in



actual possession of that land." But if plaintiff had been negligent, it does not follow that he has lost thereby his right to relief. "Even negligence may not in all cases close the doors of chancery against a complainant, for, if the position of either party had not been changed in consequence thereof, relief may be granted." Bispham's Eq. § 192. What change prejudicial to the defendant has taken place since the deed was made? There has been none, except the outlay for improvements or betterments, and the plaintiff agreed to repay to him the amount so expended. When he made these improvements, he knew, according to his own testimony, and the admissions which were made by him, that he had not purchased any part of the Combs lot, and therefore made the improvements, it would seem, with full notice of the plaintiff's equity. The plaintiff will, no doubt, allow him for the money actually expended in the way of betterments, but that is now a matter which must be settled between them. We merely suggest it as a proper course to be taken.

Upon a careful consideration of the whole case, we can find no error which was committed by the court in the trial below. No error.

DOUGLAS, J. I concur in the opinion upon the evidence of the defendant himself, who practically admits that he did not think he was buying anything more than the storehouse lot. And yet I think this case goes to the verge of the doctrine. There is no discrepancy between the previous contract and the deed. The defendant did not offer to buy the storehouse lot, as such. He made a written offer to buy a lot at a designated spot, measuring 50 by 150 feet. The deed was made in strict accordance with the written offer. It is true, this lot covered the storehouse lot, but it was not limited to the storehouse lot—certainly not in terms. Both parties thought the lot was 150 feet deep, and both parties knew that the plaintiff had the right to convey that much land, as it owned the surrounding land. Strictly speaking, there was no mistake, either in the written contract, or in the deed made in pursuance of the contract. Both papers were written as the parties intended them to be written. The sole mistake lay in the fact that neither party knew the exact depth of the storehouse lot, so called, which, it seems, was all that either party intended to buy or sell. I fully concur in the intimation of the court that the defendant should recover all betterments. Asking from a court of equity relief from its own mistake, the plaintiff should be required to do equity to the one admittedly holding the legal title. While this decision does not overrule the case of *McKenzie v. Houston*, 130 N. C. 566, 41 S. E. 780, which involved the construction of a deed, it is, of course, subversive of its essential principle.

(132 N. C. 890)

## VICKERS v. CITY OF DURHAM.

(Supreme Court of North Carolina. June 10, 1903.)

## NUISANCE—DISCHARGE OF SEWAGE—INJUNCTION—UNCONSTITUTIONAL ACT OF LEGISLATURE.

1. A threat by a city to discharge sewage on plaintiff's premises near his residence, and there leave it, would, if carried out, result in a nuisance *prima facie*, but not in a nuisance *per se*.

2. It was incumbent on plaintiff to show that the city's action would result in a nuisance, that the injury to him would be real and the damage irreparable, and that his apprehension was based on imminent danger.

3. Evidence in a suit to restrain a city from discharging sewage on plaintiff's premises near his residence examined, and held insufficient to show a probability that a nuisance would result.

4. Where it was not questioned but that power was conferred on defendant city to take real estate for the purpose of establishing a sewerage plant, but it was objected merely that the method prescribed for assessing the damages was illegal and unconstitutional, there was no ground shown for enjoining the city from constructing a plant on the land.

Appeal from Superior Court, Durham County; McNeill, Judge.

Suit by J. H. Vickers against the city of Durham to restrain defendant from discharging sewage on plaintiff's premises. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

T. M. Argo, W. P. Bynum, Jr., and Boone & Biggs, for appellant. Jones Fuller, for appellee.

MONTGOMERY, J. Our former courts of equity, from a very early day, as will be seen from the reported cases, have exercised jurisdiction to prevent by injunction threatened evils of the nature of nuisance, when the injury, if done, could not be repaired in damages—the foundation of the interference of equity resting in the necessity of preventing irreparable mischief and multiplicity of suits; and under the Code still larger powers have been conferred, affording additional remedies for the protection of rights and the prevention of the committing or continuing of wrongs connected with the free use and enjoyment of property. Indeed, so common has it become to resort to the courts for such relief that injunction cannot properly be longer called a high prerogative writ. Nevertheless, such jurisdiction ought to be carefully exercised, and the party seeking relief by injunction should be required to show that the matter complained of is of more than trivial consequence, and that he has a strong apparent right to relief. Little difficulty is experienced in administering rights under injunction proceedings where the matter in litigation is in existence, and constitutes a nuisance *per se*; under that head being embraced offenses against the public morals, the unlawful obstruction or use of the public highways, acts endangering the health

¶ 2. See Nuisance, vol. 37, Cent. Dig. §§ 37, 39, 55.

or safety of human beings, the overhanging of another's land, for the reason that proof other than the fact of their existence is not necessary to establish the nuisance. It is not necessary to go into the ill effects of such nuisance. Relief is granted in such cases as matter of course, upon its being shown that the fact exists. *Attorney General v. Blount*, 11 N. C. 384, 15 Am. Dec. 528. So, where the threatened and apprehended mischief would be a nuisance *per se*, upon an apparent cause being shown, an injunction would issue. In all other cases a different rule prevails, and its application to the different phases of each particular case is often attended with trouble, and has given rise to many conflicts in the decisions of the different courts. In the case now before us, the apprehended mischief complained of is not a nuisance *per se*. In the complaint, used as an affidavit, the allegation is that the defendant intends to discharge and deposit the sewage of the city of Durham upon the plaintiff's premises near his residence, and there leave it. That threat, if carried out, would constitute a nuisance *prima facie*, but not a nuisance *per se*. *Evans v. Railroad*, 96 N. C. 46, 1 S. E. 529; *Wood on Nuisances*, § 569. We are, then, in the present case, required to examine the evidence with the view to see whether the judge who heard the matter was in error, as the plaintiff alleges, when he held that the restraining order should be dissolved.

The complainant must set forth and show that the acts which he seeks to restrain will be a nuisance, that the injury to him will be real, and the damage irreparable, and that the apprehension is based on imminent danger. How, or to what degree of certainty, must the complainant make out his case? That is the main question in this matter. We think the rule has been laid down by this court, and that is that injunctions should be issued only in cases where, upon the evidence, there is a probability that the act complained of is or will be a nuisance if permitted to remain or be committed. In *Attorney General v. Hunter*, 16 N. C. 12, the court, after an examination of the evidence, said: "With us, under all the circumstances of the case, a probability is sufficient;" and in *Lowe v. Commissioners*, 70 N. C. 532, where the injunctive relief was the main relief sought in the action: "In such case, where a reasonable doubt exists in the mind of the court whether the equity of the complaint is sufficiently negatived by the answer, the court will not dissolve the injunction, but continue it to the hearing." The plaintiff's counsel accepted the rule of the probability of resulting injury as the correct one in this case.

Upon a careful examination of the evidence, and fully alive to the importance of the matter involved, we have come to the conclusion that it is not probable that the plaintiff will be injured by the erection of

the defendant's sewerage plant, or that it will be a nuisance after it is erected and put in use. The answer of the defendant and the affidavits filed in addition thereto leave no doubt upon our minds of sufficient importance to induce us to reverse the action of the judge. The complaint of the plaintiff and the affidavit signed by 24 citizens of Durham county constituted the plaintiff's evidence in the case before the judge. The substance of the complaint is that the defendant intended to extend its sewerage system out of the city, and to deposit the sewage upon the lands of the plaintiff near his house, and that, if the act was done, it would injure the health of his family, and thereby cause him irreparable damage, and injure the value of his property. The defendant, in its answer, avers its purpose to discharge the sewage of the city of Durham, not on the lands of the plaintiff, but in a sewage disposal plant, built with brick and cement, and then, by most approved methods known to science, have it purified before its discharge into the streams. The defendant further alleges that the plant will not in any way endanger the health of the plaintiff, or in any way interfere with or interrupt his comfort. The defendant further answered as follows: "That, after great diligence and inquiry as to his fitness, ability, and skill, it employed J. L. Ludlow, an engineer of great experience in such matters, to make the plans by which its system of sewerage is being constructed, and to supervise the erection and building of the sewage disposal plant; that it is necessary, in order to prevent disease, preserve health, and render the disposal of sewage harmless and inoffensive in every way, to purify the same in the manner above set out, and that, owing to the topographical situation of the city of Durham, it is necessary and most expedient to locate one of said plants at the place designated in the complaint and above referred to, and that by locating the same at that point the plaintiff will not be injured in health, nor will his comfort or happiness be in any wise disturbed; that the disposal plant aforesaid will be entirely harmless and inoffensive; and the defendant again denies any and all allegations of injury to plaintiff, irreparable or otherwise."

The affidavit of J. L. Ludlow, a sanitary and hydraulic engineer of experience and reputation, contains the following: "Owing to the absence of nearby running streams of sufficient size to satisfactorily dispose of the raw sewage from the city of Durham, I have incorporated in my plans disposal works for purifying the sewage before being turned into the streams. In determining the system to be adopted for this disposal and the preparation of plans for the same, I have not been restricted in any way by the city authorities of Durham, but have been given full license to adopt the best methods available. The plan comprehends a bacteri-

al treatment of the sewage by a system known as 'septic tank and contact beds,' which constitutes the best method of sewage purification known to the science of engineering and sanitation. Numerous experiments conducted in Europe and America during the last quarter of a century of the purification of sewage have demonstrated that the purification of sewage is accomplished by means of microscopic organic life, known as bacteria, and the bulk of experimentation and investigation have been directed toward determining the most favorable conditions and environments in which the bacteria can perform their life process. Nature provides bacteria in abundance in the raw sewage, but the conditions favorable to their operation must be artificially provided wherever a large quantity of sewage is accumulated and requires treatment. The most important demonstration by these investigations and experiments has been that bacterial action is performed by two different groups of bacteria, viz., the anaërobic and the aërobic, and that for proper and effective treatment of sewage, the conditions favorable to both groups of bacteria must be promoted. This has led to the development of the septic tank and contact bed system, which has been brought to a point of rational and practical operation under controllable conditions and fixed regulations. In the septic tank and contact bed system, purification takes place in two or more stages: First, the raw sewage, from which the coarser materials may or may not be previously removed and strained, is passed into the septic tank, when the conditions favorable to biologic action by the anaërobic bacteria are promoted, and the solid matter contained in the sewage is broken up into more simple compounds. The septic tank is just what the name implies, viz., a tank of dimensions suitable to the amount of sewage to be disposed of, where the sewage is confined for a time out of direct contact with light and air, which is the condition essential to the life processes of anaërobic bacteria—i. e., absence of oxygen. While it does not now appear that the anaërobic bacteria constitute the only agent at work in the septic tank, but that organic substances known as 'enzymes,' and probably other forces, are assisting in the process known as 'hydrolysis,' or the tearing down of organic compounds and rendering them in a fluid or semifluid state, however, it is amply demonstrated that such treatment of sewage does render it in a condition favorable to rapid, effective purification when exposed to the action of the aërobic bacteria by means of filtration in the contact beds. The filtration process may be pursued with a sand or other porous bed of sufficient area, but, as the agencies required are the aërobic bacteria—that is, the group requiring an abundance of oxygen for performing their life processes—the purpose should be to use the type of

filter most conducive to the activity of this group of bacteria and their rapid multiplication. This is best accomplished by a form of filter known as 'contact beds,' wherein the filter media is some form of medium-sized material having the largest practicable amount of surface for adhesion of bacteria. Quite a large number of different materials have been experimented with and found satisfactory, viz., broken stone, coal, coke, gravel, furnace slag, top cinders, clinkers, burned clay broken into lumps, etc. By this system of sewage purification, almost any degree of purification that may be desired can be obtained by properly regulating the length of time which the sewage is exposed to the septic action in the septic tank and on the contact beds, and the number of contacts to which the sewage is exposed; and the purification of from 80 per cent. to 90 per cent., which is the extraction of this percentage of all impurities existing in the sewage, is entirely practicable and of easy accomplishment. This is accomplished, too, with an entire absence of injury, or even offense, to persons living in the immediate vicinity of the works. This system of sewage purification is universally recognized by the engineering and sanitarians as the best and most complete method known to science, and has already been adopted and installed in a large number of American, English, and Continental towns and cities, and is rapidly displacing all other systems of purification. The city of Manchester, England, with a population of more than half a million, established a large experimental plant for bacterial purification of sewage in 1895, and conducted experiments much more exhaustive than any other city in the world. In 1898 this city employed a commission composed of an engineer, a biologist, and a chemist, all of the highest rank in England, to report upon the various schemes of purification that had been suggested or tried up to that time, investing the commission with full authority and ample means for making any further experiments they might deem advisable. The result of this investigation and experimentation was the adoption of the septic tank and contact bed system for treating the sewage, and to render it in a proper condition for discharging into running streams without violating the very stringent requirements of the health authorities of the English government. The plans adopted for purification at Durham are shown in the blue print attached hereto. The sewage first goes into the chamber indicated as 'septic tank,' where it is exposed to septic action, and is retained until the tank is filled. It is then pumped from the septic tank to what is designated as a 'dosing channel,' from which it is fed by automatic apparatus to primary bed No. 1, until the bed is filled. The sewage remains in this contact bed for a sufficient length of time, viz., three or four hours, and is then discharged automatically by a time

syphon to the secondary bed No. 1, where it is again exposed to the operation of the aerobic bacteria until the degree of purification that is desired is obtained, when it is discharged to the effluent pipe running in a nearby water course. During the operation of primary and secondary beds No. 1, the sewage is again accumulated in the septic tank until it is filled and septic action has taken place, whereupon it is applied to primary bed No. 2, thence to secondary bed No. 2, in the same manner as on primary and secondary beds No. 1. We thus have the contact beds working intermittently, allowing each bed in turn to have a renewed supply of air while not in operation, so that the conditions favorable to the constant multiplication in numbers of the aerobic bacteria are provided by means of working the two pairs of beds intermittently, and all conditions favorable to both the anaerobic and aerobic bacteria are thoroughly provided for, and the purification of the sewage is accomplished without any injury or harm to any person or any interests, and without any offense to the senses of smell or sight. Nature's process of purification of sewage and its transformation back into the original elements of which it is composed has been accomplished, and the effluent from the purification works which is turned into running streams has been rendered in a non-putrefying condition, and is quite harmless and entirely inoffensive."

Affidavits of two other distinguished scientists were filed by the defendant, in which the plans and statements of the affiant Ludlow were approved and verified, except as to the lack of offensive odors at all stages of the purification of the sewage. The affidavit of Ludlow contains the statement that the purification of the sewage is accomplished with an entire absence of injury, or even offense, to persons living in the immediate vicinity of the works. The affidavits of the other affiants are silent on this point.

The affidavit signed by 24 citizens and filed by the plaintiff is as follows: "We, the undersigned, make oath and say that the sewerage system as proposed and now attempted to be established by the city of Durham would be greatly injurious to the property and health of the people resident in the vicinity of the locality in which it is proposed to establish what they call a plant. It would corrupt and poison the air and water which we and our domestic animals must breathe and drink, and generate disease and produce death. We further swear that we live near and along the line of this fork, the wet weather stream upon which it is proposed to locate the dumping-ground of the filth, slime, excrement, and ordure of over one-half of Durham City, and have opportunities of knowing, and do know, whereof we speak. For some years this sewage has been emptied into Third Fork, which is dry most of the

year, and has trickled down the bed of the stream and soaked into our lands, who reside along the stream, has filled the air with a nauseous and offensive and unhealthy stench, has produced disease, and in some families the death of its members. That we live along the line of such stream, some very near and others a mile or more therefrom, and speak from actual experience. That some of us live in the immediate vicinity of the proposed place of discharge and collection of the garbage, filth, and sewage, and know that the plaintiff, J. H. Vickers, as well as ourselves, would be irreparably injured and damaged in our property and health and comforts of home by the collection in any way of said sewage in or near the creek or vicinity aforesaid, and that it would be a dangerous and unbearable nuisance; and the defendant further swears that the line of drainage could be safely and conveniently extended down said creek and the sewage conveyed away into a flowing stream, without harm or inconvenience to the people, and that those of us through whose lands the drain pipes would run will give the right of way without charge. Wherefore we protest, in defense of our property, our families and our lives, against the establishment of the proposed plant."

So it appears from everything in the case that the complaint of the plaintiff is based solely upon an apprehension of injury. None of the witnesses of the plaintiff professed to know anything concerning the plant for disinfection or the methods of purification. The plaintiff is simply afraid that he may be injured by something of which he has no theoretical knowledge, and with which he has had no practical experience. On the other hand, the affidavits filed by the defendant are made by prominent and experienced scientists, and one of them has in several instances seen the practical results of the plan proposed by the city of Durham to dispose of its sewage. In *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704, this court said: "When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering." We think that still the correct rule, though there may be and are some expressions to the contrary in *Marshall v. Commissioners*, 89 N. C. 103. In addition to what we have said above, the great importance to the city of Durham of the public work which it is trying to carry out would make us hesitate before we would interfere by injunction.

In the complaint of the plaintiff there is an allegation that the method of condemning the plaintiff's land by section 34, c. 235, p. 652, Priv. Laws 1899, is unconstitutional and void, and it is argued by the plaintiff's counsel here that the injunction should have been continued to the hearing on that account. We cannot see how an unconstitutional act of the General Assembly can be made a ground

of equitable jurisdiction. In the case before us it is not questioned that power is conferred by the act upon the authorities of the city of Durham to take real estate for the purpose of establishing the sewage plant. The objection is that the method of assessing the value of the property condemned is illegal and unconstitutional. If that question was properly before us, we would concur in that view. He can have his damages assessed in an action at law for that purpose, or the defendant can proceed to have damages assessed under chapter 49 of the Code. We have no case in our Reports in which this question is decided, but we have several in which the principle is decided—cases in which injunctions against alleged invalid city ordinances were refused. *Wardens v. Washington*, 109 N. C. 22, 13 S. E. 700; *Scott v. Smith*, 121 N. C. 95, 28 S. E. 64; *Cohen v. Commissioners*, 77 N. C. 2. The ground on which such relief is refused is that "a court of equity will never interpose its jurisdiction in the way of a mere protective relief, when the party has an adequate and effectual remedy at law, and is so circumstanced as to be able to assert it, but would rather leave him to seek his redress in that forum, except in some states where they have statutes expressly permitting it to be done." *Busbee v. Lewis*, 85 N. C. 332.

There is no error.

DOUGLAS, J. (concurring in result only). I concur in the judgment of the court on the understanding that its opinion means that the condemnation proceedings so far taken are unconstitutional, and therefore void, and that the plaintiff will have the right to maintain his action in the nature of trespass for damages for any such unlawful entry upon his property.

(132 N. C. 1111)

#### STATE v. YODER.

(Supreme Court of North Carolina. June 10, 1903.)

HIGHWAYS—REFUSAL TO WORK—CRIMINAL PROSECUTION—SUFFICIENCY OF COMPLAINT—SUFFICIENCY OF NOTICE—LAYING OUT HIGHWAY—COUNTY COMMISSIONERS' JUDGMENT—COLLATERAL ATTACK—PREVIOUS ASSIGNMENT TO OTHER HIGHWAY—EFFECT.

1. A warrant referring to a complaint, describing a highway, and naming the county where it lies, and alleging that the person summoning accused to work on the highway was overseer of that road; that accused "was liable to work on said road, he being a citizen of the said county"; that he had been duly summoned (giving time and place); and that he failed to appear and refused to work—and negating the payment of \$1, is sufficient.

2. Code 1883, § 2019, provides that the hands summoned to work on a highway shall not be required to work continuously for more than two days. *Held*, that the fact that a notice summoned accused to work on a highway for three days consecutively was not a defense to a criminal prosecution for failure to work at all; accused having made no objection to the sufficiency of the notice, which was good for

two days, and having been fined only for two days' default.

3. Laws 1899, p. 337, c. 338, requires the assignment of hands to work on a road "from the body of the county." *Held*, that an order assigning for the construction of a new road all the hands liable to road duty, and residing within  $2\frac{1}{2}$  miles of the nearest portion of the road, was not objectionable; the statute not requiring that all the hands in the county be ordered out.

4. The judgment of county commissioners ordering the laying out of a road cannot be collaterally attacked by one refusing to work on the highway, either because the hands assigned thereto are drawn from the adjoining portion of the county instead of the whole, or because it does not provide for the assessment of damages.

5. It is no defense to a prosecution for a refusal to work on a highway that accused has been previously assigned to another highway, the last assignment canceling the first.

Douglas and Connor, JJ., dissenting.

Appeal from Superior Court, Catawba County; Long, Judge.

Charles M. Yoder was convicted of failing and refusing to work on a highway, and appeals. Affirmed.

The defendant was warranted before a justice of the peace on the following complaint: "B. B. McLurd, being duly sworn, complains and says that he was duly appointed overseer by the board of commissioners of Catawba county, state of North Carolina, to open a public road in said county, Jacobs Fork township, leading from plateau over the lands of Charles Bronce and others to a point on the King's Mountain Road, near the Lincoln county line; that Charles Yoder has been duly assigned, is and was liable to work on said road, he being a citizen of the said county of Catawba; that affiant, at and in the said county of Catawba, state aforesaid, on 13th December, 1902, as overseer, duly summoned said Yoder to appear on the 18th, 19th, and 20th days of December, 1902, at a time and place named in said summons, to work on said road, and that the defendant willfully and unlawfully failed to appear, and refused to work in accordance with said summons, and failed and refused to furnish an able-bodied hand as a substitute, with the implement directed, and failed and refused to pay the one dollar as prescribed by the statute, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The justice issued his warrant against the defendant "to answer the above complaint." He was found guilty, and fined \$2 and costs, from which he appealed to the superior court. In that court he was found guilty by the jury, fined \$2 and costs, and appealed.

S. J. Ervin, Self & Whitney, and E. B. Cline, for appellant. L. L. Witherspoon and the Attorney General, for the State.

CLARK, C. J. (after stating the facts). The motion to quash was properly denied. The affidavit contains every allegation neces-

sary in a proceeding to enforce a penalty for failure to work the roads. It describes the road, names the county wherein it lies, alleges that the person summoning the defendant was overseer of that particular road; that the defendant was a citizen of that county, liable to work on said road, and duly assigned thereto, and that he had been duly summoned (giving time and place); that he willfully and unlawfully failed to appear and refused to work—and also negatives the payment of one dollar. Technical and critical fullness are not expected in proceedings of this nature, but this affidavit contains all that could be desired to give the defendant the fullest information of the charge against him, which is the only object of the complaint. Its terms were adopted by the warrant issued thereon, and come up fully to all the requirements as set out in the following cases: *State v. Smith*, 98 N. C. 747, 4 S. E. 517; *State v. Pool*, 106 N. C. 698, 10 S. E. 1033; *State v. Neal*, 109 N. C. 859, 13 S. E. 784; *State v. Covington*, 125 N. C. 641, 34 S. E. 272. "The affidavit and warrant, in contemplation of law, are one, if one is referred to by the other" (as was here the case). *State v. Davis*, 111 N. C. 729, 16 S. E. 540; *State v. Sykes*, 104 N. C. 694, 10 S. E. 191; *State v. Sharp*, 125 N. C., at page 635, 34 S. E. 264, 74 Am. St. Rep. 663.

The defendant places much stress upon the fact that he was summoned to work three days consecutively, whereas Code 1883, § 2019, provides that the "hands shall not be required to work continuously for a longer time, at any one time, than two days." This would be a good defense if the alleged default was for failure to work the third day, but the notice was good for two consecutive days, and the defendant admittedly paid no attention to it, and did not do any work at all, leaving the other citizens assigned to that road to do his part. They had a right to see that under the notice he worked two days, or paid his \$1 per day. The overseer was simply their representative in enforcing his pro rata part of the work. It appears from the evidence that the road was worked only two days by any one at that time; that the defendant made no objection that the notice specified three days, or it might have been then amended. He did not go to the road at all. He was fined \$2 for failure to work two days, only, and has in no respect been prejudiced by the notice being for three days. As a law-abiding citizen, he should have attended and worked two days, as his neighbors did, and, failing to do so, he has no good ground to object to paying \$2 to make his share of this public duty equal to theirs.

The second objection was to the introduction of the judgment of the county commissioners which ordered this road laid out, appointed an overseer, and assigned hands, etc., and is without merit. This objection is stated in the brief to be on the ground that

chapter 333, p. 337, Laws 1889, required the assignment of hands "from the body of the county." That means simply that they shall be from the road hands of the county, and the order assigning for the construction of the new road "all the hands liable to road duty, and residing in two and a half miles of the nearest portion of said road," is in accordance with what has always been the uniform understanding of the duty of county commissioners in this regard. It has never been understood that all the hands in the county were to be ordered out. There is no provision for drawing out a part of them, like a special venire. The mode of assigning hands is left to the county commissioners, and in selecting those hands near the road, and men who would be most likely to be benefited by and use the road, there was no oppression. Besides, it has been expressly held that the judgment of the county commissioners, ordering the laying out of the road, is final, unless reversed on appeal, and any person affected could appeal. The order cannot be collaterally impeached. *State v. Witherspoon*, 75 N. C. 222; *State v. Smith*, 100 N. C. 550, 6 S. E. 251; *State v. Joyce*, 121 N. C. 610, 28 S. E. 366. In this last case, at page 611, 121 N. C., page 366, 28 S. E., the court says: "When the board of commissioners ordered the road to be laid out and constructed as a public county road, appointed an overseer, and assigned hands to him to construct the road, and ordered him to have the work done, in the eye of the law it became at once a public road, and the hands so assigned were as much bound to attend and work as any other road hands in the county, and they could not question the regularity of the proceedings of the board in the matter, and, if they refused to work, they are liable, under the general law, to indictment."

The other exceptions are for refusal of special instructions. The first prayer was a general demurrer to the evidence. There being evidence tending to prove the charge, its sufficiency was for the jury. *Clark's Code*, (3d Ed.) pp. 525, 526; *Walser's Dig.* 373.

The second prayer was, in effect, that, if the defendant had been previously assigned as a road hand to another road, he could not be assigned to this. Every man liable to road duty in the county had been already assigned to some road, and, if the defendant's assignment to the new road was illegal, it would be impossible to execute the law—a most necessary one, authorizing the county commissioners to lay out new roads, and assign hands to construct and work them. The assignment to the new road canceled the assignment to the former road. Whether the number of days' work already done on the first road must be deducted from the total number of days (eight) which a hand may be required to work in a year, thus restricting the number of days the defendant can be required to work on the new road to the difference, is a matter not before us, though it

seems a reasonable construction. The defendant could not be required to work on two roads at the same time (*State v. Hinton*, 131 N. C. 770, 42 S. E. 611), but he is not indicted for failure to work on the first road after being assigned to the new road. The assignment to the latter canceled the first assignment, as a matter of course.

The only remaining exception is to the refusal of the prayer to instruct the jury that, as the order of the county commissioners laying out the new road did not "provide for the assessment of damages, the same was irregular and erroneous, and void and of no effect." The order was irregular and erroneous as to the landowners, if thus defective, but it was not "void and of no effect," so as to authorize the defendant to impeach it collaterally. He could not be judge and jury in his own favor, and decide that the order to work the road thus laid out was a nullity, and disobey the order. *State v. Joyce*, *supra*. If aggrieved by the order laying out the road, and assigning him as one of the hands, he should have tested the validity of such order by appealing. Not having done so, he should have obeyed it.

No error.

DOUGLAS, J. (dissenting). This was a criminal action, tried on appeal by the defendant from the judgment of a justice of the peace. The following is the "complaint" on which the warrant was issued: "B. B. McLurd, being duly sworn, complains and says that he has been duly appointed overseer by the board of commissioners of Catawba county to open out a public road in said county, Jacob's Fork township, leading from plateau over the lands of Charles Bronce and others to a point on the King's Mountain Road near the Lincoln county line; that Charles Yoder has been duly assigned, is and was liable to work on said road, he being a citizen of the said county of Catawba; that affiant, at and in the said county of Catawba, on the 13th day of December, 1902, as overseer, duly summoned said Charles Yoder to appear on the 18th, 19th, and 20th days of December, 1902, at a time and place named in said summons, to work on said road; and that the defendant willfully and unlawfully failed to appear and refused to work in accordance with said summons, and failed and refused to furnish an able-bodied man as a substitute, with the implement directed, and failed and refused to pay the one dollar as prescribed by the statute, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. B. B. McLurd." The defendant was found guilty both before the justice of the peace and on appeal in the superior court. The defendant moved to quash the warrant and in arrest of judgment. Both motions were refused by the court below, and are now before us on exceptions.

I think the motion in arrest of judgment

should have been granted, as the so-called complaint does not charge any criminal offense. The warrant simply directs the arrest of the defendant "to answer the above complaint." Section 2017 of the Code of 1883 provides that "all able bodied male persons between the ages of 18 and 45 years shall be required under the provisions of this chapter to work on the public roads. \* \* \*" The warrant, including the complaint as a part thereof, does not allege a single one of the requisites specified in the Code. It states merely the legal conclusion that he was "duly assigned" and was "liable to work on said roads, he being a citizen of the said county of Catawba." The word "citizen" might be construed as meaning inferentially that he was a male person, but that is only one of its legal meanings, and it never can be construed to include the idea of being able-bodied and between the ages of 18 and 45. No motion was made to amend the warrant, although full notice was given by the motion to quash. It will be seen that the statute designates the class to which it shall apply, in express terms, which are words of limitation, and not of exception. Now, if the statute provided that all persons should be required to work the roads, with certain exceptions, the case would be different, as the existence of the facts creating the exception would generally be matter of defense. It is well settled that if the words are essentially those of qualification, and not of exception, even if stated under the form of an exception or proviso, they must be alleged by the state. In *State v. Norman*, 13 N. C. 222, the distinction is thus clearly drawn: "We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act; the other, adding a qualification whereby a case is brought within that operation. Where a proviso is of the first kind, it is not necessary, in an indictment, or other charge founded upon the act, to negative the proviso; but, if the case is within the proviso, it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso, for in reality that which is provided for in what is called a proviso to the act is part of the enactment itself." This case has been repeatedly cited with approval, and seems never to have been questioned. *State v. Tomlinson*, 77 N. C. 528; *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; *State v. Pool*, 106 N. C., at page 700, 10 S. E. 1033; *State v. Davis*, 109 N. C., at page 784, 14 S. E. 55; *State v. Downs*, 116 N. C. 1064, 21 S. E. 689.

It is true, the penalty is prescribed in section 2020 of the Code of 1883, but that section does not describe the offense, nor specify the class to which the penalty shall apply, except by reference to other sections, including, of course, section 2017. The expression "lia-

ble to work on the roads" is merely a legal conclusion from facts elsewhere stated.

While I can find no case exactly like that before us, there are many involving the same principle, inasmuch as they hold the warrant or indictment invalid where it did not fully describe the offense. In *State v. Smith*, 98 N. C. 747, 4 S. E. 517, it was held (quoting the syllabus) that "a warrant against a person for failing to work the roads, which fails to allege that the defendant has been duly assigned, and was liable to work on that particular road, and that he had been properly summoned, is fatally defective." In *State v. Baker*, 106 N. C. 758, 11 S. E. 360, it was held (quoting the syllabus) that "a warrant charging simply that the defendant 'did refuse to work the public road after being legally warned by P., supervisor, against the peace and dignity of the state,' is insufficient." In *State v. Pool*, 106 N. C. 698, 10 S. E. 1033, in which the warrant was held to be fatally defective, various defects are pointed out—among others, the failure to negative the payment of \$1 in lieu of personal service. In *State v. Neal*, 109 N. C. 859, 13 S. E. 784, it was directly held that a warrant against one for refusing to work on the public road was fatally defective if it failed to negative the payment of \$1 by the defendant in discharge of his liability. The acts of 1887 (page 133, c. 73) and of 1889 (page 337, c. 338) do not affect the case at bar.

The principle above stated would be sufficient to determine this appeal. But there is one other question clearly presented in the record, as well as in the briefs of counsel, that I think it better also to discuss. The defendant requested the court, substantially, to charge that he could not be required to do double road duty, by being assigned to two different roads at the same time. This point has been directly decided in *State v. Hinton*, 131 N. C. 770, 42 S. E. 611, where the court says, "We do not think that the law intends to impose upon any one the double burden of working the roads in different districts at the same time." The state contends that this exemption from double duty applies only to roads already laid out, and that "the law imposes this obligation upon him [working on a new road] in common with other residents of the county, in addition to his liability to render service in keeping in repair roads already established." We do not see the distinction. Compulsory working on the roads is in the nature of taxation and should be uniform, as far as local conditions will permit. I think that the defendant should have been permitted to show where and when he had worked on the public roads during the current year, in order to get full credit for the time already given to public duty.

CONNOR, J., concurs in the dissenting opinion.

(1901 Va. 443)

**SUN LIFE ASSUR. CO. OF CANADA v. BAILEY.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**LIBEL—PLEADING—DECLARATION—PUBLICATION—INSULTING WORDS—LIABILITY OF CORPORATION—EVIDENCE—INSTRUCTIONS—DAMAGES.**

1. A declaration which sets out the plaintiff's cause of action with sufficient fullness and clearness to apprise the defendant of the grounds of the plaintiff's claim, and to enable the defendant to plead to the action, is sufficient.

2. Publication of a libel is sufficiently alleged, where the libelous instrument is set out, and accompanied by the allegation that the defendant made publication of it.

3. The sending of a letter through the mail is not a publication.

4. Publication may be before or after mailing, either by dictation to a stenographer, writing out on typewriter, and subsequent signature by the author, or by making the contents of the letter known to other persons either before or after it was mailed.

5. Common-law libel and an action for insulting words under the statute cannot be blended in one count; but a publication containing insulting words may be declared on under the statute, although it is libelous at common law.

6. A corporation can be held liable in an action under the statute for insulting words uttered or published by an agent, and required or authorized by his employment, and in the course of the business of the corporation.

7. In an action for insulting words, evidence of the effect produced by an article other than that alleged, and for which the defendant was not shown to be responsible, is inadmissible.

8. Publication is an essential element of libelous defamation.

9. An incomplete statement of the law in one instruction may be cured by a complete statement in another, if, when the two are read and considered together, the court can see that the jury could not have been misled by the incomplete instruction.

10. Where only compensatory damages can be recovered, the standing of the defendant does not influence the recovery.

Error to Law and Equity Court of City of Richmond.

Action by one Bailey against the Sun Life Assurance Company of Canada. Judgment for plaintiff, and defendant brings error. Reversed.

B. Rand Wellford and J. C. Taylor, for plaintiff in error. Hill Montagne, for defendant in error.

CARDWELL, J. The defendant in error brought his action for defamation against the Sun Life Assurance Company of Canada, and recovered a judgment for \$750 damages. The declaration contains two counts, the first of which is a count for libel at common law, and the second for insulting words under the statute. To the declaration, and to each count thereof, plaintiff in error demurred, the demurrer was overruled, and this ruling of the trial court constitutes the first assignment of error.

The ground relied on in the demurrer to the first count is that it does not sufficiently allege

§ 2. See *Libel and Slander*, vol. 22, Cent. Dig. § 192.



publication of the libel. Omitting the formal part of the declaration, the wrong alleged in the first count is set out as follows: "Falsely, wickedly, and maliciously did compose, publish, by and through its agents, Foster & Bartow, who were at the time managers of the defendant's insurance business for the city of Richmond and state of Virginia, and acting within the scope and course of the business in which said agents were employed, and caused to be published of and concerning the said plaintiff, a certain false, scandalous, malicious, and defamatory libel, by means of a letter dated March 7, 1901, mailed by said agents to, and received by, said plaintiff, containing the false, scandalous, malicious, defamatory, and libelous matter following." This is followed by the letter on which the action is based, and the usual allegations concluding a common-law count for libel or slander.

"A declaration which sets out the plaintiff's cause of action with sufficient fullness and clearness to apprise the defendant of the grounds of the plaintiff's claim, and to enable the defendant to plead to the action, is sufficient." *Guarantee Co. v. National Bank*, 95 Va. 480, 28 S. E. 909.

It is true that the first count of the declaration in this case sets out that the libel complained of consisted of a letter mailed to the plaintiff, but there is also the allegation that there was, by the defendant, a publication of the matter contained in the letter, which might have been before or after the mailing of the letter, either by dictation of it to a stenographer, written out on a typewriter, and subsequently signed by the author, or by making the contents of the letter known to others either before or after it was mailed, or in a number of other ways. *Gambrill v. Schooley* (Md.) 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414; *Adams v. Lawson*, 17 Grat. 250, 94 Am. Dec. 455. It is undoubtedly well-recognized law that the sending of a letter through the mail is not a publication, as the sender is not responsible for what the recipient does with the letter after it is received. *Odgers on L. & S.* 151, and cases cited. But where the libelous letter is set out in the declaration, accompanied by the allegation that the defendant made publication of it, we think that this sufficiently apprises the defendant of the plaintiff's claim to enable him to plead to the action.

We are further of opinion that the court did not err in overruling the demurrer to the second count. The count, as we have observed, is for insulting words under the statute; and the first objection made to it is that it blends or mingles in one count a common-law libel and an action for insulting words. That this cannot be done is well settled. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725. It was, however, held in that case that where the count satisfactorily shows that it was intended to be a count under the statute for insulting words, and not for common-law defamation, it is good, because a publication

containing insulting words may be declared on under the statute, although it is libelous at common law. We do not see that the second count leaves any room for doubt that it was intended to be a count under the statute for insulting words, and not for common-law defamation.

The second objection made to this count is that it is an action against a corporation, and that such an action will not lie. This question was raised in this court for the first time, it would seem, in *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358, but it was deemed unnecessary to pass on it.

That a corporation may be held responsible in an action for the publication of a libel is no longer an open question in the United States courts. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. And in *Brown v. N. & W. Ry. Co.*, 42 S. E. 684, recently decided by this court, which was an action for the publication of an alleged libel, the learned counsel representing the defendant did not interpose the defense that such an action would not lie against a corporation.

In a number of other cases this court has, following the rules of construction provided by statute (now chapter 2 of the Code of 1887, and especially the thirteenth subdivision of section 5 of the chapter), construed the word "person," in a statute, to include corporations as well as natural persons for civil purposes. *City of Lynchburg v. N. & W. Ry. Co.*, 80 Va. 243, 56 Am. Rep. 592, and cases cited.

Now that corporations are allowed by law to transact practically every business that may be carried on by an individual, and may be held responsible, as is well settled, in an action for the publication of a libel by or through their agents, we can see no good reason why they should not be held liable in an action under the statute for insulting words uttered or published by an agent acting within the scope of his employment, and in the course of the business of the corporation.

In *Railroad Company v. Quigley*, 21 How. 202, 16 L. Ed. 73, the opinion by Campbell, J., says: "That for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

At the trial of this cause, defendant in error (plaintiff below) introduced in evidence, without objection by plaintiff in error, an article published in the *Prospect*, a newspaper published in Richmond, Va., and Atlanta, Ga., and subsequently introduced S. H. Pulliam as a witness, who was asked, over the objection of plaintiff in error, whether the article in the *Prospect* altered his opinion of the defendant in error, to which the witness replied, "Why, yes; I thought that was something against him." Then follow-

ed other questions to and answers by the witness touching the article in the Prospect, and to all of which plaintiff in error strenuously objected.

While plaintiff in error made no objection to this newspaper article being read to the jury, regarding it as having no relevancy to the case, as the libel set out in the declaration had nothing whatever to do with the article in question, or connection with it, when it came to the examination of the witness Pulliam as to the effect the article had upon his opinion of the defendant in error, very naturally objection was made to the admission of this evidence, and it was clearly error to admit it; no evidence whatever having been introduced to show or tending to show that the plaintiff in error was responsible for the publication of the newspaper article.

The question raised by the second bill of exceptions was waived by the oral argument here.

The third is to the granting of instructions asked by the defendant in error, the refusal of the court to grant instructions asked by the plaintiff in error, and to the giving of instructions by the court in lieu of others asked.

Defendant in error's third instruction is as follows:

"The court instructs the jury that 'malice,' in a legal sense, means any wrongful act done willfully or purposely; and the jury are instructed that if they believe from the evidence that Foster & Bartow, the managers of the defendant's business in the state of Virginia, wrote the letter charged in the declaration within the scope of their employment, and said letter was libelous, intentionally, without any just cause, the jury will infer malice therefrom, and must find for the plaintiff."

We do not think that this instruction, as plaintiff in error contends, took from the jury the privilege of saying whether the letter was libelous or not, and told them they must infer malice if they believed it (the letter) was written intentionally and without any just cause, etc.; but, clearly, the instruction makes malice alone the criterion of the right of recovery, leaving wholly out of view the question of publication—an essential element of a libelous defamation.

Where the court undertakes to state a case upon which the plaintiff should recover, it must state a complete case, and embrace all the elements necessary to support a verdict. It is true that an incomplete statement of the law in one instruction may be cured by a complete statement of it in another, if, when the two are read and considered together, the court can see that the jury could not have been misled by the incomplete instruction. *Washington, etc., Ry. Co. v. Quayle*, 95 Va. 741, 80 S. E. 391. But that is not the case here. The defect in the instruction under consideration is not cured by

a complete statement of the law in another instruction. Therefore, we cannot say that the jury could not have been misled by the incomplete instruction.

The refusal to give plaintiff in error's instruction numbered 2, and the giving of instruction "c" in lieu thereof, is assigned as error.

It was sought by instruction No. 2 to have the jury told that if they believed from the evidence that the duty of the author of the letter, Mr. Bartow, as an agent of the defendant company (plaintiff in error), did not require or authorize him to write the letter sued on, but that it was his personal act, outside of the scope of his duty to the defendant, and written because he felt angered and aggrieved at what he conceived to be the bad treatment of him by the plaintiff, they should find for the defendant; and instruction "c," given in lieu of that instruction, is as follows: "If the jury believe from the evidence that the letter sued on was the personal act of Mr. Bartow, and outside of the scope of his duties as agent of the defendant, and written by him because he felt angered and aggrieved at what he conceived to be the bad treatment of him by the plaintiff, they must find for the defendant."

While there is practically no very material difference in the two instructions, the instruction No. 2, as asked, more clearly, we think, drew the distinction between the circumstances under which a corporation is liable for the acts of its agent, and those under which it is not liable. It explained the meaning of the term "scope," as used in the preceding instruction, by telling the jury that the defendant was not liable unless the duty of Mr. Bartow either required or authorized the writing of the letter sued on; and, as this ground was not covered by any other instruction, the instruction No. 2 should have been given as asked.

The court gave in lieu of instruction "a" asked for by the defendant in error (plaintiff below) the following: "The jury are instructed that it is not incumbent upon the plaintiff to prove any special damages, and, if they find for the plaintiff, they shall find such damages as they think he is entitled to under all the circumstances as shown in the evidence. And in ascertaining the damages, they may consider the plaintiff's standing, and that of the defendant."

The court had properly in another instruction told the jury that this action being against the defendant corporation, of which the writer of the letter sued on was the agent, they could not give punitive or exemplary damages unless they believed from the evidence that the alleged libel of the agent was either authorized by the defendant, or was subsequently ratified by it; and there being no evidence whatever tending to show that the defendant (plaintiff in error) either authorized or ratified the act of Bartow in writing and mailing the letter sued on, but,

on the contrary, the evidence being distinct and uncontradicted that the company's chief officers knew nothing of the writing of the letter until the institution of this suit, it was clearly erroneous to tell the jury that, in ascertaining the damages they might allow the plaintiff, the standing of the defendant company might be considered.

Whatever might have been the standing of the defendant, as disclosed by the evidence, it had nothing whatever to do with the question as to what actual or compensatory damages, if any, the plaintiff was entitled to recover. *N. & W. Ry. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817; *N. & W. Ry. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Lakeshore Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

As the case, for the reasons stated, has to be remanded for a new trial, we deem it inexpedient to express any opinion upon the evidence, except as we have found it necessary to do so in passing upon the instructions given and refused.

The judgment of the court below must be reversed, and the cause remanded for a new trial to be had in accordance with the views herein expressed.

(101 Va. 408)

**MARTIN'S ADM'R v. RICHMOND, F. & P. R. CO.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**WITNESSES—EXAMINATION—APPEAL—REVIEW  
—FINDINGS OF JUDGE—RAILROADS—  
ACCIDENT AT CROSSING.**

1. After a witness has been cross-examined respecting a former statement made by him, the party who called him has a right to re-examine him as to the same matter, and to introduce in rebuttal evidence to support him.

2. When a case at law is decided without the intervention of a jury, and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence, not the facts, is certified, the judgment of the trial court will be given the same effect as if it were the verdict of a jury.

3. Evidence in action for injuries at railroad crossing held insufficient to show negligence on the part of defendant.

Error to Circuit Court, Stafford County.

Action by Martin's administrator against the Richmond, Fredericksburg & Potomac Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. D. Carter and A. T. Embrey, for plaintiff in error. Leake & Carter and St. Geo. Fitzhugh, for defendant in error.

BUCHANAN, J. Upon the first trial of this case there was a verdict in favor of the plaintiff, which was set aside upon motion of the defendant, and a new trial granted. Upon the second trial, all matters of law and fact having been submitted to the court, it gave judgment for the defendant. To that judgment this writ of error was awarded.

The action of the court setting aside the

verdict of the jury upon the first trial is assigned as error.

One of the material questions in the case was whether or not the defendant's train gave any warning of its approach to the public crossing where it ran into the vehicle in which the plaintiff's intestate was riding, and caused the injuries complained of. The plaintiff had introduced evidence which tended strongly to prove that no such warning had been given. The defendant, in sustaining that issue on its part, introduced a witness who testified positively that such warning was given. Upon the cross-examination of the witness the foundation was laid for his impeachment by showing that he had stated at the time of the accident that no warning was given, and in rebuttal the plaintiff introduced a witness who testified to such contradictory statement. After the plaintiff had closed his evidence, the defendant introduced a witness to contradict the plaintiff's witness on this point, but the court, upon the plaintiff's objection, refused to permit the witness to testify.

The rejected evidence was clearly admissible, and the court erred in not receiving it, unless, as the plaintiff insists, the time and circumstances under which it was offered justified the court in rejecting it. The bill of exceptions taken upon the court's refusal to receive the evidence discloses fully the circumstances under which the evidence was offered and rejected, and is as follows:

"Be it remembered that during the trial of this case Jesse Stone, Sr., was called as a witness for the defense, and among other things testified as follows on cross-examination by plaintiff:

"Q. Did you see Mr. Jett there—John Jett?

"A. I don't remember whether I did or not.

"Q. He testified that he saw you there.

"A. Well he might have seen me some time after the accident happened, but he was not there when the accident happened.

"Q. Did you have any conversation with him, Mr. Stone?

"A. I do not remember.

"Q. When he run up, didn't he say to you, "Mr. Stone, what's the matter?"

"A. He might have done it. I don't remember.

"Q. And did you or not reply that the Martins were killed by the train that run up on them and did not give them any warning?

"A. No, sir.

"Q. You didn't say that to John Jett?

"A. No, sir; I didn't. I could not have said that after hearing that whistle."

"Redirect Examination.

"By counsel for defendant.

"Q. If Mr. Jett should state that you made any such remarks to him, would it be the truth or a lie?

"A. It would be an untruth, because I did not make it. And, more than that, here is my boy here present, who was right there with me at the time, right by my side the whole time. I am not interested in this case at all. I am just here to tell what I know about it."

"Conway Chichester, a witness for the plaintiff, after the defendant had completed its testimony in chief, was called again in rebuttal, and, having finished his evidence in rebuttal, he was questioned as follows:

"Q. Do you know the condition that crossing was in before this accident—I mean as to the road?"

"Whereupon defendant objects to this question and answer, because it was not evidence in rebuttal, but evidence in chief, this ground having been gone over by the plaintiff in his testimony in chief. The court sustained the objection, remarking that the practice had grown so loose as to the time and order in which testimony could be introduced that it was hard to draw the line, and, for itself, would be glad to go back to the strict common-law rule, which was well understood and well defined; that, since the point had been raised, the court would adopt in this trial the strict rule, and apply it to each side. The plaintiff then introduced no further testimony.

"Whereupon the defendant introduced as a witness Jesse Stone, Jr., who was with his father (Jesse Stone, Sr.) on the day and at the scene of the accident when Mrs. Martin, the plaintiff's intestate; was killed, and who had been regularly summoned as a witness, and had been in attendance at the trial, but up to this time had not been put on the stand; the said Stone, Jr., being now called to prove that Stone, Sr., did not say at the scene of the accident to John Jett (as testified by Jett) that the railroad company had killed Mrs. Martin without giving any warning, the said John Jett having previously testified as follows on this head, viz.:

"Q. You testified yesterday, did you not, that you were at the scene of the accident a short while afterwards?"

"A. Yes, a short while.

"Q. Did you or not see Mr. Jesse Stone there, who also testified?"

"A. I did, and talked with him.

"Q. What did he say, Mr. Jett?"

"A. Well, the word I replied to him, I said, "How in the world did this thing happen?" Well, he said, "They didn't give any alarm coming down by that whistle board." He repeated those words to me.

"Q. He told you that a few minutes after the accident?"

"A. Yes, sir.

"Q. That who did not give—the company?"

"A. That the train did not give any alarm coming down at the cut there—the whistle post.

"Q. Are you sure of that?"

"A. Yes, sir."

"The plaintiff objected to the introduction of said Stone, Jr., because this evidence was not strictly in rebuttal, because the defendant had asked Stone, Sr., during his examination in chief, and before Jett had testified, if Jett should make any such statement would it be the truth or a lie, and the said Stone, Sr., had stated in reply that it would be an untruth; and because Jett had been examined by the plaintiff on this point to rebut this denial of Stone, Sr.

"The court sustained the objection of the plaintiff, and refused to admit the testimony of Stone, Jr., to which ruling of the court the defendant excepted, and tenders this, his bill of exception, and asks that the same be sealed, signed, and enrolled; which is accordingly done."

The contention of the plaintiff is that the court was justified in rejecting the evidence of Stone, Jr., under the strict rules of evidence which it was applying upon the defendant's motion as to the order in which testimony should be introduced, since the defendant had, in its evidence in chief, gone into the question upon which it sought to introduce Stone, Jr., in rebuttal. This contention is not sustained by the facts. The defendant, in its evidence in chief, had introduced no testimony to sustain the witness (Stone, Sr.) whom the plaintiff sought to impeach. Upon redirect examination it inquired further into the alleged contradictory statements made by him. This it clearly had the right to do. The process of explaining away discrediting evidence belongs naturally in the re-examination. The same principle applies to a discrediting by prior inconsistent statements; after a witness has been cross-examined respecting a former statement made by him, the party who called him has the right to re-examine him as to the same matter. 1 Greenleaf on Ev. (16th Ed.) §§ 407, 466a. Under the strictest rules as to the order in which testimony ought to be introduced, the evidence of Stone, Jr., was clearly admissible. Not only was it admissible, but it was very material. It tended to sustain the defendant's contention on one of the vital issues in the case, and, the court having erred in excluding it, such erroneous ruling was good ground for setting aside the verdict of the jury and granting a new trial.

This brings us to the consideration of the errors assigned to the action of the court upon the second trial. Upon that trial all matters of law and fact were submitted to the court for its decision and judgment. No exceptions were taken to the court's action upon that trial except to its judgment in favor of the defendant which was asked to be set aside upon the ground that it was contrary to the law and the evidence. The only question, therefore, which arises upon the last trial is whether or not, considering the case as on a demurrer to the evidence (Code 1887, § 3484), the judgment of the court was contrary to the evidence, or the evidence was

plainly insufficient to support it; for when a case at law is decided by the court without the intervention of a jury, and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence, not the facts, are certified, as in this case, the rule of decision in the appellate court is to give the judgment of the trial court upon the evidence the same effect as if it were the verdict of a jury.

The case made by the plaintiff's witnesses, briefly stated, was that on the morning of the accident, which was in July, 1901, his intestate, with three of her children and a colored boy, were on their way to church, traveling in a two-horse Dayton wagon; that when near the crossing, and just before they reached the side track, they stopped, and all looked up and down the track as well as they could, and listened for the train, and neither saw nor heard it; that they then started forward, looking up and down the track, when they saw the train approaching; at this time the horses to the vehicle were about the middle of the main track, and the train, which was running about 60 miles an hour, struck the rear part of the wagon causing the death of his intestate and her two daughters, all of whom were sitting on the rear seat; that the crossing was out of repair, not filled up between the rails; that near the crossing were two mounds covered with weeds and bushes, and a tree not far from the track, which obscured the view in the direction from which the train came; that no whistle was blown nor warning given until the cattle alarm was sounded, which was after the horses had gotten on the main track.

The case in brief made by the defendant's witnesses was that its train which caused the injuries complained of was a newspaper train, running a few minutes late, at 55 to 57 miles an hour, which was about the speed fixed by schedule; that in the direction from which the train came the track is straight for more than 3,000 feet, as to which there was an unobstructed view; that neither the mound nor the tree referred to in the plaintiff's evidence interfered with the view; that the whistle for the crossing was blown 40 or 50 feet before the train reached the whistle post, over 1,250 feet from the crossing; that the train was within 100 yards of the crossing when the horses went upon the track, too late to stop the train; that, as soon as they were seen upon the track, the whistle was blown, the bell rung, and the emergency brake applied.

From this brief statement of the case it will be seen that the evidence was conflicting on every material question.

The evidence of the defendant, if true (and that was a question for the jury—or the court in this case), was clearly sufficient to show that the defendant was not guilty of negligence in the management of its train, or, if negligent, to show that the plaintiff's in-

testate was guilty of contributory negligence.

We are of opinion that the judgment of the circuit court should be affirmed.

CARDWELL, J., absent.

(101 Va. 597)

GRAY et al. v. RUMRILL.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

APPEAL—FINDING OF TRIAL JUDGE—WILLS—TESTAMENTARY CAPACITY.

1. The judgment of the trial court upon a submission of all matters of law and fact is entitled to the same weight as though rendered upon the verdict of a jury.

2. Upon the question of testamentary capacity, the burden is upon the party who seeks to set up the instrument, and the proof must be clear and convincing.

3. Evidence in a suit to set aside a will held to sustain a finding that decedent was wanting in testamentary capacity.

Appeal from Law and Chancery Court of City of Norfolk.

Bill by E. W. Rumrill against E. M. Gray and others. Decree for plaintiff, and defendants appeal. Affirmed.

Walke & Old and L. L. Lewis, for appellants. A. P. Thom and P. J. Morris, for appellee.

CARDWELL, J. This is an appeal from a decree of the court of law and chancery of the city of Norfolk, declaring null and void a writing dated the 16th day of November, 1899, purporting to be the last will and testament of Joseph E. Rumrill, deceased, late of the city of Norfolk, who departed this life on the 29th day of November, 1899, after having made and published the paper above referred to, whereby he gave his diamond ring and gold watch and chain to his cousin W. C. Gray, and devised and bequeathed all the rest and residue of his estate, both real and personal, after payment of his debts, funeral expenses, and the cost of a tombstone upon his grave, to be equally divided between his aunt Julia A. Topping and his uncle E. M. Gray.

This alleged will was probated in the corporation court of the city of Norfolk on the 5th day of December, 1899; and Gray and Morse, the executors named therein, qualified as such.

Upon the probate of the will, the appellee here, Earle Wayne Rumrill, an infant, suing by Ella Miars, his mother and next friend, filed his bill in the court of law and chancery of the city of Norfolk against the executors and beneficiaries named in the will, alleging, among other things, that he was the only child and heir at law of the said Joseph E. Rumrill; that the paper writing which had been probated as the will of Joseph E. Rumrill was not his will, because on the 16th day of November, 1899, the date of its execution, and for a long time prior thereto, and at all times subsequently, the said tes-

tator was of weakened, disordered, and deranged mind, and utterly without testamentary capacity; that the testator was unduly controlled and influenced by the beneficiaries therein named, or by some of them, in the execution of the said will, etc. To this bill the appellants filed their demurrer and answer, and upon a hearing thereon the demurrer was overruled, and an issue devisavit vel non directed.

Upon the trial of this issue, the whole matter of law and fact having been submitted to the court without a jury, the judge who tried the issue found against the appellants, as the proponents of the will, who were the plaintiffs in the issue, and entered an order accordingly, which, with the evidence introduced, and certain exceptions taken during the trial, was certified to the chancellor, who overruled the motion of the proponents of the will to set aside the judgment of the court, and entered the decree appealed from, setting aside and annulling the alleged will.

While there were some exceptions taken to rulings of the court in the trial of the issue devisavit vel non, the real question in the case is, was the paper writing purporting to be the last will and testament of Joseph E. Rumrill, deceased, executed by him according to the forms of law, at a time when he possessed legal testamentary capacity and was free from undue influence?

The learned judge below rendered his decision that at the time the paper was executed the testator did not possess testamentary capacity.

The case having been submitted to the court below for the determination of all matters of law and fact, its judgment is entitled to the same weight with this court as though rendered upon the verdict of a jury, and this court will not disturb the finding of the trial court unless it has plainly decided against the evidence or without evidence. *Reusens v. Lawson*, 96 Va. 293, 31 S. E. 528, and authorities cited.

The facts necessary to correctly outline the case are these: Joseph E. Rumrill died at the early age of 38 years as the result of a dissolute and intemperate life. He had been a member of the Virginia Pilot Association, and for some months before the execution of his alleged will had been discharged or superannuated by the pilot association because he could no longer be trusted to do the work of piloting a ship, the result of his life of debauchery. He had married in 1887 the mother and next friend of appellee, but in November, 1897, she sued for, and on January, 1898, obtained, a divorce from him. On February 8, 1898, about one month after this divorce had been granted, the infant appellee was born. The ground of this divorce was the adultery of the husband and father with a lewd woman living in a most disreputable portion of the city of Norfolk, whom he had met in 1895, and cohabited with until the spring of 1899, when he was

sent by his friends to an inebriate asylum near Baltimore, with the hope of restoring him to health and self-control, but he returned to Norfolk and plunged again into a life of debauchery. After a time he became repentant, and anxious for his former wife to remarry him, importuning her to do so on account of their child, and with the result that she put him on probation; telling him "that if he would go down and follow his business for three months, and act like a man, she would marry him." Finally, however, from intemperance and other causes, he became very sick, and was confined to his room and bed on Main street, in the city of Norfolk. There his former wife visited him with their child, and he continued to urge her to remarry him on account of the child. He was all the time growing worse, and on Friday, the 20th of October, 1899, Capt. Edwards, the head of the pilot association, was, on account of Rumrill's extreme illness, sent for to see him. Capt. Edwards went, and, with the view of having him cared for, advised an immediate marriage with his former wife. This plan was adopted, and, at the request of Rumrill, Capt. Edwards and one Matthews went to Mrs. Miars' house, informed her of the extreme situation of the sick man, and urged her to remarry and take care of him. She consented, and the marriage was fixed for the next day, Saturday, October 21st, at 2 o'clock p. m.

Up to this time neither the beneficiaries of this alleged will, nor any other of the testator's relatives, had taken the slightest interest in him, or shown any concern about him; but upon Matthews mentioning that evening to E. M. Gray, one of the beneficiaries in the will, the proposed marriage, the relatives became greatly interested and most active. On Saturday morning, Topping, the husband of one of the beneficiaries, went to Rumrill's room, and kept watch over him, so that none of his former wife's family or friends could see him; and on Sunday morning E. M. Gray, the other beneficiary, took him in a carriage and carried him up to a room on Charlotte street, which Mrs. Topping had rented. On that morning, after Rumrill had been removed by Gray to the room on Charlotte street, Mrs. Miars (thus spoken of in the record because she resumed her maiden name when divorced) sent her brother William Miars to find him, and, upon inquiry of Gray as to where Rumrill was, Gray replied that he did not know; and, upon cross-examination as a witness in this case, Gray admitted that he made this reply because he did not want Miars to know where Rumrill was, and that he personally told Topping that Capt. Edwards was trying to get Rumrill remarried to his former wife, whereupon Topping went and kept guard over him until he (Gray) took him up on Charlotte street. Mrs. Miars never knew where Rumrill was until she received a note from him, asking her to come to see him

on Charlotte street. This she did, and, when she reached the door and asked for him, admission was refused her, and the door was slammed in Mrs. Miars' face. From that time on, no one who was anything to the infant appellee was permitted to come near Rumrill. We do not, however, mention the facts as to how Rumrill was taken charge of and secluded by the beneficiaries in his alleged will with the view of considering the question whether or not he was unduly influenced to execute that paper (it is not, in the view we take of the case, necessary for us to consider that question), but as circumstances corroborative of the proof, to be later referred to, that at the time his physical as well as mental condition was so very weak that he had so little will power, and was so easily influenced that the last person with him absolutely controlled him.

On November 15, 1899, C. H. Ferrell, James A. Wilson, W. C. Gray, E. M. Gray, and Mrs. Topping met in the room of the testator. Just how this meeting was brought about does not clearly appear. But when the object of the meeting was mentioned to Rumrill, he said that he did not want to make a will that day—felt too tired. Thereupon all left the room, except Ferrell, who took a seat by Rumrill, and obtained from him the data from which he had the will written by a lawyer; and the next day, November 16, 1899, the same parties who were there the day before met in Rumrill's room, the will was read to him, and he affixed his signature to the paper. At the time, Rumrill had liquor in his room, and a glass of toddy sitting near him, which he called for immediately after fixing his signature to the paper, and drank of it.

Upon the question whether or not the testator had testamentary capacity to dispose of his estate, it is well-settled law that, to establish such capacity, the proof must be clear and convincing.

In *Tucker v. Sandidge*, 85 Va. 556, 8 S. E. 654, it is said: "The onus probandi is upon the party who seeks to set up the instrument in question, and this from the fact that the propounder alleges that the paper offered for probate is the true will of a free and capable testator, and hence it devolves upon him to make good his allegation (that is, to prove by competent testimony that the instrument is what it purports to be), for in every such case the conscience of the court is to be satisfied, and nothing short of clear and convincing evidence will suffice. This doctrine has been uniformly recognized and acted on by this court." See, also, *Chappell v. Trent*, 90 Va. 901, 19 S. E. 314.

There is absolutely no conflict in the testimony in this case that the testator, Rumrill, before his final illness, during which his alleged will was made, had gotten into the condition that his will power was so far gone that he was most easily influenced, and could be led like a child, and changed with his com-

pany. His bad mental condition during his last illness is proved by seven or eight witnesses, besides Dr. Graves, his attending physician, who saw him every day, and oftentimes twice, and by Dr. Leigh, who saw him a number of times as consulting physician.

Both of these physicians, of high standing in their profession, testify emphatically that the testator was not capable of making a will; that his impaired mental condition was of a permanent nature, and constantly growing worse. The statement of Dr. Graves, corroborated by Dr. Leigh and others, is that the progress of the testator was downward; that he never improved, but showed a decided diminution in the power of recovery or recuperation; and that this was his condition mentally as well as physically.

While it is conceded that the testimony of attending physicians with respect to testamentary capacity is entitled to great weight, it is urged that unless the attending physician be present at the making of the will, and testifies as to the mental capacity of the testator at that time, the testimony of the subscribing witnesses is to be preferred. Whatever might be the influence of this argument in a case where it was not proven that the testator's mental condition before, at the time of, and after the making of his will, until his death, was the same, it can have but little, if any, force in this case. According to appellant's own testimony, the testator did not have an exceptional condition of mind at the time of the making of his will. On the contrary, Mrs. Topping, one of the beneficiaries, testifies that she was with him all the time during his last illness, and that his mind never varied a single minute. It is true, she also says that it was "as sound as it could be"; but, unfortunately for the credibility of her statement, it is clearly shown that she did not regard his mind as sound as she represented it to have been, as she, at least twice, at intervals of a week, had approached the attending physician, Dr. Graves, to inquire if he thought the testator was competent to make a will, and was told each time that he was not. Her husband, at her instance, interviewed Dr. Leigh on the same subject before the will was executed, and received the same answer that was given by Dr. Graves to Mrs. Topping. Mr. Topping was also heard to declare, when he was told of the proposed marriage of the testator to his former wife, that Capt. Edwards was trying to marry this woman to an insane man.

Dr. Graves minutely states the condition of the testator mentally, and reaches the conclusion that he was at no time during his last illness competent to make a will, and he saw the testator at least once on the very day that the alleged will was executed. The substance of Dr. Graves' testimony as to the condition of the testator during his last illness is that physically he was weak, worn, and weary, and in a general state of exhaustion,

with fixed features and a sort of weakly hanging jaw. Mentally, he was in a state of apathy or lethargy—a decided stupor. He was inactive, sluggish, morbid, and inert. His eyes had some degree of vacancy—intermediate look—and were generally directed towards his feet. There was an occasional uplifting and shifty look of the eyes when he was aroused. He would return to his condition of stupor as soon as efforts to hold his attention were relaxed. He took no part in conversation, except to give monosyllabic answers to questions, and would, as soon as his attention was released, relapse into listlessness.

This testimony, corroborated by the other attending physician, as well as by a number of witnesses testifying as to the physical and mental condition of the testator, is by no means overcome by the subscribing witnesses to his alleged will, and who, practically, only give it as their opinion, unaided by skill or experience in such matters, that the testator at the time was mentally competent to make his will.

We are of opinion that the decree of the lower court, holding that the paper propounded by appellants as the last will and testament of Joseph E. Rumrill, deceased, is not his true last will and testament, is plainly right, and must be affirmed.

(101 Va. 406)

#### CLINE v. WESTERN ASSUR. CO.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

#### MARINE INSURANCE—LIABILITY OF INSURER—COLLISION—POLICY.

1. An insurer is liable only for losses proximately occasioned by the perils insured against.

2. The term "collision" in a contract of marine insurance means the act of ships or vessels striking together, and does not embrace the striking of a sunken or floating substance.

3. Section 3252 of Code of 1887, which provides that no failure to perform any condition of an insurance policy or violation of any restrictive provision thereof shall be a valid defense in an action on the same unless such condition or restrictive provision is printed in type as large as long primer, does not cover stipulations of a policy with respect to risks insured against which impose no onus on the insured.

Error to Law and Chancery Court of City of Norfolk.

Action by James H. Cline against the Western Assurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Edward R. Baird, for plaintiff in error.  
Hughes & Little, for defendant in error.

WHITTLE, J. This was an action of assumpsit on a policy of marine insurance covering the plaintiff's interest in the steam tug *Annie*. The policy was issued from the Baltimore office of the defendant company, and was mailed by its agents there to the plain-

tiff, who then resided in the city of Richmond.

The contract of insurance consists of a policy in usual form, with a rider attached, and contains a stipulation that the provisions of the rider are to be regarded as a substitute for those of the policy in case of conflict.

After a general indemnity clause embracing the "hull, tackle, apparel and furniture, engines, boilers, machinery, and stores of the good tug called the *Annie*," there is excepted from the risks assumed "loss or damage caused by the bursting or collapsing of boiler or boilers, or the breaking of machinery, unless caused by stress of weather, stranding, burning or collision."

The trial court sustained a demurrer to the last amended declaration, and rendered judgment for the defendant. To that judgment a writ of error was allowed by one of the judges of this court.

The declaration avers "that the said tug *Annie*, \* \* \* while proceeding down the James river from the port at Richmond, sustained injuries whereby her connecting rod, light-pressure cylinder, high-pressure cylinder, head-strap, and key and cross-head were broken, and her piston rod bent, and \* \* \* that the injuries aforesaid were caused by collision and stress of weather; that when said tug \* \* \* was off Chafin's Bluff the said tug collided with some sunken or floating obstruction; that there was a freshet and strong current in the river; that the injuries aforesaid were caused by such collision with such obstruction in the then prevailing freshet and strong current."

It will be observed that the gravamen of the complaint is damage to the machinery, and it appears from the statement in the declaration as to the manner in which the accident happened that the proximate cause of it was impact with the "sunken or floating obstruction," and not stress of weather. If there had been no obstruction in her course, it is quite apparent that the tug would have been unaffected by "the prevailing freshet and strong current" in the river.

The law cannot consider the causes of causes, and an insurer is only liable for losses proximately occasioned by the perils insured against; the maxim being "*Causa proxima, non remota, spectatur.*" *Brown's Leg. Max.* 217; *Insurance Co. v. Reynolds*, 82 Grat. 613; *Insurance Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63; *Magoun v. Insurance Co.*, 1 Story, 164, Fed. Cas. No. 8,961; *Peters v. Insurance Co.*, 14 Pet. 109, 10 L. Ed. 371.

In the view taken by this court of the case, it involves the consideration of two propositions:

(1) Was the disaster, which is the ground of action, caused by a "collision" within the meaning of the policy? And, if it was not,

(2) Does the type statute (Code Va. 1887, § 3252) apply to and render invalid the ma-

¶ 1. See *Insurance*, vol. 28, Cent. Dig. §§ 1115, 1129.



chinery clause of the rider for the reason that it is printed in type of smaller size than long primer type?

It is not pretended that the injury described in the declaration was caused either by stranding or burning, and, as remarked, the contention that it was proximately caused by stress of weather is not maintainable.

Unless, therefore, striking the sunken or floating obstruction constituted a collision in the sense of the policy, there can be no recovery under the first proposition.

It must be borne in mind that the court is dealing with a contract of marine insurance, and it is in that relation that the meaning of the term "collision" is to be ascertained. Bouvier defines it to be "the act of ships or vessels striking together, or of one vessel running against or foul of another." Bouvier's Law Dict. (Rawle's Revision) 349.

The case of *Richardson v. Burrows*, decided in Queen's Bench, December 16, 1880, is precisely in point.

The action was on a marine policy which contained the following clause: "Warranted free from particular average (partial loss) unless the ship or craft be stranded, sunk in collision, or on fire;" and the question was whether striking a sunken wreck was a collision within the meaning of the policy. Lord Coleridge, who presided at the trial, held that it was not, and says in that connection: "It [collision] means collision with another ship, and does not mean either rock, or sand bank, or floating wreck, or any thing but the ordinary meaning, in my judgment, of collision." The case was not appealed.

In the case of *Hough v. Head*, 54 L. J. Q. B. 294, the charterers were operating a vessel under a charter party which provided:

"That in the event of loss of time by deficiency of men, collision, breakdown of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is gotten in an efficient state to resume her voyage."

The charterers had taken out a policy against loss of freight on the vessel being operated under the charter. The vessel, while passing through the Straits of Magellan, struck some soft substance with her bottom amidships, but did not lose headway. At the end of the voyage it was discovered that her keel was broken, and that she had become incapable of steaming for some time. Suit was brought against the underwriters for loss of freight while the vessel was undergoing repairs.

Among other defenses, it was insisted that there was no collision.

Grove, J., said: "I am also in favor of the defendant on the other two grounds, though it is really unnecessary to say much about them. I think that what happened did not amount to a collision. The vessel probably ran on to a bank, and this was not, as it seems to me, a collision within the ordi-

nary acceptance of that term, such as would be the case if a vessel struck another vessel or other navigable matter, such as a raft. \* \* \* On these grounds the defendants are, in my opinion, entitled to judgment."

"It will be noticed that, in order to bring the collision clause into operation, there must be a collision between the ship insured and some other ship or vessel, and that the only damages insured against are (in the ordinary forms of the clause) sums payable to the owners of the latter vessel in consequence thereof. The shipowner is, therefore, not protected against liability due to his vessel running into a dockwall, breakwater, pontoon, or anything that is not another ship. Nor even where there has been a collision between his ship and another ship is he indemnified in respect to any damages which he may, in consequence thereof, be compelled to pay to any third person." 2 Arnold on Marine Ins. §§ 795, 796. See, also, 2 Marshall on Marine Ins. bk. 1, § 2, p. 494; Emerigon on Ins. (Meredith Ed.) p. 327; 2 Browne on Civil and Admiralty Law, p. 111; Everard v. Kendall, L. R. 5 C. P. 428; Robson v. The Kate, 21 Q. B. D. 13.

The authorities relied on by counsel for plaintiff in error cannot be fairly said to be in conflict with the foregoing citations.

Spencer on Marine Collisions, § 10, says: "The term 'collision,' in the strict nautical and legal acceptance of the term, means the impinging of vessels together. Common usage, however, has extended the application of the term so as to include the impact of a vessel with other floating objects."

The author proceeds to divide collisions into two classes—those occurring between vessels and other floating objects, and those occurring with fixed and stationary objects.

He quotes the decision of *The Maxey*, F. C. 9,894, to sustain the doctrine that common usage has extended the application of the term so as to include the impact of a vessel with other floating objects. The real language of that opinion is: "This clearly is not a case of collision within the nautical acceptance of that term, which imports the impinging of vessels together whilst in the act of being navigated. Common usage, however, applies the term equally to cases where a vessel is run foul of when entirely stationary, or is brought in contact with another by swinging at her anchor."

The author also states that Lord Coleridge held in *Richardson v. Burrows*, supra, that the striking of a ship on a field of ice is not a collision. As has been seen, his lordship's ruling in that case was in respect to a ship striking a sunken wreck, and not a field of ice, as supposed.

In the concluding paragraph of the section the author says: "Our courts have repeatedly held that actions may be maintained in admiralty for damages arising from contact of a vessel with rafts, and a variety of floating objects, and no reason is apparent why

these mishaps may not be designated as collisions."

Courts of admiralty have jurisdiction over all torts occurring on navigable waters, and the cases with which the decisions adverted to dealt were marine torts, and not collision. 3 Joyce on Ins. § 2252, is relied on to sustain the contention that, where a vessel is insured against collision, a recovery may be had for an injury occasioned from running against a snag.

The English case referred to as supporting the text is that of *Reischur v. Borwick*, 2 Q. B. 548, decided in the year 1894. The language of the policy sued on was: "Only against risk of collision (as per clause attached), and damage received in collision with any object, including ice."

The court held that the first part of the sentence alluded to collisions between ships, but allowed a recovery because the injury from the snag was embraced by the language "collision with any object."

Lindley, L. J., says: "The risk of collision as 'per clause attached' refers to collisions with other ships, and may be disregarded. The other risk refers to and includes such a collision as took place in the present case, viz., a collision between the ship insured and a snag in the river which she was navigating."

Lopes, L. J., says: "This is a policy indemnifying the insured against 'the risk of collision' (by which I understand collision with other ships) 'and damage received in collision with any object, including ice.'"

In section 2753 of Joyce on Insurance, the quotation is from the case of *Insurance Co. v. Borwick*, 2 Q. B. 279, decided in the year 1895. The language of the policy there was: "Against risk or loss or damage through collision with any other ship or vessel, or ice, or sunken or floating wreck, or any other floating substance, or harbors or wharves, or piers or stages, or similar structures."

The judge says: "It is contended that the losses in the present case do not come within a clause insuring against loss by collision, but the clause in question here is much more extensive in its exemption."

*Borrows v. Bell*, 4 B. & C. (10 E. C. L.) 736, was a case in which a vessel coming into a crowded harbor during a storm struck upon an anchor, and, springing a leak, was beached by the crew. The question involved was whether that was a case of stranding. It does not appear that the policy contained anything on the subject of collision.

The remaining authority relied on is the case of *London Assur. Co. v. Campanhia*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113, in which it was held that "vessels may be in collision within the meaning of an insurance policy although but one of them is in motion while the other is at a wharf, fully loaded, and ready to proceed upon her voyage."

It seems clear that it cannot be predicated of the foregoing authorities that they sustain

the contention that the injuries complained of are covered by the collision clause of the policy in question. To the contrary, the decisions are practically unanimous the other way.

The second proposition involves the construction of section 3252 of the Code of Virginia of 1887, which reads as follows:

"In any action against an insurance company or other insurer, \* \* \* no failure to perform any condition of the policy, or violation of any restrictive provision thereof, shall be a valid defense to such action, unless it appears that such condition or restrictive provision is printed in type as large as or larger than that commonly known as long primer type, or is written with pen and ink in or on the policy."

It is insisted that the paragraph in the rider to the policy "Warranted free from claim for loss or damage caused by the bursting or collapsing of the boiler or boilers, or the breaking of machinery, unless caused by stress of weather, stranding, burning or collision," is invalid, because it is printed in smaller type than that prescribed by statute.

It may be remarked that the paragraph in question and the general indemnity clause are printed in the same type. So there is nothing in the circumstance that the machinery clause is in smaller type than long primer type to indicate a purpose on the part of the insurer to mislead the insured with respect to the provisions of that clause.

The statute in terms specifies "conditions" and "restrictive provisions," which impose upon the insured the performance of some function the nonperformance of which would defeat a recovery in an action on the policy, provided such "condition" or "restrictive provision" is printed in type of the size required, or is written with pen and ink. It can have no application, therefore, to the machinery clause, since that clause imposes the performance of no duty upon the insured; and in no event could his right of recovery be affected by any act done or omitted to be done by him in regard to it. It is apparent that the policy of the statute is to require such "conditions" or "restrictive provisions" as impose an obligation upon the insured to do or to abstain from doing some act to be so plainly printed as not to escape observation. Otherwise, as experience has proved, his right of recovery might be defeated by the neglect to perform a requirement of the existence of which he is wholly ignorant. In other words, the design of the enactment is to protect the insured from being entrapped, by the use of small type, into omitting the performance of some act required as a condition precedent to a recovery, such as furnishing an appraisal, proof of loss, and the like.

But stipulations of the policy with respect to the risks insured against, which impose no onus on the insured, are not within the statute.

The machinery clause is plainly of the latter class. It enjoins no duty upon the insured,

and, with respect to it, he can be guilty of no offense, either of commission or of omission, which could by possibility affect his right of recovery in an action on the policy.

It contains a specification merely of the loss or damage for which the insurer has assumed responsibility, and there can be no more reason for holding that the type statute applies to that clause than to the general indemnity clause. The statute does not prescribe the size of type in which that class of stipulations shall be printed.

The case of *Life Association v. Berkeley*, 97 Va. 571, 34 S. E. 469, is relied on as sustaining a different construction of section 3252, but the condition of the policy construed in that case was distinctly of the character proscribed by the statute. The association issued a policy on the life of F. B. Berkeley for \$2,000 (in consideration of bimonthly premiums of \$12.50), to be paid upon the death of the insured, less "any indebtedness due the company." On an inner sheet of the policy, in fine type, there was a provision that the policy should be charged with any unpaid portion of a gross premium of \$1,110. In other words, the policy entitled the beneficiary to receive \$2,000 upon the death of the insured in consideration of the payment of the bimonthly premiums; whereas the provision referred to required the payment, in addition, of such part of a gross premium of \$1,110 as might remain unpaid by the bimonthly premiums at the death of the insured. The provision imposed an obligation not embraced in the body of the policy, which, if upheld, would have defeated pro tanto a recovery on the policy. The court therefore properly held that the stipulation was within the prohibition of the statute, and therefore invalid.

So, in *Burruss v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49, the court, after declaring the application to be a part of the contract of insurance, said: "In the case at bar it is conceded that the conditions and restrictive provisions found in the application, the failure to perform which is relied on by the defendant, in part, as its defense to the plaintiff's motion, are in type smaller than that required by the statute. The clause in the application obnoxious to this provision of the statute must, therefore, be disregarded, and the case considered as if no conditions or restrictive provisions were embodied in the contract sued on."

It was also insisted on behalf of defendant in error that the policy became effective in Maryland, and for that reason the Virginia type statute does not apply; but, the case having been disposed of on other grounds, the decision of that question is deemed unnecessary.

In both aspects of the case this court is of opinion that the law on the demurrer is with the defendant, and that the judgment of the trial court in so holding is without error, and must be affirmed.

(101 Va. 480)

## YOUNG v. HART.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

## MARRIED WOMEN—CONTRACTS—CONFLICT OF LAWS—ACTION—PLEADING.

1. A contract of a married woman, valid where made and to be performed, is valid everywhere, unless she be domiciled in a state where the law of the domicile imposes a total incapacity to contract on the part of its married women.

2. As to the remedy upon foreign contracts, the law of the forum governs.

3. Under section 2, Act March 7, 1900 (Acts 1899-1900, p. 1240, c. 1139), which provides that a married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried, an allegation that a married woman owned separate estate, and that the contract sued on was made with reference to such separate estate, is wholly unnecessary.

Error to Circuit Court of City of Danville.

Action by Josephine B. Hart against H. M. Young and Sadie S. Young. Judgment for plaintiff, and Sadie S. Young brings error. Affirmed.

Blackford, Horsley & Blackford and Peatross & Harris, for plaintiff in error. Berkeley & Harrison, for defendant in error.

BUCHANAN, J. In February, 1901, Josephine B. Hart, the defendant in error, instituted her action of debt against H. M. Young and Sadie S., his wife, upon two promissory notes. The notes are alike in every respect except as to amounts, one being for \$7,000 and the other for \$537. The following is a copy of the larger note:

"\$7,000. Charleroi, Pa., April 8, 1895.

"One year after date, for value received, we or either of us, promise to pay Josephine B. Hart or order the sum of seven thousand dollars with interest at six per cent. per annum at Bank of Kentucky Louisville, Ky.

"H. M. Young.

"Sadie S. Young."

There was a judgment by default against the husband. The wife made defense, and upon the trial of the cause all matters of law and fact having been submitted to the decision of the court, there was a personal judgment against the wife for the aggregate amount of the notes. To that judgment this writ of error was awarded upon the application of the wife.

It appears that the plaintiff, Mrs. Hart, after the death of her husband, about the year 1879, received \$4,000 or \$5,000 from insurance policies on his life, which she placed in the hands of Mr. Young for investment. At that time both Mrs. Hart and Mr. Young resided in Louisville, in the state of Kentucky. About the year 1885 the latter, having in the meantime married, removed to Kansas City, in the state of Missouri, retaining the money of Mrs. Hart for the purposes of investment,

1. See *Husband and Wife*, vol. 26, Cent. Dig. § 272.

as she contends, or as her debtor, as he insists. In the year 1890 Mrs. Hart, upon advice, went to Kansas City, made a settlement with Mr. Young, and took his and his wife's joint note for the sum of \$5,500, payable at the Bank of Kentucky in Louisville, state of Kentucky, July 1, 1890. The note was not paid, and in January, 1891, the parties, by agreement, met in Chicago, in the state of Illinois, where Young and his wife made and delivered three promissory notes of equal amounts for the balance due on the Kansas City note, which were all payable in the city of Chicago. Young and wife, after residing in the last-named city for some time, removed to Charleroi, in the state of Pennsylvania, where the notes in suit were made and delivered by Young and wife to the agent of Mrs. Hart for the principal and interest due on the Chicago notes, which were then and there surrendered.

At the time the notes sued on were made, there is no question that the state of Pennsylvania was the actual domicile, if not the legal domicile, of Young and wife. The capacity of the wife to make the notes is put in issue by the pleadings. She insists that the debt for which the notes were given was her husband's debt, and that she was merely surety thereon, and that neither under the laws of Pennsylvania, where the notes were made and delivered, nor under the laws of Kentucky, where they were to be paid, were they valid contracts as to her.

By the Pennsylvania act of June 8, 1893 (Act No. 284, p. 344), it is provided by section 1 "that hereafter a married woman shall have the same rights and powers as an unmarried person to acquire, own, possess, contract, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, and either possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property unless her husband join in such mortgage or conveyance."

Section 2 of the act provides that "hereafter a married woman may in the same manner and to the same extent as an unmarried person make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise and enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation endorser, maker, guarantor, or surety for another, and she may not execute or acknowledge a deed or other written instrument conveying or mortgaging her real property unless her husband joins in such mortgage or conveyance."

By section 2127 of the Kentucky Statutes of 1899 it is provided, among other things, that "no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability upon a contract made after marriage to answer for the debt, de-

fault or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed or mortgage or other conveyance," etc.

It is proved in the case that by the law of Illinois a married woman may make contracts and incur liabilities to the same extent and in the same manner as if she were a feme sole. The notes made by Young and wife in Chicago, and made payable there, were clearly Illinois contracts, and valid and binding upon Mrs. Young as well as upon her husband. Whether Mrs. Young was, as between her husband and herself, a surety, as she insists, or was in fact jointly liable with her husband for the debt, as the plaintiff's evidence tends to show, she could have been sued upon those notes, and a personal judgment recovered against her, in either the state of Pennsylvania or in the state of Kentucky; for it seems to be well settled that a contract of a married woman, valid where made and to be performed, is valid everywhere, unless she be domiciled in a state where the law of the domicile imposes a total incapacity to contract on the part of its married women. Where the common law prevails in full force by which a married woman is deemed incapable of binding herself by any contract whatever, it has been held in some cases, and suggested in others, that this utter want of capacity must be considered as so fixed by the settled policy of the state that its courts could not yield to the law of another state in which she might undertake to contract. *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 478; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Minor on Conflict of Laws*, § 72.

The circuit court was of opinion that, treating Mrs. Young as a mere surety on the Chicago notes, which she had the unquestioned capacity to make, she could have been sued upon them in either the state of Pennsylvania or the state of Kentucky, and personal judgment recovered against her, and that the renewal of the notes in the state of Pennsylvania under the facts of this case did not release her, nor lessen her liability.

Without entering into the consideration of that question, there is another ground upon which we think the judgment of the circuit court can be placed, which is free from difficulty or doubt.

Whilst the weight of evidence perhaps tends to show that the debt for which the notes were given was the husband's, and not the wife's debt, yet there is direct and positive proof to the contrary. Dr. Breyfogle, one of the plaintiff's witnesses, and her advisor in the matter, in answer to the question whether or not he knew that Mrs. Young received the benefit of the money for which the notes were given, or any part thereof, testified that he was "sure that Mrs. Young had the full benefit of the money from the fact, as Mrs. Young informed me, that at the time of his marriage that money was well

invested, and immediately after his marriage both he and Mrs. Young expended a considerable sum when Mr. Young was not in a position to earn any considerable part of said expense, and they could only have procured this money by converting the said investments into cash after their marriage. In addition to the above, I know that Mrs. Young admitted it was a joint liability, and that it was her debt as well as her husband's." He further testified that the Chicago notes were made for the purpose of fixing beyond any question the joint liability of both parties thereto under the laws of the state of Illinois, and that this was so understood by both Mr. and Mrs. Young at the time the notes were given. The latter, in her correspondence with the plaintiff, seems to treat the notes as evidencing a debt due from them jointly, and not merely a liability for which she was surety.

Upon a demurrer to the evidence—and the case, by express statutory provision (Code 1887, § 3484), must be so considered in this court—there is sufficient evidence to establish the fact that Mrs. Young was jointly liable with her husband for the debt evidenced by the notes sued on. This being so, it is wholly immaterial whether the notes be treated as Pennsylvania contracts, the state where they were made and delivered, or Kentucky contracts, the state where they were to be paid; for by the laws of either of those states the contracts were such as Mrs. Young had the right to make, and, being valid where contracted and to be performed, they will be enforced by the courts of this state in the manner provided by its laws, for as to the remedy upon foreign contracts the law of the forum governs. *Minor on Conflict of Laws*, § 205; *Story on Conflict of Laws*, § 556; *Union Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Freeman's Bank v. Ruckman*, 16 Grat. 126.

By section 2 of an act of assembly approved March 7, 1900 (Acts 1899-1900, p. 1240, c. 1139), which was in force when this action was instituted, it is provided that a married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by or against her shall have accrued before or after the passage of the act.

Being liable on the notes as an unmarried woman whether they be treated as Pennsylvania or Kentucky contracts, there was clearly no error in rendering a personal judgment against her.

The demurrer to the declaration was properly overruled.

The allegation that Mrs. Young was a married woman owning separate estate, and that the contracts sued on were made with reference to such estate, were wholly unnecessary under the act approved March 7, 1900, *supra*, and was mere surplusage. The declaration

stated a good cause of action, and there was nothing in the nature of the case, as disclosed by the declaration, to render it necessary under section 3243 of the Code of 1887 to set forth the place where the notes declared on were made.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

CARDWELL, J., absent.

(101 Va. 458)

AMERICAN HIDE & LEATHER CO. v.  
CHALKLEY & CO. (two cases).

(Supreme Court of Appeals of Virginia. June 11, 1903.)

PLEADING—AMENDMENT—BILL OF PARTICULARS—SALES—REFUSAL TO ACCEPT—DAMAGES—ACTION FOR PRICE—TITLE—INSTRUCTIONS.

1. An allegation of a tender of a greater quantity than that alleged to have been sold may be corrected at bar.

2. The object of a bill of particulars is to advise the defendant of the precise nature and extent of the demand asserted against him. The better practice is to demand it before pleading to the merits.

3. Where a contract of sale is executory, and title and possession still remain in the seller, his remedy against the buyer, who wrongfully refuses to pay for and accept the goods, is an action of assumpsit on a special count to recover damages for the breach of the contract.

4. The measure of his recovery is the difference between the contract price of the goods and the net price which they produce at a resale, fairly made, after deducting all expenses incurred by the seller in taking care of the goods and selling them.

5. Where the title has passed, and the buyer refuses to pay for the goods, the remedy of the seller is an action for the agreed price.

6. Where the contract is executory, and the buyer refuses to accept and pay for the goods, the seller should give him notice of the intention to sell, and hold him responsible for the loss.

7. Where the subject of the sale is nonspecific goods, the property does not pass until an appropriation of the specific goods has been made with the assent of both seller and buyer.

8. An instruction stating a principle substantially covered by another instruction may be refused.

Error to Circuit Court of City of Richmond.

Actions by Chalkley & Co. against the American Hide & Leather Company. Actions were tried together. Judgments for plaintiff, and defendant brings error. Affirmed.

Christian & Christian, for plaintiff in error. Allen G. Collins, for defendant in error.

WHITTLE, J. The defendant in error, Chalkley & Co., instituted two actions of assumpsit in the circuit court of the city of Richmond against the plaintiff in error, the American Hide & Leather Company, to recover in one case \$1,349.13, the difference between the contract price for a lot of hides sold by defendant in error to plaintiff in

error, which the latter declined to receive, and the price realized therefrom on subsequent sales; and in the other to recover \$2,000—\$1,737.86, part thereof, the difference between the contract price for another lot of hides to be shipped to Bayard, W. Va., rejected by plaintiff in error, and the price realized therefor at subsequent sales, and \$262.14, the residue thereof, being expenses paid in handling the hides and for freight.

The actions were tried together, and resulted in a verdict for the plaintiff in each case for the full amount of his demand. Judgments upon those verdicts are here for review.

The first assignment of error is to the action of the trial court in overruling demurrers to the declaration.

The first point applies only to the declaration in one case, the ground of objection being that the declaration alleges a sale of 3,000 hides, and a tender of 4,000 hides.

There was no obligation on the defendant to receive the additional hides, and the discrepancy could in no wise have affected the merits of the cause. It was the subject of bar amendment, and does not constitute reversible error.

The second ground of demurrer is that both declarations fail to allege notice to the defendant of plaintiff's election to resell the hides at its risk.

Of that objection it is sufficient to remark that under the practice in this state the question of such notice is a matter of evidence, rather than of pleading. The declarations seem to have followed literally the established forms in actions to recover damages for a breach of contract to accept and pay for goods bought, where the title and possession remain in the seller. There was therefore no error in overruling the demurrers to the declarations. 2 Chit. Pl. (12th Am. Ed.) 264; 4 Min. Inst. (pt. 2) 1404; 1 Bar. L. Pr. 342.

The next assignment of error is the ruling of the trial court in sustaining the sufficiency of the bills of particulars tendered by the plaintiff.

It appears that the fact that a bill of particulars would be required in each case was made known before the jury was sworn, although no formal demand for them was made until a later period in the trial.

It further appears that a letter under date of November 26, 1900, from plaintiff in error to defendant in error, a copy of which was produced in evidence by the former, contains a detailed statement of the hides agreed to be purchased, and their price; and that Marion Chalkley, the plaintiff, in his testimony, stated to whom the hides were resold, and, at the instance of counsel for the defendant, rendered an itemized account of the expenses incurred in handling the hides, and the amount of freight paid thereon. Subsequently bills of particulars were filed, as follows:

(1) To loss or difference between the price you contracted to pay for a lot of hides sold to you to be shipped to Bayard, W. Va., and rejected by you, and the amount realized therefrom by subsequent sales.....	\$1,737 86
Expenses of handling freight, etc....	262 14
	<hr/> \$2,000 00

(2) To loss or difference between price you contracted to pay for a lot of hides sold you, and rejected by you, or which you declined to receive, and the amount realized therefrom by subsequent sales.....	\$1,349 13
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The object of a bill of particulars is to advise a defendant of the precise nature and extent of the demand asserted against him. If it be conceded that the foregoing bill of particulars, standing alone, does not measure up to that requirement, it nevertheless appears that the defendant could not have been prejudiced thereby, since the letter and itemized account referred to, taken in connection with the defective bill of particulars, supplied all needful information in respect to the claims asserted by the plaintiff.

The usual and better practice is to demand a bill of particulars before pleading to the merits. Danger of taking the plaintiff by surprise is thereby obviated, and better opportunity is afforded the defendant to conform his pleadings to meet the specific demand intended to be asserted against him. *Lovelock v. Cheveley*, 3 Eng. Com. Law Rep. 185; *Randall v. Glenn*, 2 Gill, 430; *Long v. Kinard*, Harp. 47.

Plaintiff in error also excepted to the two instructions given at the instance of the plaintiff, and to the modification of its instructions, Nos. 1 and 2.

Plaintiff's instructions read:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff sold the defendant Southern hides, and the plaintiff shipped to the defendant Southern hides, but that the defendant refused to receive the hides shipped them, they may find for the plaintiff, and assess his damages."

"(2) The court instructs the jury that if they shall believe from the evidence that the plaintiff is entitled to recover in either action, if the plaintiff used reasonable diligence in promptly disposing of the hides, so as to realize their actual value at the time of the defendant's breach of his contract, then the measure of damages is the difference between the prices at which the hides were sold to the defendant and the price at which the hides were afterwards sold by the plaintiff, together with the expenses and freight."

The objection urged to instruction 1 is that it "practically told the jury that the defendant had and could make no defense to the action, if the plaintiff shipped him the kind of hides he purchased, no matter in what condition they were shipped, and no matter if the plaintiff did try to defraud it by drawing for more than he was entitled to draw for."

It appears from the testimony of Aaron Hecht, vice president of the defendant company—the officer with whom the contract for sale of the hides was made—that no question was raised about the condition of the hides, but that he rejected them because “the average weight was entirely unreasonable.”

This testimony, therefore, disposes of the objection to instruction 1, and, as will be seen presently, the other points of objection are fully met and covered by instructions given on behalf of the defendant.

Instruction 2 correctly propounds the law in respect to the measure of damages in this class of cases.

The doctrine is that where a contract of sale is executory, and the title and possession still remain in the seller, his remedy against the buyer, who wrongfully refuses to accept and pay for the goods, is an action of assumpsit on a special count to recover damages for the breach of contract.

It is said that the seller cannot maintain an action for the agreed price, as he could do if the title had passed, but must sue for indemnity for the loss of his bargain; the quantum of damages which he has sustained, and the measure of his recovery, being the difference between the contract price of the goods and the net price which they produce at a resale, fairly made, after deducting all expenses incurred by the seller in taking care of the goods and selling them.

In such case the seller should give the buyer notice that he intends to sell, and hold him responsible for the loss. This notice, it will be observed, is not a notice of resale, but a notice that the seller will assert his right of resale, and bind the buyer by the price obtained. See, in this connection, 2 Benj. on Sales (4th Am. Ed.) § 1117; Hare on Contracts, 446; 2 Schoul. Pers. Prop. § 513; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Patten's Appeal*, 45 Pa. 151, 84 Am. Dec. 479; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Benjamin's Prin. of Sales*, rule 53, p. 195, and cases cited; *Rosenbaum v. Weeden*, 18 Grat. 785; also notes to that case, 98 Am. Dec. 787, and in *Virginia Reports Annotated* (18 Grat. 787); *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525.

In the cases in judgment, the property in the goods had not passed. The contracts were for the sale of nonspecific hides, being agreements merely to sell hides of a particular description. But the specific hides upon which the contracts were to operate had not been agreed upon, and the rule in such case is that the property in the goods does not pass until an appropriation of the specific goods has been made, with the assent of both seller and buyer. *Benjamin's Prin. of Sales*, rule 23, p. 81.

In the cases at bar the plaintiff notified the defendant that he would sell the hides at its risk, unless received.

The instruction given by the court in lieu of instructions 1 and 2 asked for by the

defendant told the jury “that if they believe from the evidence that the plaintiff agreed to sell to the defendant a general run of ‘Southern hides,’ ranging from 25 to 60 pounds; that the average weight of such hides was from 35 to 42 pounds, and that the plaintiff drew his drafts on defendant on invoices for hides averaging nearly 49 pounds—some as high as and over 55 pounds—then the court instructs the jury that the defendant was justified in entertaining the suspicion either that the plaintiff had shipped hides which defendant had not agreed to purchase, or that he was attempting to defraud it by drawing for a greater amount than he was entitled to draw for, and in either case the defendant was justified in refusing to honor the drafts for the hides thus drawn for.

“And if the jury believe from the evidence that the plaintiff was attempting to perpetrate a fraud in the shipment, then the court instructs the jury that the plaintiff cannot recover in either of these actions, and they must find for the defendant.”

This instruction plainly presented to the jury the points involved, and substantially covers the ground of the instructions in lieu of which it was given. It will be likewise observed that the instruction supplies the deficiencies in instruction No. 1 given for the plaintiff, pointed out by the defendant in his objection to that instruction. It is not error to refuse to give an instruction, when substantially the same ground is covered by another instruction which is given. *Alleghany Iron Co. v. Teaford*, supra.

The instructions, considered as a whole, fairly submitted the law of the case to the jury.

The remaining assignment of error is to the action of the court in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence.

Without entering upon a review of the testimony, it is sufficient to say in respect to that branch of the motion that, under the principles applicable to a demurrer to evidence, this court would not be warranted in disturbing the verdicts of the jury, approved, as they have been, by the judge who presided at the trial.

It follows from these views that the judgments complained of are without reversible error, and they must be affirmed.

(101 Va. 468)

GAY'S ADM'R v. SOUTHERN RY. CO.  
et al.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

MASTER AND SERVANT—INCIDENTAL RISKS—NOTICE OF DANGER.

1. When a servant enters upon an employment, it is the duty of the master to inform him of the nature of the risk and peril to be incurred in the course of his employment, but

not as to a special danger which springs out of a particular fact, which in its details cannot be anticipated.

**Error to Circuit Court of City of Alexandria.**

Action by the administrator of Dona Gay against the Philadelphia, Wilmington & Baltimore Railroad Company and the Southern Railway Company. Judgment for defendants, and plaintiff brings error. Affirmed.

D. Harmon and C. W. Allen, for plaintiff in error. F. L. Smith, Munford, Hunton, Williams & Anderson, and W. H. Payne, for defendants in error.

**KEITH, P.** The administrator of Dona Gay sued the Philadelphia, Wilmington & Baltimore Railroad Company and the Southern Railway Company for injuries resulting in the death of his intestate. The jury rendered a verdict subject to a demurrer to the evidence, and, the court having entered judgment for the defendants, the case is now before us upon a writ of error awarded the administrator.

The evidence proves, or tends to prove, the following facts: Dona Gay was on the 16th day of July, 1899, in the employment of the Southern Railway Company as one of the crew of a shifting engine in the yards of the company at Alexandria, which at this point extend from the station in a southerly direction for about one-half a mile, to a place designated in the evidence as the "Hill." There were at the time three tracks of the Southern Company, the most eastern of which was known as the "Main Track," that next to it as the "Valley Track," and the westernmost of the three as the "Bridge Track." Still further to the west, at no great distance, were the tracks of the Philadelphia, Wilmington & Baltimore Railroad. On the morning of the accident, Dona Gay, who had been continuously on duty from the preceding evening until 7 o'clock of that morning, had stopped work, thinking that his tour of duty had been completed; but, there being urgent need for his services, he was again summoned, and resumed his duties upon the yard engine. Some hours before the accident occurred a car loaded with lumber was taken from the yards of the Southern Railway and transferred, as was the custom, by means of connecting rails, to one of the tracks of the Philadelphia, Wilmington & Baltimore Road. Soon thereafter, while engaged in the same duty of shifting cars from the one road to the other, the engine came in contact with a gondola, and drove it with violence upon a car laden with lumber. The gondola "mounted" the lumber car, and it took more than an hour to remove the gondola and free the track. The load of lumber was confined by wooden standards placed in iron sockets, and one of these standards was so bent or broken that it projected over the side of the car. After the

track had been cleared of the wreck of the gondola, the car loaded with lumber was taken by the Philadelphia, Wilmington & Baltimore, returned to the Southern Railway, and placed upon the track known as the "Valley Track," which, as we have already stated, is the one nearest to the main line of that road. The shifting engine and crew went on the side track in order to permit a passenger train to pass, and the engineer in charge then said that he would go out and get the bad loads from the valley track and put them on the repair track. Before the shifting engine started, the conductor proposed to Gay to get a drink of water; Gay got up on the engine first, drank, and then took his position between the tender and the engine. He was looking around the corner of the cab, when he was struck on the left side of his head, just above his eye, and received an injury from which he died in a few days.

There is evidence which tends to show that the engine was moving at the time of the injury from 12 to 20 miles an hour; that the standard upon the lumber car projected to within 6 or 7 inches of the cab of the engine. There is evidence which also tends to prove that Gay at the time of the injury was watching the cars upon the valley track to ascertain which of them were out of repair, whether they had brakes on, and how many, and how many links and pins were needed in moving them to their proper position in the yard, all of which was in the line of his duty.

Do these facts, considered as upon a demurrer to the evidence, establish negligence of the defendants, or either of them?

The collision between the gondola and the lumber car, by which the latter was disabled, was the result of negligence; but that act was not the proximate cause of the injury to the deceased, and no such claim is asserted. The lumber car having been disabled and rendered unfit to be forwarded to its destination until it had been examined, its injuries repaired, and its load readjusted, it is not perceived that the Philadelphia, Wilmington & Baltimore Railroad was guilty of any wrong in returning it to the Southern Railway.

It is claimed that it might have been put in a safer place than that at which it was left on the valley track, because that track was next the main passenger track of the Southern Railway, and that it would have been safer to have placed it upon the bridge track. In the light of subsequent events, it is true that the accident complained of would not have happened if this had been done; but without going into a consideration of the evidence as to the reasons which it is alleged induced those who were charged with the duty of returning the lumber car to the Southern Railway track to select the valley track, instead of the bridge track, we cannot see that the act itself was, with respect to



the shifting crew, negligent, or one from which it could reasonably have been expected that any injury would result. It is true that, with respect to passenger trains, an obstruction upon the valley track would be more dangerous than if it were upon the bridge track; but to the shifting crew the choice between the track would a priori seem to have been a matter of indifference.

It was the duty of the Southern Railway Company to exercise ordinary care to furnish a reasonably safe place in which, and reasonably safe instrumentalities with which, its employes should perform their duties. There is no suggestion that the engine and track were not in complete order, or that the engine was not manned by a competent and efficient crew. We have seen that the act of negligence by which the lumber car was disabled was not the proximate cause of the injury to Dona Gay, and that the Philadelphia, Wilmington & Baltimore Road, finding it disabled upon their track, was guilty of no negligence in restoring it to the Southern Railway, from which it had received it, and in placing it upon the valley track of that company.

It was necessary to take the lumber car to the shop where it could be overhauled, its load readjusted, and any injury which it had suffered could be ascertained and repaired. It was the business of the yard crew to remove disabled cars, and this duty involves risks which are incident to that service, and which are assumed by those who undertake to discharge them. It was necessary to remove this car, and, while the decedent may not have known of the precise danger to which he was exposed upon this particular occasion, he did know the general duties required of him, and the perils attendant upon their discharge.

In *N. & W. Rwy. Co. v. Donnelly's Adm'r*, 88 Va. 856, 14 S. E. 693, it is said: "It is well settled that when a servant enters upon an employment he accepts the service subject to the risks that are incident to it. An employe who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment, or continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim against his employer is concerned." *Robinson's Adm'r v. Dinny*, 96 Va. 41, 30 S. E. 442; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869.

In *Yeaton v. Boston & Lowell R. Corp.*, 135 Mass. 418, the plaintiff had some experience in railroading; knew how to "brake" and make up cars. He, with others, were in the habit of taking damaged cars and putting them upon what was known as the "Hospital Track." Whenever there had been damaged cars during his employment, his

attention was called to it, generally by the yardmaster, who usually told the men that the cars had been damaged, and that he wanted them put upon such and such a track.

The court says: "The plaintiff was forty-five years old, and, with his admitted experience, was thus of sufficient age and intelligence to understand the nature of the risk to which he was exposed by his employment. He knew that broken cars were to be moved and handled in the yard, and he voluntarily undertook and continued in a service which he knew included the moving and handling of them. He was aware of the danger which attends handling broken cars, and sought to guard against it by looking to see if the cars which he was to assist in moving were out of order. Notice was expected to be received in such cases, but he was also in the habit of looking out for himself. It was incident to a service of this description that broken cars might sometimes be put in the wrong place in the yard, and that sufficient notice of defects in them, and of their being put in the wrong place, might be given. These are omissions of notice in respect to matters of detail, which cannot be given in advance, and which are not like an omission to give instructions to an inexperienced hand as to the general dangers to which his service will expose him."

That case illustrates what we have already said—that it is the duty of the master to inform the employe of the nature of the risk and peril to be incurred in the course of his employment, but not as "to a special danger which springs out of a particular fact, which in its details cannot be anticipated."

"There was no negligence on the part of the defendant in sending broken cars for repairs to the yard where the plaintiff was at work. This was a proper place for them. There was no negligence in omitting to give notice to the plaintiff that broken cars were to be sent to this yard for repairs, and that his employment included the duty of handling and moving them. All this he knew already. What he did not know was that this particular car was broken, and that broken cars which were sent for repairs might be found in that part of the yard where this car was." *Yeaton v. Boston & Lowell R. Corp.*, *supra*; *Watson v. Railway Company*, 58 Tex. 434.

We are of opinion that the judgment of the circuit court of Alexandria City should be affirmed.

(101 Va. 487)

RICHMOND PASSENGER & POWER CO.  
v. RACKS' ADMR.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

STREET RAILROADS—INJURY TO TRESPASSER  
—EVIDENCE.

1. Evidence is inadmissible, in an action against an electric railroad for injuries to a

person on the track, to show the distance in which a car could be stopped, which is entirely different from that by which the injury was caused, and differently equipped.

2. No duty is owing by a railroad company to a trespasser on its track, except, after it knows of his danger and peril, to exercise reasonable care to avoid injuring him.

Error to Law and Equity Court of City of Richmond.

Action by Racks' administrator against the Richmond Passenger & Power Company. Judgment for plaintiff. Defendant brings error. Reversed.

H. Taylor, Jr., for plaintiff in error. Wm. L. Royall, for defendant in error.

CARDWELL, J. Royall Racks, administrator of Frances Racks, deceased, brought his suit in the law and equity court of the city of Richmond, and recovered a judgment against the Richmond Passenger & Power Company for the sum of \$500 damages by reason of the death of the said Frances Racks, caused, as alleged, by the negligence of the defendant.

The circumstances under which the plaintiff's intestate lost her life are as follows:

On the afternoon of March 2, 1902, she, accompanied by her daughter, about 13 years of age, and two other small colored girls, walked out from her home, in the city of Richmond, to look at the high water in the river, and in returning home they were diverted from their route by boys throwing stones at them, and wandered away into the county of Henrico and got lost. About dark they found themselves upon the county road leading from Richmond City to Seven Pines, in the county of Henrico, upon which the defendant's track is laid, and on which it operates electric cars for the transportation of passengers between Richmond City and Seven Pines, and they undertook to follow this road back to Richmond. After going a short distance the party discovered some one with a lamp near the road, and called to him to know the way they should go in order to reach Richmond, and were told to "follow that road; that will put you to Richmond," or "to keep the county road and go straight ahead." A short way from where these instructions were received, the county road deflects to the north for the purpose of crossing a stream that has high banks directly in front of the place of deflection, whilst the electric railroad runs straight along, and crosses the stream upon a trestle, which is about 60 feet high and 415 feet long. This trestle has no walkway upon it, but a person crossing it must step from joist to joist, the joists being about 18 inches apart, with nothing between them, or under the spaces between them; and there is not room enough on either side of the railway track for a person to stand while one of the defendant's electric cars is passing. Upon reaching the point where the county road and railway track separate, the deceased, with the little

girls accompanying her, followed the railway track; and upon reaching the trestle, and finding that they could not walk across it, they got on their knees and hands, and attempted to make their passage over it by crawling from joist to joist; and, when they had gotten beyond the middle of the trestle, one of the defendant's electric cars on its return from Seven Pines to Richmond ran upon and over them, killing the deceased, Frances Racks, at a point about 65 feet from the western end of the trestle.

The approach of the railway track from the east of the trestle is on a down grade, while the trestle itself is level; and upon approaching the trestle the current of electricity is turned off, and the car allowed to roll of its own motion until it reaches about midway of the trestle, when the current is gradually turned on again, to restore sufficient speed to ascend the grade beginning at the west end of the trestle.

It is not controverted that under these circumstances the deceased was a trespasser, and no duty was owing to her by the defendant, except, after it knew of her danger and peril, to exercise reasonable care to avoid injuring her; and therefore the only question in the case is whether or not the motorman in charge of the car did all that he could do in the exercise of reasonable care to stop his car after he discovered her peril.

The undisputed facts proved are that the car of the defendant company which ran upon the deceased is about 42 feet long; that the night of the accident was very dark and very damp—"almost raining"; and that, by reason of the dampness, the track was in the very worst of all conditions for stopping the car.

With the view of proving the distance within which the car might have been stopped, the plaintiff introduced several expert witnesses—among them, T. E. Felt, superintendent of the Richmond & Petersburg Electric Railway Company, who testified in regard to stopping the cars on his road; and, when recalled a second time for examination, he was permitted, in answer to a question by plaintiff's counsel, over the objection of the defendant, to state that when the current of electricity has stopped the wheels of one of his cars from revolving, or the wheels are made to reverse, so that the car is moving only by its own momentum, it would stop in 40 feet. Evidence having been introduced as to the construction and equipment of the cars of the defendant operated on the Seven Pines Road, showing that they had entirely different machinery from the machinery of the cars on the Richmond & Petersburg Electric Railway, as described by the witness Felt, and that no comparison could properly be made between the equipment or appliances upon the cars operated upon the respective roads, the defendants moved the court to exclude the testimony of Felt, as to stopping cars, which mo-

tion was overruled, and this ruling is made the foundation of the defendant's first bill of exceptions.

The court is of opinion that this exception is well taken. No foundation had been laid for the testimony of the witness objected to, by showing similarity between the cars of which he was speaking and the car involved in the accident out of which this suit arises. On the contrary, it had not only been shown that the cars were dissimilar, but that the circumstances existing at the time of the accident were different from those under which the witness testified as to stopping cars on his road. Testimony as to what could be done to avoid injury to a person on an electric car track, with different cars, differently equipped, and under different conditions, instead of being helpful to the jury in reaching a right conclusion as to whether the motorman in charge of the car in question negligently failed to do all in his power to avoid injury to the deceased after he discovered her peril, was well calculated to lead them away from the pertinent and relevant testimony in the case, into the field of conjecture, which, as has often been repeated, cannot be permitted. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. *N. & W. Ry. Co. v. Cromer*, 99 Va. 794, 40 S. E. 54.

The two remaining exceptions taken by the defendant may be considered together. The one relates to the giving of an instruction asked by the plaintiff, and the other to the refusal of the court to award a new trial on the ground that the verdict is contrary to the law and the evidence.

The instruction referred to, and the only instruction given for the plaintiff, is as follows:

"The jury are instructed that if they believe from the evidence that the motorman in charge of the defendant's car on the evening of March 2, 1902, could, by the exercise of ordinary care, have prevented said car from running on the deceased after he saw her, that they are instructed that it was his duty to prevent said car from running on the deceased, and if they believe further from the evidence that he neglected said duty, and that the death of deceased was due to such neglect of duty, the defendant is liable for such neglect of duty, and in that case their verdict should be for the plaintiff."

It is not claimed that the instruction propounds an incorrect proposition of law, but the contention is that there was not sufficient evidence to warrant the court in giving it. We do not deem it necessary to consider this contention, as we are called upon to determine whether or not the evidence is sufficient to sustain the verdict of the jury.

The first witness for the plaintiff was R. A. Powell, the motorman of the car. He testified that he was not certain as to where he was when he first saw these people on the

trestle; it was hard to tell in the dark, and he could not be positive. But he explains that, in order to reduce the speed of the car when entering upon the trestle, so as to go upon it at a low rate of speed, the current of electricity is cut off, which so reduces the headlight that nothing could be seen in front until the current was put on again, when the headlight is revived; that, as was usual, the current had been cut off, and he began to feed his car up (by applying the electricity) about the center of the trestle, or when he supposed he was about the center, and it takes some time to feed it up to nine points, needed to ascend the grade beginning at the west end of the trestle; that he had fed it up to 9 points, and was running on nine points when he first saw these people. He thereby explains that he was several car lengths past the center of the trestle when he saw them, and instantly applied his brake, reversed his current, and made the best stop he could, using all the means in his power to prevent the accident. In answer to the question: "There is no guessing on your part that instantly you saw those people you tried to stop that car in every way you could?" the witness says: "I did in every way I could to prevent the accident. I don't believe a man ever worked on a car more faithfully than I did, trying to stop it."

The car, as we have observed, was about 42 feet long, and the deceased was run over 65 feet from the western end of the trestle; that is, about 142 feet from the middle of the trestle, approaching from the east. The witness was not asked how close he thought he was to those people when he first saw them, nor as to how far the car ran beyond the point of the accident before it stopped; but, from the explanation he makes as to how he handled the car (that the headlight would only light the trestle in front about 40 feet when feeding the car up), if he had run, as he stated,  $2\frac{1}{2}$  car lengths past the middle of the trestle while feeding the car up, the only inference that could have been drawn was that he was in less than 40 feet of the people when he first saw them. The statement of the witness of the defendant, L. V. Mayor, who was a passenger standing by the motorman, Powell, in no way conflicts with the latter's testimony, but corroborates the statement he made that the car was too close when the people were seen to be stopped in time to avoid running over them. Mayor says that the reversing of the car attracted his attention, and, looking forward, he saw the people about 40 feet off.

Another witness for the defendant, who was a passenger on the car, and standing near the motorman, also corroborates the latter in the statement that he did everything in his power to stop the car before reaching these people.

Plaintiff's witness R. W. Jennings testified that a car running 8 miles an hour, the supposed speed of the car at the time of this ac-

cident, on a dead level and a dry rail, could be stopped in 40 feet; on a wet rail, with the use of sand, it would take only 5 feet further, but, if you did not have sand, it would take 10 feet more, maybe longer than that. He could not tell, however, about a slick rail—as was the case here—how long it would take to stop the car, and he concurs in the statement of other witnesses that the current of electricity cannot be reversed, so as to bring the wheels to a dead stop, or make them go back instantly, as it takes it at least two seconds to give it time to “get in”; that is, to take hold and have effect.

Annie Racks, the 13 year old daughter of the deceased, as a witness for the plaintiff, testifies that the light on the car went out just as the car reached the eastern end of the trestle, and that the light came on no more until the accident was over and the car had gotten across the trestle. She, as stated by all the other witnesses, says that it was a dark night, and in this darkness, while she was crawling upon her hands and knees, over the trestle, she claims that she saw the motorman turning “all around the brakes” (meaning, doubtless, turning the brakes around) when the car was the distance of the width of Broad street from her; that the light did not go out until the car was as close to her as across Broad street; and that they were then about the middle of the trestle. It appears that the witness saved her life by swinging under the trestle at the point where her mother was killed, while one of the remaining two of the party jumped off the trestle, and the other was knocked off; and all this occurred at a point, as we have seen, 65 feet from the western end of the trestle, and at least 142 feet west of its center, so that, in the very nature of things, as well as by the plaintiff's other evidence in the case, it is impossible that this witness' statement that the lights on the car went out as it entered upon the east end of the trestle, and never came on again until it had passed over the trestle, can be true. But if the statement be accepted as true, it neither proves as a fact, nor warrants the inference, that the motorman in charge of the car failed to do, as he states he did, all in his power to stop his car after he discovered these people on the trestle. On the contrary, the plaintiff's other evidence conclusively proves that if the statement of Annie Racks be true—that the lights on the car went out as it entered upon the east end of the trestle, and remained out until it passed entirely over it—it was impossible that the motorman could have at any time seen these people on the trestle before running over them. It is not pretended that he saw them from the east end of the trestle, where, as Annie Racks claims, the light went out, and never came on again, for, if such was the case, he wantonly or recklessly ran his car upon them; and it is conceded by counsel in argument here that such was not the case, the contention being only that when

the motorman saw the deceased's peril he became so awe-stricken that he lost ability to deal effectually with the situation.

Subjecting the whole evidence to the most rigid application of the rule governing demurrers to evidence, no other conclusion could rightly be reached than that the death of the deceased was due solely to her own reckless intrusion upon the defendant's trestle and right of way as a trespasser.

It follows that the judgment of the lower court refusing to set aside the verdict of the jury and award the defendant a new trial must be reversed and annulled, and the cause remanded.

(101 Va. 432)

### MILLER & MEYERS v. CITY OF NEWPORT NEWS.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

#### MUNICIPAL CORPORATIONS—ABATEMENT—INSTRUCTIONS—DRAINS—LIABILITIES.

1. The failure of a city to exercise its charter power to abate nuisances not rendering its streets unsafe does not give persons injured by such failure a private action against the city, nor does a failure to make or enforce ordinances prohibiting nuisances give such action.

2. An instruction which is wholly inapplicable to the case should not be given.

3. If the instructions taken as a whole present the law fairly and clearly, and in a manner not likely to mislead the jury, or if the error in an instruction excepted to is corrected by other instructions, the verdict will not be set aside.

4. A municipal corporation has the right to construct ditches and drains for the purpose of draining the surface water from its streets into a ditch or drain which is a natural water course, so long as reasonable care and skill are exercised in doing the work.

Error to Circuit Court of City of Newport News.

Action by Miller & Meyers against the city of Newport News. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. C. Baker, A. C. Peachy, and C. A. Ashby, for plaintiffs in error. J. A. Massie, for defendant in error.

CARDWELL, J. Plaintiffs in error are the joint owners of five vacant lots situated in the city of Newport News fronting on Twenty-Fifth street, and brought their action to recover damages of the city because of the condition in which it is alleged their lots are kept by reason of a certain ditch or drain which goes over them and empties into Newport News creek.

This action is based upon the theory that (1) the city, by artificial means and channels, collected the surface water along its streets and avenues, and poured the same upon the lots in question; (2) that, granting that some of this surface water would voluntarily go on the lots, the defendant city had largely and injuriously added to this amount, so

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. §§ 1551, 1552.

that there is always a stream flowing over these lots, and an entirely different stream from that originally passing through the said ditch or drain, in that it is now filthy and unhealthy, and entirely destroys the use of the lots; or (3) that the said ditch or drain is maintained so as to be a nuisance, rendering said lot uninhabitable.

The action is defended on the ground that the nuisance complained of was not created by the city, but the ditch or drain is, and always was, a natural water course, and was not cut, constructed, or altered or used by the city.

The proceedings in the circuit court resulted in a verdict and judgment for the defendant city, which we are asked to review and reverse upon the grounds (1) that the verdict and judgment are contrary to the law and the evidence; and (2) the court misdirected the jury by the giving of certain instructions for the defendant city, and the refusal of two instructions asked for by the plaintiffs.

It appears that the city of Newport News was incorporated by an act of the General Assembly approved January 16, 1896. Acts 1895-96, p. 74, c. 64. Miller, one of the plaintiffs in error, acquired the five lots in question in 1897, and conveyed one-half interest therein to Meyers, his coplaintiff in error, in September, 1898. The city is divided by the tracks and yard of the Chesapeake & Ohio Railway Company, and in the fall of 1899 the city built a bridge over the railway tracks and yard in Twenty-Fifth street, one end of which bridge is very near plaintiffs in error's lots, and this fact increased their value enormously, as is conceded. The lots were at the time they were bought by plaintiffs in error, and still are, 9 or 10 feet below the grade of Twenty-Fifth street and Warwick avenue; in fact, they are very low lots, and from the formation of the land the natural surface drainage of a part of the city is through the drain across Warwick avenue and Twenty-Sixth street, over the lots of the Old Dominion Land Company to the lots of plaintiffs in error, thence into Newport News creek; and the city has reduced the amount of territory drained through this natural outlet by the construction of the approaches to Twenty-Fifth and Thirty-Fourth street bridges. No city property or city sewers drain through this outlet, as admitted by plaintiff in error Miller testifying in his own behalf; and the filthy and unsanitary matter which is conveyed by this natural drain across these lots comes either from private property or from the streets, some of which are paved and others not paved. The ditches made on the sides of the streets that plaintiffs in error complain of were caused by the working of the streets and turning the water from the middle to the sides. The lots of plaintiffs in error are in the same condition they were at the time

they were purchased, and the city has exercised no ownership or control over this natural water course through the lots. Plaintiffs in error's witness Lentz states that the ditch or drain which runs across these lots is a natural water course, and has been since he came to the city in 1885, and in fact he says, "That ditch has been there since the day of Adam," meaning thereby to say that from the lay of the land the natural flow of the water has always been through this outlet; and this fact is testified to by a number of witnesses examined on behalf of the city.

Upon this evidence before the jury, clearly their verdict should not be disturbed, unless the circuit court has erred in giving or refusing instructions.

In submitting the case to the jury the court gave four instructions asked by plaintiffs in error and a like number asked for by the defendant. Exceptions are taken to the refusal of the court to give instructions numbered 1 and 4 asked by the plaintiffs in error, and to the giving of the four instructions asked by the defendant.

By instruction No. 1 the court was asked to tell the jury that a city is liable for failure to exercise its legislative and discretionary power to abate or remove a public nuisance, whether caused by itself or private parties. The instruction was properly refused, as there was no evidence tending to show that, if a nuisance existed upon the lots of plaintiffs in error, it was caused by the defendant. The case here is very unlike the case of *Chalkley v. City of Richmond*, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730, so much relied on by plaintiffs in error. In that case water from the James river was diverted from its natural course through an artificial sewer constructed by a third person, and afterwards, repaired and controlled by the city in one of its streets, and was allowed to flood the plaintiff's cellar.

Where one constructs a sewer on his premises, and through it discharges filth and garbage into the street, creating a nuisance, and to the injury of an adjacent lot owner, no action lies in favor of such adjacent owner against the city for failure to provide a sewer or for a failure to abate the nuisance, his remedy being against the person offending for maintaining a nuisance. The mere fact that a nuisance exists, and has occasioned an injury to the third person, does not render the corporation liable, provided the nuisance was not created or maintained by the corporation itself. *Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937.

The failure of a city to exercise its charter power to abate nuisances not rendering its streets unsafe does not give persons injured by such failure a private action against the city, nor does a failure to make or enforce ordinances prohibiting nuisances give them such action against the city. 2 Dill. Munc.

Corp. § 851; Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; Cain v. Syracuse, 95 N. Y. 83.

In Robinson v. City of Danville (recently decided by this court) 43 S. E. 337, it is held that where a culvert erected under a railroad was subsequently extended by the city across a street, but neither the city nor any municipal body of the town before incorporation had ever passed any resolution concerning the culvert, or in any way had assumed control over the same, the city was not liable to a property owner for damages from its obstruction.

Instruction No. 4 asked by plaintiffs in error was also properly refused, it being wholly inapplicable to the case, as the defendant city made no claim of a prescriptive right to allow the water to flow upon the lots of plaintiffs in error, but maintained that the formation of the earth at this point was such that surface water, in seeking its level, naturally found its way over these lots, and that the city had not added to the quantity of water passing through this natural drain; and was not responsible for the unsanitary matter it accumulated and conveyed upon the lots.

Instruction No. 1 of defendant in error submitted to the jury the question whether or not the drain or ditch complained of was a natural water course, and whether or not the city had altered or changed its use. We are of opinion that the instruction was proper, and was rightly given.

We are further of opinion that defendant in error's instruction No. 2 is without a valid objection. This instruction embodies two propositions of law entirely applicable to the case; first, that a city is not liable for not providing and enforcing ordinances for the abatement of nuisances on private property which do not render its streets unsafe; and, second, that a city is not liable for not providing and enforcing ordinances for the abatement of nuisances in its streets not rendering them unsafe for travel, and not created or maintained by itself, but occasioned by the acts of private individuals alone.

Whether or not the nuisance complained of here was created by private individuals alone, as distinguished from any acts of the city, either singly or jointly with others, was left to the jury. The objection urged to this instruction is that it purports to contain a complete statement of the law, and leaves out of view the question whether the city, by artificial means, turned surface water on plaintiffs in error's lots. If it were conceded that this objection to the instruction is well taken, we are unable to see that plaintiffs in error were prejudiced thereby. The jury were told by plaintiffs in error's third instruction that they were to read all of the instructions together in considering of their verdict, and the question whether the defendant in error, by artificial means, turned surface water on plaintiffs in error's lot is submitted to the

jury by other instructions dealing with that question.

Instructions to the jury should be clearly expressed, and the law clearly and distinctly stated, but a verdict will not be set aside because some expression standing alone might be regarded as erroneous or misleading if the instructions taken as a whole present the law fairly and correctly, and in a manner not likely to mislead the jury, or if the error in an instruction excepted to is corrected by other instructions given by the court. Washington, A. & Mt. V. Electric Ry. Co. v. Quayle, 95 Va. 749, 30 S. E. 391; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614; Kimball v. Borden, 97 Va. 477, 34 S. E. 45; Rich. Traction Co. v. Hildebrand, 99 Va. 48, 34 S. E. 888.

We are further of opinion that the circuit court did not err in giving defendant in error's third and fourth instructions. The third told the jury that there is no liability upon the city for failure to provide sewers to carry surface water, or for failure to relieve the plaintiffs' property of burdens put upon it by nature; and if they believed from the evidence that the drain or ditch complained of was not constructed by the city, but existed as such before the incorporation of the city, there is no liability upon the city for allowing surface water to find its way into this ditch and be carried through the same.

The fourth instruction simply told the jury that a city has a right to construct ditches along its streets and drain the surface water into a ditch or drain which was its natural course, for the purpose of draining its streets, even though the quantity of water increases in the time of rainy weather and diminishes at other times; and, if the jury believed from evidence that such was the object of the city in constructing the small drains on the sides of its streets, there is no liability upon the city for so doing.

We are unable to see the force of the contention of counsel that defendant in error's third instruction conflicts with plaintiffs in error's fifth instruction, which, in effect, told the jury that if they believed from the evidence that the defendant in error had assumed and exercised control of the big ditch or drain in question, there was liability upon the city from the time it so assumed and exercised such control, and it was immaterial who may have first built or established the ditch or drain, and that any altering, repairing, or giving authority to do so, furnishing labor, implements, and official supervision and direction of the work by the city and its agents, were to be considered in determining whether the city had assumed and exercised such control.

Nor is defendant in error's instruction No. 4 liable to the objection that it took from the jury the question whether or not the ditch or drain was a natural water course,

and made the "object" of the city in draining its streets the gravamen of its liability.

"Town officers, in repairing highways, may construct drains and culverts within the limits of the highway; and if the surface water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action at law lies for damages thereby occasioned. Town officers are bound to make every highway safe and convenient for travelers; and they and their officers are protected in doing it so long as they act within the scope of their authority, and execute their work in a reasonably safe and skillful manner, although their operations cause the surface water to flow upon the adjoining proprietors in large quantities to their injury. Their rights are commensurate with their duties. They are not bound to submit the propriety of their judgment or their methods in making repairs within the scope of their authority to the supervision of a court or jury." Angell on Water Courses, § 108.

The law as stated by that learned author is sustained in *Powell v. Town of Wytheville*, 95 Va. 73, 27 S. E. 805; citing a number of other decisions of this court.

The case of *St. Paul, etc., Ry. Co. v. Duluth* (Minn.) 58 N. W. 159, 23 L. R. A. 88, 45 Am. St. Rep. 491, was very similar, in many respects, to the case at bar, and it was there held that there is no liability upon a city where it, by means of artificial sewers, collected surface water on the hillside, and conveyed it to its common and natural dumping ground, the plaintiffs' property, made such by nature, and not by the city. In the opinion it is said: "The plaintiffs seem to forget that nature, and not the city, has made this place such dumping ground, and the city has never relieved the land of such servitude;" and in conclusion it is said: "Can the owner of a swamp improve it, and then compel the owner of the higher land around it to keep the surface water naturally tributary to the swamp from coming from the higher lands upon the swamp? We think not."

Another case in point is *Waffle v. New York Central Ry. Co.*, 53 N. Y. 11, 13 Am. Rep. 467, where the court said: "The defendant had an absolute right to drain the surface water upon its land into the stream which was its natural outlet, through ditches constructed upon its own land, although the quantity of water in the stream was thereby increased in times of high water and diminished at other times. A proprietor having the right to reclaim his land by draining the surface water therefrom by ditches discharging into a stream running therein, which is the natural outlet of the water, the object of so doing, whether for the erection of buildings, agriculture, or the construction of a railroad, is wholly immaterial. He may so drain whenever so disposed to do so, irrespective of the object."

It would seem unnecessary to review other authorities cited in support of the proposition

of law that a city has a right to construct ditches and drains for the purpose of draining the surface water from its streets into a ditch or drain which are a natural water course, so long as reasonable care and skill is exercised in doing the work.

As opposed to the propositions of law laid down in the instructions given at the instance of defendant in error in this case, counsel cite a number of authorities, but we deem it unnecessary to review them, as they are cases where water was collected and discharged on the premises where it would not have naturally gone, or where sewers have been constructed to empty into a water course, polluting it. These authorities do not distinguish between artificial modes of drainage, diverting water from its natural course onto private property, from the natural flow of surface water. They would be applicable to a case where a city had constructed, owned, and controlled a sewer which emptied upon an adjacent proprietor's lot, or had diverted surface water or water of streams from its natural course, and poured it with increased force or destructiveness upon the adjacent owner's lot; or where a private culvert, sewer, or drain had, by the exercise of its corporate powers, been taken control of by a city, and converted into a public one. That was the case in *Chalkley v. City of Richmond*, supra. But, as shown in *Robinson v. City of Danville*, supra, that was a very different case from one in which the city has exercised no authority or control over a culvert, sewer, or drain emptying upon a landowner or overflowing the land by becoming obstructed.

The primary questions in this case are, first, whether the surface water emptying upon the lots of plaintiffs in error, of which they complain, flows through its natural channel or outlet; and, second, whether or not defendant in error has undertaken to control this natural flow of water, or to exercise any control over it as a public sewer or drain. The first question being answered in the affirmative and the second in the negative, there could be no recovery of the defendant in error for damages to the lots of plaintiffs in error. *Robinson v. City of Danville*, supra.

We are of opinion that the judgment of the circuit court should be affirmed.

(91 Va. 452)

#### BISSELL v. HOOD.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

#### PARTNERSHIP—CONTRACT—EQUITY PRACTICE —EXCEPTIONS TO COMMISSIONERS' REPORT.

1. Where a partnership contract provides that each partner shall be allowed to draw a salary of \$75 per month, and for a division of the net profits at the end of the year, the salary of each person was to be considered an item of expense of the business.

Appeal from Law and Equity Court of City of Richmond.

Bill by E. H. Bissell against W. T. Hood. Decree for defendant, and plaintiff appeals. Affirmed.

Christian & Christian and J. Preston Carson, for appellant. Bev T. Crump and Overton Howard, for appellee.

HARRISON, J. The record shows that the appellee, W. T. Hood, has been for many years the owner of a nursery for the planting, propagation, and sale of fruit and ornamental trees, the business being conducted under the style of W. T. Hood & Co. It appears that the appellee was an experienced and practical man in the conduct of the nursery business, but possessed no skill or experience in bookkeeping or conducting in other respects the affairs of an office. The appellant, E. H. Bissell, was an experienced clerical and office man, especially conversant with the agencies usually employed in the disposition of nursery stock, and had been at times, for some years prior to the date of this controversy, employed by the appellee at his office. On the 30th of December, 1898, the parties mentioned entered into an agreement for the conduct of this nursery business on their joint account for the year 1899. This contract was reduced to writing, and contains 25 clauses.

It provides that for the year 1899 the appellee was to have charge of the nurseries, and the appellant to have charge of the office, and to superintend the agents employed to sell and dispose of the trees. The part to be performed by each is set forth with particularity, and specific mention made of the sources from which the income was to be derived, the items of expense of the business, and how the same were to be charged, with explicit directions as to the division between them of the net profits at the end of the year, each being allowed in the meantime to draw a salary of \$75 per month, which was to be charged to expense.

The Twenty-Third clause of the contract provided that, if the business of the year 1899 showed a profit, the contract was to be renewed for another year from January 1, 1900, subject in every respect to the same conditions and restrictions. At the end of the year 1899 a controversy arose between the parties as to whether there had been a profit in the business of that year, with the result that the bill in this case was filed by E. H. Bissell, setting forth the contract, and claiming that it constituted a partnership between himself and W. T. Hood; that there had been a profit in the business for the year 1899, in which he was entitled to share, and that such profit also entitled him to a renewal of the contract for another year; that he had been excluded from any further participation in the business by the appellee and all of his rights under the contract ignored.

The bill asked that the appellee be enjoined from carrying on the business without the co-operation of appellant; that, if necessary to the ends of justice, the partnership be dissolved, and a receiver be appointed to take charge of the assets and wind up its affairs, so that the respective interests of the parties in the assets and business might be ascertained and settled by decree, and that all proper accounts be taken, and general relief granted.

To this bill the appellee, who was defendant in the court below, filed two pleas. The first denies that appellee entered into a contract of partnership with the appellant, and insists that the contract filed with the bill was merely an agreement to employ the appellant upon a certain consideration, with a further provision for a share in the profits of the business for the year 1899 as additional compensation for his services. The second plea avers that the business conducted by appellant under his style of W. T. Hood & Co. did not show a profit for the year 1899 after providing for the payments and expenses set out in the contract.

The court declined to pass upon a motion to strike out plea No. 1, or upon any question raised on the pleadings, and for the purpose of deciding the issue of fact joined under plea No. 2 referred the case to one of its commissioners to ascertain the profits, if any, made from the business of W. T. Hood & Co. during the year 1899.

Under the agreement between the parties there could be no recovery in this case unless the business for 1899 showed a profit. Whether or not there was such a profit is put directly in issue by plea No. 2. In determining that fact it was wholly immaterial whether or not the contract created a partnership, for the only matter that could be affected by that question was whether the monthly withdrawals of \$75 by each should be charged to expense. The contract itself settled that question by expressly providing that such withdrawals should be so charged.

No question of law is presented. The sole inquiry raised by the record is whether or not the business of W. T. Hood & Co. showed a profit for the year 1899. The solution of that question has called forth a mass of conflicting testimony that is made part of the record. A learned and experienced commissioner has made two elaborate reports based upon the evidence, settling the accounts involving the business of the parties for the year 1899. In both of these reports he finds that there was a loss. The learned judge of the court below, after full consideration of the entire record, has reached the conclusion that there was a loss, and has denied the relief sought. Objection is made that the lower court refused to pass upon the method of accounting or course of reasoning pursued by the commissioner, and declined to pass upon any of the exceptions taken to the reports. The decree appealed



from shows that the court considered the case upon both reports of the commissioner, together with the testimony, exhibits, and papers returned therewith, and upon the several exceptions taken thereto by both plaintiff and defendant. The decree then proceeds as follows: "Upon consideration whereof the court is of opinion that it is unnecessary to pass upon the method of accounting, or the course of reasoning by which the said commissioner reached his conclusion. And the court being further of opinion from this present report of Commissioner Guy, as well as from his former report, and from the evidence and papers returned with each of said reports, and from the proceedings in this cause, that the conclusion of the commissioner in his second report is correct, the court, without formally passing upon any or all of the exceptions filed by complainant and by defendant, approves and confirms the conclusion \* \* \* that under the contract between the parties \* \* \* no profit was made during the year 1899 in the business of W. T. Hood & Co."

It thus appears that the court did not pass upon the course of reasoning of the commissioner or the exceptions in detail, because it was not thought necessary, as the court was satisfied upon the whole record that the plaintiff had failed to make out his case. While the court did not in words overrule the exceptions, it in effect did so. Unless, however, the court ought to have sustained the exceptions, and thus made a decree in favor of the plaintiff necessary, its failure to formally overrule them is harmless error. *Bristol Iron & S. Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

The several assignments of error set forth in the petition for appeal consist of objections to the allowance of certain items and the disallowance of others by the commissioner in his statement of accounts.

The propriety of the commissioner's action in the particulars mentioned depends upon the weight to be given a large mass of conflicting evidence. It is manifest that no useful purpose would be served by attempting to enter here upon a detailed consideration of the account stated by the commissioner, or of the voluminous evidence returned by him with his two reports. To do so would prolong this opinion beyond reasonable limits, without at all promoting the ends of justice, and without possible benefit to either party concerned.

We have given the entire record a careful consideration, and feel satisfied that the appellant has not been prejudiced by the decree complained of. It appears to us that the commissioner has stated the account according to the true intent and meaning of the contract between the parties, dealing liberally with the appellant by solving, as stated in his second report, every doubt in his favor, and that his conclusions are sustained by the evidence. To give effect to the views

urged on behalf of the appellant in support of his several exceptions to the reports would involve a wide departure from the contract, if not a total disregard of its terms.

For these reasons the decree appealed from must be affirmed.

(101 Va. 478)

#### CITY OF NORFOLK v. FLYNN.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**MUNICIPAL CORPORATIONS—POLICE POWER—HEALTH—MILK—REGULATION OF SALE—CITY ORDINANCE—EXTRATERRITORIAL OPERATION—LICENSE FEES.**

1. The Norfolk city ordinance, prohibiting the sale of impure or unwholesome milk, prescribing a test, creating the office of milk inspector, and requiring him to make frequent inspections and to report all violations of the ordinance to the board of health, was a proper exercise of the state's police power.

2. Norfolk City Code, c. 43, § 344, provides that every person conveying milk for the purpose of selling the same, and persons who sell milk in a store, booth, or stand, in the city, shall register annually and be licensed by the milk inspector to sell milk within the city limits. *Held* that, since such ordinance was only intended to apply to persons who came within the city limits to sell milk, it was not invalid on the ground that it purported to have force beyond the corporate limits.

3. Norfolk City Code, c. 43, § 344, provides for the licensing of milk venders within the city, and requires that each applicant for a license shall pay 50 cents per cow, if he keeps cows, and \$2 per milk stand or depot kept for the sale of milk, the amount so collected to be used exclusively for the purpose of paying the salary and expenses of the milk inspector, and requires such inspector to pay over monthly to the treasurer of the city all sums collected by him. *Held*, that such license fee was not a tax assessed, but an inspection fee, designed as compensation for the inspection and license, and hence the ordinance was not invalid, under Acts 1895-96, p. 685, c. 625, providing that it shall be unlawful for any city to impose or collect any tax on a person selling farm or domestic products within its limits, and not within a regular market house of the city.

Error to Circuit Court of City of Norfolk.

Prosecution by the city of Norfolk against Joseph E. Flynn for violation of the city milk ordinance. From a judgment of the police justice against defendant, which was reversed on appeal to the circuit court, the city brings error. Reversed.

Walter H. Taylor, for plaintiff in error.  
Burroughs & Brother, for defendant in error.

KEITH, P. The police justice of the city of Norfolk issued a warrant against Joseph E. Flynn for violation of an ordinance creating the office of milk inspector, defining his duties, and regulating the sale of milk in the city of Norfolk. The police justice entered a judgment against Flynn, from which an appeal was taken to the circuit court of the city of Norfolk, where it was reversed, and the case is now before us upon a writ of error to the judgment of that court.

The ordinance in question prohibits the sale of impure, diluted, or unwholesome milk, pre-

scribes a test of what constitutes pure milk, creates the office of milk inspector, prescribes his duties, requires him to make frequent inspection and analysis of the milk sold in the city, and directs him to report all violations of the ordinance to the board of health.

By section 344, c. 43, of the Norfolk City Code, it is provided that "every person who conveys milk in carriages or otherwise for the purpose of selling the same, and those who sell or offer it for sale in a store, booth, stand or market place in the city of Norfolk, shall register annually in the books of said inspector, on the first day of May of each year, or within thirty days thereafter, and be licensed by said inspector to sell milk within the limits of the city for one year. Before said license is granted the applicant shall be required to pay fifty cents per cow, if he keeps cows, and two dollars for each stand or depot, if he has a stand or depot, for the sale of milk. The amount so collected shall be used exclusively for the purpose of paying the salary and expenses of said inspector. And whoever neglects so to register or violates any of the provisions of this section shall be punished for each offense by a fine of not less than five nor more than twenty dollars. The inspector shall pay over monthly to the treasurer of the city all sums collected by him."

Defendant contends that this section is invalid because, first, no ordinance of the city of Norfolk can have the force of law beyond the corporate limits of the city; and, secondly, because it is in violation of an act approved March 3, 1896 (Acts 1895-96, p. 685, c. 625), which is as follows: "It shall be unlawful for any city or town of this state, or of any agent or officer of any such city or town, to impose or collect any tax, fine or other penalty upon any person selling their farm and domestic products within the limits of any such town or city outside of and not within the regular market houses and sheds of such cities and towns."

The police power of the state, so far as it is necessary to protect the health of its inhabitants, has been delegated to the city of Norfolk. The general nature, character, and extent of the police power has been so recently investigated by this court that we deem it unnecessary to do more than refer to the cases. *Town of Farmville v. Walker*, 43 S. E. 558, 101 Va. —; *City of Danville v. Hatcher* (just decided by this court) 101 Va. —, 44 S. E. 723.

It is manifest upon the face of the ordinance in question that it was passed in the exercise of the police power of the city, and that its sole object was to secure to the people of Norfolk pure and unadulterated milk. It is matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and of the young; that through the agency of impure milk the germs of many diseases are disseminated; and, even where there is the absence of any dele-

terious impurity or the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious, and its sale in its least injurious aspect is a fraud upon the community. Against such practices it is the duty of the constituted authorities to protect the communities under their control. The ordinance in question is not extraterritorial in its effect. It is not intended to operate beyond the limits of the city of Norfolk. It only touches those who come within the limits of the city to dispose of their milk.

This subject was considered in the case of *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399. In that case the objection was made "that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extraterritorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point.

"The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine it does or does not contain germs of any contagious or infectious disease, it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits, provided for by this ordinance, applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

We do not think there is any merit in the first contention.

The city of Norfolk has no power to impose any tax, fine, or penalty on persons

selling their own farm and domestic products in contravention of the act of assembly of March, 1896, already quoted. The ordinance of the city under consideration does not, in our judgment, levy a tax or impose a fine or penalty within the purview of that act. We are of opinion that it was not the purpose of the Legislature in that act to impose any restriction upon the city in the exercise of the police power delegated to it for the protection of the health of its citizens; and, unless plainly required so to do, we should be indisposed to adopt a construction which would render the city powerless to protect the health of its citizens from the sale of impure or adulterated milk. The means adopted seem to us to be reasonable. It was necessary to the end in view that there should be an inspector, that he should have the power to take samples of the milk and have them analyzed, and his duties involved expenses which it was proper that those engaged in the sale of milk should bear. A license from the inspector was evidence to the community that they could with safety purchase milk from the dealer to whom it was issued. He who is licensed should not complain, because he derives a direct and important benefit from it, for which he is required to pay a reasonable compensation. The dealer discovered in improper practices in the effort to foist upon the community milk unfit for use has no right to complain if he has been detected in such practices. What the dealers are required to pay by the ordinance is not for purposes of revenue, and is not a tax, but is an inspection fee, designed as a compensation for the service rendered.

The Supreme Court of the United States is jealous to guard against any encroachment by the states upon the power of the federal government to regulate commerce, yet it has been held that fees for the sanitary examination of vessels under the quarantine laws of the states, though they may in some degree tend to regulate commerce with foreign nations and among the states, are a valid exercise of the police power.

In *Morgan's Railroad Co. v. Board of Health of Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 80 L. Ed. 237, the court, after discussing the quarantine laws of the state of Louisiana and their various charges for services rendered incident thereto, in answer to the claim that the sums thus exacted were in effect a tonnage tax, forbidden by the Constitution of the United States, and exclusively within the power of Congress to regulate, said: "In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact, it is not a 'tax' within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel, which receives the certificate that declares it free from further quarantine requirements."

Paraphrasing the language of the court in

that case, the city of Norfolk says to the dealer: "If you appear free from objection, you are relieved by the officer's certificate of all responsibility on that subject. For this examination you must pay. The danger comes from you, and, though it may turn out in your case there is no danger, yet, as you belong to a class from which this kind of injury comes, you must pay for the examination which distinguishes you from others of that class."

We are of opinion that the ordinance under investigation does not, and was not designed to, act beyond the limits of the city of Norfolk, but operates only upon those who undertake to sell milk within the jurisdiction of the city.

We are of opinion that it is a reasonable exercise of the police power, and that the charges which it imposes are in no sense a tax, penalty, or fine, but for fees for services rendered; and it is therefore not repugnant to the act of assembly relied upon by defendant in error.

The judgment of the circuit court must be reversed, and this court will enter such judgment as the circuit court should have entered.

GARDWELL, J., absent.

(101 Va. 423)

**NORFOLK & A. TERMINAL CO. v. MORRIS' ADM'X.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**TRIAL—RECEPTION OF EVIDENCE—STREET RAILWAYS—NEGLIGENCE—CONFLICTING EVIDENCE.**

1. The order in which evidence is introduced is a matter largely in the discretion of the trial court, and its judgment will not be reversed because evidence proper in chief was introduced in rebuttal.

2. It is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars.

3. Where the jury is properly instructed, its verdict upon conflicting evidence will not be disturbed.

Error to Law and Chancery Court of City of Norfolk.

Action by the administratrix of Morris against the Norfolk & Atlantic Terminal Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The third instruction given by the court is as follows: "The court further instructs the jury that it is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars; and if they believe from the evidence that the defendant company started

its car when the decedent, Robert Morris, was lawfully entering the said car, and before he could get into a place of safety thereon, and that the fact that said decedent was so entering said car and had not gotten to a place of safety thereon at the time it was started was known to said defendant or its servants, or could have been known to them by the exercise of the greatest care, and that his death was caused by the failure of said defendant to exercise such care, then they should find for the plaintiff, unless they should believe from the evidence that said Morris was guilty of negligence which contributed to the injury."

Harry L. Lowenberg, for plaintiff in error.  
Green, Withers & Green, for defendant in error.

KEITH, P. Morris' administratrix sued the Norfolk & Atlantic Terminal Company to recover damages for the death of her intestate, which it is alleged was caused by the negligence of the defendant company. There was a verdict and judgment against the company, to which, upon its petition, a writ of error was awarded.

The first error assigned is to the ruling of the trial court under the following circumstances:

The defendant company, to maintain the issue upon its part, introduced George O. Reid, who, having been examined in chief, upon cross-examination by plaintiff's counsel was asked the following question: "Did this car give any signal before it started?" Defendant objected to this question on the ground that it referred to a matter not testified to by witness on direct examination, whereupon counsel for plaintiff said they would make witness their own. Defendant then objected on the ground that it was not the "proper time for the introduction of other witnesses on behalf of plaintiff, as defendant was not through with its witnesses, and that in no event could plaintiff introduce other witnesses to testify except in rebuttal." These objections were overruled, and the witness was permitted to answer the question.

This is no ground for reversal. In *Flick v. Commonwealth*, 97 Va. 766, 34 S. E. 39, it was held that the order in which evidence is introduced is a matter largely in the discretion of the trial court, for which this court will not reverse the judgment of the trial court save in very exceptional cases. It will not reverse merely because evidence proper in chief was introduced in rebuttal.

The second bill of exceptions is to the action of the court in granting certain instructions asked by the plaintiff and in refusing those asked by the defendant.

The petition of plaintiff in error in its assignment of error with respect to the instructions makes specific objection only to the second and third of those given by the

court, and refers in general terms to the sixth instruction asked for by the defendant as stating the law correctly. The instructions given to the jury will appear in the report of the case. They involve no principle that has not been time and again dealt with by this court, and we do not deem it necessary to advert to them further than to say that they fairly and correctly state the law of the case in every aspect presented by the evidence.

The sixth instruction asked for by the defendant company above referred to is in the following words:

"The defendant company was bound to have its cars stop a reasonable time at its Sewell Point terminus to allow passengers to get on the same; but, if its cars did so stop, it was not bound to look after the movement of all of its passengers and of said R. R. Morris, but that said passengers and said R. R. Morris were presumed by the law to take care of themselves and avail themselves of the reasonable opportunity to board the cars which was afforded them."

It was not error to refuse this instruction. It does not correctly state the duty of the defendant company to its passengers in getting on its cars, but the law upon that branch of the subject is well stated in the third instruction given by the court.

The defendant company moved the court to set aside the verdict and grant a new trial, and its refusal to do so constitutes the remaining assignment of error.

The evidence tends to prove the following state of facts: The Norfolk & Atlantic Terminal Company owned and operated a railway line from the city of Norfolk to Sewell's Point. Its terminal at Sewell's Point is at the end of a large pier several hundred feet in length. At the end of its track on this pier, and on the southern side thereof, there is a coal bin. Between the coal bin and the side of a car standing on the track there is a space of about 12 to 18 inches. On the northern side of the track is a warehouse. Between the warehouse and track there is a space of from 12 to 15 feet, from which passengers usually get on board the cars. On the 9th of June, 1901, between 7 and 8 o'clock p. m., a closed motor car, to which was attached an open trail car, stood at this terminus for several minutes, waiting to receive its passengers. There was quite a crowd gathered, seeking to take the train on its return trip to Norfolk. Among them was R. R. Morris, who was thrown from the car when it started and sustained injuries from which he died on the evening of the next day.

There was, as we have said, quite a crowd seeking transportation to Norfolk. There is evidence which strongly tends to prove that the car started without a proper signal, and with an unusual and violent jerk; and the jury, by its verdict, have established as true all that the evidence tended to prove in sup-

port of the verdict. Upon every point of interest in the case there is a conflict of testimony. This is true not only as to all the facts relied upon to establish the negligence of the company, but it is equally true with respect to evidence which tends to prove contributory negligence of the plaintiff's intestate.

It is claimed on the part of the company that the cars were filled to overflowing; that Morris was warned not to attempt to board the cars, and that when he had done so he was ordered to get off. But here we are again confronted with a conflict of the evidence. It is true that the crowd was great and pressing, but it is impossible for the court to say under the circumstances of this case that it was contributory negligence for Morris to get upon it. All that this court can do in such a case is to see that the jury is properly instructed, and that the testimony, considered as upon a demurrer to the evidence, is sufficient to support the verdict. With this our duty ends, and the law leaves the protection of the litigant to the jury under the supervision of the trial court.

It may be thought that we have dealt somewhat summarily with this case, but there is nothing of novelty in the law which it involves, and a discussion of the facts would be unprofitable.

The judgment is affirmed.

(101 Va. 414)

**JOHNSON v. COLLEY et al.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**GIFTS CAUSA MORTIS—WHAT CONSTITUTE—TITLE—DELIVERY.**

1. The essential attributes of a gift causa mortis are: (1) It must be of personal property; (2) the gift must be made in the last illness of the donor, while under the apprehension of death as imminent, and subject to the implied condition that if the donor recover from the illness, or if the donee die first, the gift shall be void; and (3) possession of the property given must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee.

2. The title to every gift causa mortis must vest in the donee at the time of the gift, subject to the conditions subsequent that it may be revoked by the donor during life, and that it will be defeated by operation of law if the donor should recover from the illness which induced the gift or should survive the donee. It becomes absolute only at the donor's death.

3. The expressions of a donor "if I die," or "if anything happen to me," are but the expressions of the condition attached by implication of law to every gift causa mortis.

4. Where delivery is made to a third person for the use of the intended donee, the person to whom the delivery is made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as agent of the donor.

Appeal from Circuit Court, Goochland County.

Bill by Libby Johnson, by her next friend, against Colley and others. Decree for defendants, and plaintiff appeals. Reversed.

A. K. & D. H. Leake, for appellant. L. O. Haden and A. A. Gray, for appellees.

**HARRISON, J.** The question presented by this record is the validity of an alleged gift causa mortis. The facts are few, simple, and uncontradicted.

It appears that Joseph Newton Johnson, a bachelor advanced in life, lived in the county of Goochland in comfortable circumstances, being the owner of valuable real and personal property. The only persons living with him at the time of his death and for some time prior thereto were Lizzie Johnson, a negro woman, and her two illegitimate children, one of whom was Libby Carter Johnson, a little girl about 11 years of age, who, by her next friend and guardian ad litem, is the appellant here. These persons, Lizzie Johnson and her two children, attended to the domestic affairs of Joseph Newton Johnson, doing his cooking and washing, and waiting on him generally. It appears that the deceased was warmly attached to the appellant, saying that "he thought as much of her as if she were his own dear child, and that he would provide for her well at his death." The evidence is abundant that the deceased attempted to accomplish this cherished purpose. In August, 1901, he had prepared by his friend and neighbor George P. Cowherd, the treasurer of the county, a will by which he made this child his sole legatee and devisee except to the extent of providing a home for her mother with her. On the day before his death he sent for his friend Mr. Cowherd, and had him read over the will prepared in August, 1901, which had not been executed. After reading the paper, Cowherd asked him if he wished any changes made. He replied that he did not, that the will was as he wanted it. He then asked that Marcus Smith be called in, and that he and Cowherd would witness the will. Cowherd suggested that, as he had been named as executor, some one else had better act as witness. Thus the execution of the will was temporarily postponed. As Cowherd was leaving, the room, the deceased handed him a bundle of money, with the injunction that, if he died, or anything happened to him, Cowherd must give it to the little colored girl, Libby Carter Johnson, and see that she got it. Mr. Cowherd then left the room with the money in his possession, and did not again see the deceased, who died the next day, without having perfected the execution of the will which had been prepared in accordance with his wishes.

After the death of Johnson, the money placed in the hands of Cowherd for the appellant was counted in the presence of witnesses, and found to amount to the sum of \$1,758.43, and then deposited in bank by Cowherd for safe

keeping, until he should be advised as to its proper disposition.

Briefly stated, the essential attributes of a gift *causa mortis* are: (1) It must be of personal property; (2) the gift must be made in the last illness of the donor, while under the apprehension of death as imminent, and subject to the implied condition that if the donor recover of the illness, or if the donee die first, the gift shall be void; and (3) possession of the property given must be delivered at the time of the gift to the donee, or to some one for him, and the gift must be accepted by the donee.

These propositions are so well established that citation of authority is not necessary in support of them.

In the case at bar the factum of the gift is clearly established. It is also indisputably shown that the gift was of personal property, and that it was made during the last illness of the donor, and under the apprehension of death as imminent, the donor having died of his then existing disorder the following day.

It is contended that the delivery of the package of money to Cowherd was not an absolute surrender of dominion and control over the property; that it was not a complete transfer of present title and possession to the donee; that the gift was testamentary in character, and therefore void.

By "testamentary" is meant that no title whatever was to vest in the donee until the donor's death; that thus the gift was in the nature of a testament, and, not being executed in the mode prescribed by the statute of wills, it was inoperative.

The title to every gift *causa mortis* must vest in the donee at the time of the gift. It vests, however, subject to certain conditions subsequent. The donor may revoke the gift during his life, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee. If it is not revoked or defeated by operation of law, it becomes absolute at the donor's death, but not until then. 3 Minor's Inst. p. 606; 2 Kent, 444; 3 Redfield on Wills (2d Ed.) p. 322, etc.; 1 Story's Eq. § 606; 3 Pom. Eq. § 1146.

Subject to these conditions, which are incident to every gift *causa mortis*, and may arise to defeat the title vested in the donee, there was certainly a delivery of the package of money to George P. Cowherd, who took complete physical possession of it, and at once removed it from the house of the donor to his own home for safe-keeping. As already seen, the donor had the right to revoke the gift, or it may have been defeated, in the manner indicated, by operation of law, but apart from these conditions, to which the gift was subject, it is difficult to perceive what control the donor could have exercised over current money in the hands of another at some distance from his dying bed. From the time of the delivery until the death of the donor the money was in the exclusive

possession and control of Cowherd, the donor having transferred to the donee a present title to the inchoate, imperfect, and defeasible interest contemplated by every gift *causa mortis*.

It is insisted that the language of the donor, "if I die, or anything happen to me," which accompanied the delivery of the money, was a condition attached to the gift that it was not to take effect until the donor's death, and shows that a testamentary disposition was intended, and not a gift *causa mortis*. The language used by the donor is but the expression of the condition attached by implication of law to every gift *causa mortis*—that it does not take effect absolutely and irrevocably except in case of the death of the donor. It is not necessary that the donor should express the condition, but, if he does so, it tends to make plain the character of the gift, rather than to cast doubt upon it. So far as we have had access to the authorities, they are practically unanimous in holding that the language "if I die," when used by the donor in making the gift, is but an inference of law from the circumstances, and does not impair the gift. Wells v. Tucker, 3 Bin. 370; Snellgrove v. Bailey, 3 Atk. 214; Notes to Ward v. Turner, 1 Lead. Cas. in Eq. p. 1222; Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

The language "if anything happen to me" was but another mode of expressing the donor's apprehension of death, and was not intended to annex some condition other than death to the gift. Under the circumstances in which the words were employed, they commonly mean "if I die," their use being repetition, adding nothing to the last-mentioned expression. Thomas v. Lewis, supra; Shackelford v. Brown, 89 Mo. 546, 1 S. W. 390; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313. In the last-mentioned case Judge Peckham, in delivering the opinion of the court, referring to the words of the gift, said: "The declaration of the donor that his wife should keep the assignment, and not hand it over to the donee till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law as to the gift, whether the declaration was or was not made. Clearly, he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void."

The case of Basket v. Hassell, 107 U. S. 622, 2 Sup. Ct. 415, 27 L. Ed. 500, is much relied on in support of the contention that the gift in question was testamentary in character, but we fail to appreciate its pertinency as authority. The facts are wholly different, and the case is clearly distinguishable from the case under consideration. Chaney held a bank certificate of deposit payable to his order or demand. During his last illness he indorsed the certificate as follows: "Pay to Martin Basket, of Henderson,

Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself." He delivered the certificate thus indorsed to Basket, and afterwards died. It was held that this was not a valid gift causa mortis of the money represented by the certificate. The decision turned on the construction and legal effect of the indorsement, "Pay to Martin Basket; to no one else; then not till my death." It was held under the restrictive terms of this indorsement the title to the property did not vest in Basket at the time of the gift, subject to be divested by revocation or by operation of law during the donor's life, but by the express terms of the assignment no title was to vest until the death of the donor. That being a disposition of property to take effect only after the death of the donor, it came within the ordinary definition of a will, and, not being executed in conformity with the law regulating testamentary dispositions of property, it was inoperative.

We will not prolong this opinion to review in detail several other cases relied on by the appellees. They have been fully considered, and are not regarded as at all affecting the soundness of the conclusion reached in the case at bar.

Judge Lewis spoke for this court in *Yancey v. Field*, 85 Va. 756, 8 S. E. 721, and he has demonstrated the inaptness of that case as authority for this in an opinion filed by him in the case of *Thomas v. Lewis*, supra.

It is further contended that George P. Cowherd was merely the agent of the donor to deliver the package of money to the appellant after the donor's death; that the agency ceased with the death of the donor; and that Cowherd was left without authority to act or carry out the instructions of his principal with respect to the money placed in his hands. Delivery may be made to a third person under such circumstances as to create an agency merely; as where the donor retains dominion or control over the thing given. If, however, the delivery is made to a third person for the use of the donee, or under such circumstances as indicate that the donor relinquishes all right to or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained.

Where one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such a delivery to a third person for the use of the intended donee as he is then capable of making considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as the agent of the donor. *Wells v. Tucker*, 3 Bin. 370; *Deval v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; *Shackleford v. Brown*,

89 Mo. 546, 1 S. W. 390; *Sessions v. Mosely*, 4 Cush. 87; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; 3 Minor's Insts. p. 603; *Roper on Legacies*, vol. 1, p. 5; 2 Schouler, Pers. Prop. 1645.

In the case at bar the object of the donor's bounty was a child of tender years. He was a man of intelligence and business experience, and doubtless knew that this child was too young to be intrusted with the large sum of money he desired to give her, and for this reason he turned to his friend and adviser, in whom he appears to have had great confidence, and placed the money in his hands as the surest means of securing the same for the use and benefit of this little child upon whom his last earthly solicitude was lavished. There being no countervailing circumstances, one who thus receives property for another must be held to be the trustee of the intended donee, and not the agent, merely, of the donor.

We are not unmindful of the great danger of fraud in this sort of gift, and that courts cannot be too cautious in requiring clear proof of the transaction. Nor are we prepared to dispute the wisdom of Lord Eldon's observation that "it would be quite as well if this donation causa mortis was struck out of our law altogether." So long, however, as the law remains unchanged by competent authority, imbedded as it is in our jurisprudence, and sanctioned by the experience of centuries, the courts must give it effect in cases like this, where the evidence is clear and convincing.

For these reasons the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

(101 Va. 523)

#### CITY OF DANVILLE v. HATCHER.

(Supreme Court of Appeals of Virginia. June 11, 1903.)

#### INTOXICATING LIQUORS—REGULATION—POLICE POWER—MUNICIPAL CORPORATIONS—LICENSE—CONSTITUTIONAL LAW.

1. The regulation of the sale of intoxicating liquors is wholly within the police power of the state, and the traffic is not one of the privileges or immunities of citizenship guaranteed and protected by the United States Constitution or the fourteenth amendment.

2. The courts have nothing to do with the question of whether or not legislation is wise and proper. The only question they have to deal with is one of power under the Constitutions of the state and the United States.

3. In the absence of constitutional restrictions, the Legislature may invest municipal corporations with the police power of the state in whole or in part.

4. The power of a court to declare an ordinance unreasonable, and therefore void, is restricted to cases in which the Legislature has enacted nothing upon the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed

[1. See Constitutional Law, vol. 10, Cent. Dig. § 651.

incidental power of the corporation merely, and no such power exists where the municipal corporation is authorized to pass ordinances of a specific and defined character.

5. When a city council is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient.

6. The fact that charter powers given a city to regulate the sale of intoxicating liquors are found in a section giving power to the city to grant or refuse licenses to insurance companies and others, does not render such provision void, though the provision in respect to the insurance companies and other business is void.

7. Where a city charter gives it the power to wholly prohibit the sale of intoxicating liquors or to license it under such regulations as the council may prescribe, the only limitation on such grant is its exercise in good faith.

Appeal from Corporation Court of Danville.

Bill by one Hatcher against the city of Danville. Decree for plaintiff, and defendant appeals. Reversed.

Peatross & Harris, for appellant. Withers & Green, for appellee.

WHITTLE, J. This appeal involves the validity of certain ordinances adopted by the city of Danville for the regulation of the retail whisky traffic of that city.

The case made by appellee in his bill is that he had been a retail liquor dealer in the city of Danville, and is the owner of considerable property, valuable only in that business, consisting of a stock of liquors and wines, and certain fixtures, mirrors, bar counters, and other usual appurtenances of a retail liquor store; and also of a lease on a building for an indefinite period, in which his bar fixtures have been erected for the conduct of his business. That it had been his intention to apply for license for the fiscal year commencing May 1, 1902, but that he is deterred from doing so by a threat on the part of the city authorities to enforce against him certain illegal and unreasonable ordinances, which, if carried out, would destroy his business, and render valueless his property.

The substance of the ordinances assailed is: (1) That every barroom, saloon, store, or other place licensed, used, or kept for the sale of wine, ardent spirits, malt liquors, or other intoxicating drinks in the city shall be closed at 10 o'clock p. m., and remained closed until 5 o'clock a. m. the following day; and the ordinance prohibits the sale or disposition of those articles between the hours named.

After the institution of this suit the city council amended the ordinance by substituting for the hours indicated 7 o'clock p. m. and 6 o'clock a. m. The ordinance, as amended, is made the subject of complaint by supplemental bill.

(2) That barkeepers and all persons who are licensed to sell wine, etc., in the city shall, during the time they are required by law to keep their places of business closed, remove all screens and obstructions to view from the aisles, passageways, etc., within

their respective places of business, and shall be required to keep the same lighted. The ordinance likewise provides that no person, including the owners or keepers of such barrooms, etc., shall go into or frequent them during the time they are required to be closed, except that they may, on Sunday mornings or other days in which they are required to be closed, enter the same to extinguish the light, and on the evening of such days enter to relight the same.

(3) The license tax is fixed at \$500, and the licensees are required to remove all screens, doors, shaded windows, curtains, and obstructions to a full view of their places of business day and night; also that all bars shall be placed at a distance not further than 12 feet from the door. It is provided that violations of these several ordinances shall be punished by fine.

The bill further charges that the ordinances are unreasonable and oppressive, and were passed by the council without authority, for the purpose of harassing complainant, and forcing him to unreasonable expenditures of money, and depriving him of the lawful exercise of his personal rights; and its prayer is that they be declared null and void, and that the city be enjoined from their enforcement.

The city, by its answer, maintains that it has full and complete power under its charter to enact the ordinances complained of, and to refuse licenses to sell liquor altogether. It likewise denies that the ordinances were passed for the purpose and with the improper motive ascribed to it.

The trial court granted the injunction prayed for, and at the hearing perpetuated the same, except as to the ordinances requiring barrooms, etc., to be closed from 10 o'clock p. m. until 5 o'clock a. m., and imposing a license of \$500.

From that decree the city appealed.

In order to arrive at a proper solution of the question involved in this controversy it is needful to inquire:

(1) As to the power of the state with respect to intoxicating liquors; and (2) to what extent it has conferred that power on the council of the city of Danville.

The latest deliverance by this court in relation to the first branch of the inquiry will be found in the case of Council of the Town of Farmville v. Walker (decided at the March term, 1903) 43 S. E. 558.

It is there said: "That the regulation of the sale of intoxicating liquors is within the police power of the state is established, if not literally, by all the cases where the subject has been considered; certainly by an overwhelming array of authority."

It has been repeatedly decided that the subject is wholly within the police power of the Legislature, and that the traffic is not one of the privileges or immunities of citizenship guaranteed and protected by the United States Constitution or the fourteenth amendment thereto.



It may be entirely prohibited; and its regulation, when permitted, is absolutely within the discretion of the several states. These principles are sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the fourteenth amendment. *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Giozza v. Tiernan*, 143 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

In *Kidd v. Pearson* it was held that a state has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits, to prohibit all sale and traffic in them in the state, to inflict penalties for their manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes.

It is further declared that the right of a state to exercise the foregoing powers is no longer an open question before that court.

The distinction between the power of a state to levy taxes for revenue, and, in the exercise of its police power, to exact a license tax for the privilege of carrying on the business of a retail liquor dealer, is strikingly illustrated by the cases of *Royall v. State of Virginia*, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735, and *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304.

In the former case a Virginia statute requiring lawyers to pay a license tax for the privilege of practicing law, in money and not in coupons, was declared to be a violation of the contract of the state to receive coupons in payment of all "taxes, debts, dues and demands due the state," and therefore void; while in the latter the validity of a statute which required a license for the sale of intoxicating liquors to be paid in money, and not in coupons, was sustained.

In the case of *Huckless v. Childrey* the court said: "It is conceded that the state might, in her discretion, absolutely abolish the sale of spirituous liquors, or prescribe on what terms they shall be sold. In this view, there does not seem to be any violation of the obligation of the state in requiring the tax which is imposed to be paid in any manner whatever—in gold, in silver, in bank notes, or in diamonds.

"The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage.

"License taxes imposed upon such pursuits and professions are imposed purely for the

purpose of revenue, and not for the purpose of regulating the traffic or the pursuit."

There are also numerous decisions of courts of last resort of the states which uphold the authority of the several states in the exercise of their police power to absolutely control the liquor traffic.

Judge Cooley, in discussing the legislative power over the subject, uses the following language: "Perhaps there is no instance in which the power of the Legislature to make such regulations as may destroy the value of property without compensation to the owner appears in a more striking light than in the case of those statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the Legislature then steps in, and by an enactment based on general reasons of public utility annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purposes of sale becomes a criminal offense; and without any change whatever in his conduct or employment the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business, which that moment was lawful, becomes the subject of legal proceedings, if the statutes shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, the reasons address themselves exclusively to the legislative wisdom." *Cooley, Const. Lim.* 120.

"The courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. The Legislature of the state has plenary power, except where it is restricted by the Constitution of the state or of the United States. If the statute, the validity of which is attacked, is not in conflict with the state or federal Constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation." *Prison Ass'n v. Ashby*, 93 Va. 670, 25 S. E. 894.

A further illustration of the absolute power of the Legislature over the sale of intoxicating liquors is furnished by the decision of this court in the case of the *Council of Town of Farmville v. Walker*, *supra*, in which "An act to establish a dispensary for the sale of intoxicating liquors in Farmville Magisterial District, Prince Edward county, Virginia; to prohibit all persons, firms, or corporations to sell, barter or exchange such liquors in said district, and to repeal all laws in conflict with this act, so far as they apply to the said magisterial district," was declared to be constitutional.

It is unnecessary to multiply authorities in support of the first proposition. It is abund-

dantly sustained by the great weight of authority, state and federal.

It remains, in the second place, to consider to what extent the Legislature has conferred on the city council of Danville power to deal with the subject of selling by retail intoxicating liquors within the territorial limits of the city.

Quoting from the opinion of the trial court, the accuracy of which an inspection of the city charter verifies, it appears that "the powers to be deduced from these several citations can be condensed into what may be found in sections 2 and 4 of chapter 7, which give to the council the right to 'grant or refuse licenses to all sellers of wine or spirituous or fermented liquors' 'under such regulations as it may prescribe.'"

In the absence of constitutional restrictions, it is competent for the Legislature to confer its police power upon municipal corporations in such measure as it deems expedient. It cannot, of course, bestow greater power than the state itself possesses; and it must keep within the limitations, if any, imposed by the organic law. Subject to these restraints, it is within the province of the Legislature to invest such corporations with the police power of the state in whole or in part.

The language in which the grant of power is couched in this case is unmistakable, and too plain to admit of elucidation. It leaves it absolutely within the control of the council to determine whether they will wholly suppress or grant the privilege, subject to such restrictions as they may see fit to impose.

Within the sphere of their delegated powers, municipal corporations have as absolute control as the General Assembly would have if it had never delegated such powers and exercised them by its own enactments, and the courts can no more interfere with the acts of the one than the other. To permit such interference would be to deny the existence of a discretionary power, and transfer its exercise from one co-ordinate branch of the government to another. *Taylor v. Carondelet*, 22 Mo. 110; *Heland v. Lowell*, 3 Allen, 408, 81 Am. Dec. 670; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Mason v. City of Shawneetown*, 77 Ill. 533; *State v. Clarke*, 54 Mo. 17, 36, 14 Am. Rep. 471.

In *Schwuchow v. City of Chicago*, 68 Ill. 444, it was held that, where the Legislature confers the power to suppress groceries where liquor is sold, or to regulate, license, and restrain the same, it is a matter purely discretionary whether or not the city will wholly prohibit its sale or license and regulate the traffic. The grant of such powers carries with it authority to allow the privilege on such terms and conditions as the council may see fit to impose.

Where absolute control over the whole subject of granting licenses is conferred, the

city may impose any other conditions calculated to protect the community, preserve order, and suppress vice, such as the closing of the grocery on election days, holidays, and Sundays, or at a particular hour each evening, etc. Such powers grow out of the fact that it is discretionary to prohibit the sale, or license it on such terms as the city may choose. In that case it is said: "Restrictions upon the traffic in spirituous liquors are not like such as restrict the ordinary avocations of life which advance human happiness, or trade and commerce, that neither produces immorality, suffering, nor want. This business is, on principle, within the police powers of the state, and restrictions which may rightfully be imposed on it might be obnoxious as an illegal restraint of trade when applied to other pursuits. The control of the liquor traffic being a police regulation, no one can acquire such a vested right in it by a license as that it may not be resumed when the interests of society require it."

Beach, in his work on Public Corporations, at section 512g, quotes with approbation what was said by Niblack, J., in an able opinion delivered in a recent Indiana case:

"An ordinance cannot be held to be unreasonable which is expressly authorized by the Legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely." *Coal-Float v. Jeffersonville*, 112 Ind. 19, 13 N. E. 117. The author, in the same section, proceeds as follows: "So, where the Legislature expressly authorized the municipality to pass any certain ordinance, that ordinance will be upheld, regardless of the opinion of the court as to its reasonableness or unreasonableness. This principle was fully discussed in a celebrated and extreme case in Missouri. The charter of the city of St. Louis authorized the city to regulate bawdy houses. The court construed this provision to allow the passage of an ordinance licensing bawdy houses, and in discussing the reasonableness of such an ordinance it was said: 'It is naked assumption to say that any matter allowed by the Legislature is against public policy. The best indications of public policy are to be found in the enactments of the Legislature. To say that such a law is of unusual tendency is disrespectful to the Legislature, who no doubt designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern.'" *State v. Clarke*, supra.

Dillon distinguishes ordinances which are from those which are not amenable to attack in the courts for unreasonableness, as follows:

"Where the Legislature in terms confers

upon a municipal corporation the power to pass ordinances of a specific and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance thus passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable, or against sound policy. But where power to legislate on a certain subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 1 Dillon on Mun. Cor. § 328.

It is insisted on behalf of appellee that the provisions in the charter of the city of Danville, under consideration, fall within the doctrine laid down in the foregoing section with respect to general grants of power.

If the premise were correct, the authorities relied on (which have been carefully considered, but which it is not deemed necessary to specifically review) would sustain the decree appealed from.

But it is clear that such is not the case. The general grant of power adverted to is placed precisely on the same footing with the implied or incidental powers of a municipality. The legal intentment of such grant is that the authority conferred by it shall be employed reasonably. If exercised unreasonably, it is an abuse of the confidence reposed, and is in contravention of the implied limitation on the powers conferred, and may be controlled by the courts.

But these principles have no application where the Legislature, as in the present case, has invested the city council with all its police power over the subject. Under such conditions no case has been found which warrants an interference by the courts with the discretion of the council, exercised in good faith, for the general welfare of the inhabitants of the city.

As remarked, courts interfere with municipal legislation on the theory that the council have exceeded or abused their authority; but that cannot be predicated of the acts of the council in this instance under a grant which devolves upon them as wide discretion over licensing and controlling the sale of intoxicants within the territorial limits of the city of Danville as is possessed by the Legislature itself.

It would seem paradoxical to hold that the ordinances of a city council, passed in good faith, attaching conditions in future to the business of selling intoxicating liquors can be assailed for unreasonableness under a charter which empowers the council to wholly prohibit the business, or to license it under such regulations as they may prescribe.

The only limitation on such a grant of power is that it must be exercised in good faith.

In the ultimate analysis it is a question of power, and the language of the charter in question plainly indicates a purpose to invest the city council with absolute control over the sale of liquor within their territorial jurisdiction.

When a city council "is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient." *Beers v. Dalles City*, 16 Or. 334, 18 Pac. 835.

"Courts of equity cannot interfere by injunction with the exercise in good faith by municipal corporations of discretionary powers conferred upon them by law." *Town of Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *R. F. & P. R. Co. v. Richmond*, 26 Grat. 83; *Id.*, 96 U. S. 528, 24 L. Ed. 734; *Norfolk v. Norfolk Landmark*, 95 Va. 564, 28 S. E. 959; *Woodall v. City of Lynchburg*, 100 Va. 318, 40 S. E. 915.

"Courts cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power."

There is no conflict between the provisions of the charter under review and those which invest the corporation court with jurisdiction to grant licenses to liquor dealers.

The council has no power to grant license to individual applicants. That is the province of the court.

Nor has the court power to adopt the policy of granting or refusing license to sell intoxicating liquors within the city limits. That is the province of the council.

If the policy of sanctioning the business be adopted, or, rather, if it be not prohibited, by the council, then the individual applicant must obtain license from the court in the manner and upon the terms prescribed by law.

Again, it is contended that the charter powers referred to occur in a chapter entitled "Taxes, Taxation," etc., and is found in a section which confers power on the city "to grant or refuse license" to insurance companies and other lawful businesses.

That the collocation of these enactments is incongruous must be allowed. Nevertheless, the fact remains that the provisions in respect to the sale of intoxicating liquors are police regulations, and are not for the sole purpose of raising revenue. They are embraced in a distinct and complete paragraph, are separable, and can be disposed of without disturbing the section so far as it applies to or affects other subjects.

If, therefore, the provision in respect to insurance companies and other businesses is void (as to which no opinion is expressed), the questions involved in this appeal arise out of an independent and disconnected subject-matter, the enactment in regard to which is valid, and, under the authorities, may be sustained. *Trimble v. Commonwealth*, 96 Va.

818, 32 S. E. 786; *Robertson v. Preston*, 97 Va. 293, 33 S. E. 618.

Upon the whole case the court is of opinion that the ordinances the validity of which is drawn in question are within the charter powers of the city council, that they were enacted in good faith, and are valid and binding.

For these reasons the decree appealed from must be reversed, and the court will enter such decree as the lower court ought to have entered, dissolving the injunction, and dismissing the bill, with costs.

CARDWELL, J., absent.

(66 S. C. 256)

### GENTRY v. SOUTHERN RY.

(Supreme Court of South Carolina. May 14, 1903.)

#### INJURY TO EMPLOYE—NONSUIT.

1. Where the only negligence charged in an action for injuries to an employé was the using of a defective sill on the back end of a tender of a locomotive, and there was no evidence from which it could be inferred that the sill was defective, a judgment of nonsuit was proper.

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Gary, Judge.

Action by M. O. Gentry, administrator of John Jackson, against the Southern Railway. From judgment of nonsuit, plaintiff appeals. Affirmed.

Stanyarne Wilson and H. E. De Pass, for appellant. O. P. Sanders, for respondent.

**GARY, A. J.** This is an action for damages alleged to have been sustained through the negligence of the defendant in killing John Jackson on or about the 15th day of January, 1900. The fourth paragraph of the complaint is as follows: "Fourth. That on the aforesaid date, and under the circumstances above mentioned, the defendant was carelessly, negligently, and wrongfully using said locomotive engine, the sill of which on the back end of the tender was so weak and out of repair that when said engine was attempted to be coupled by plaintiff's intestate, John Jackson, as was his duty, to the freight car on said side tracks above mentioned, the said sill broke, thereby causing the bumper, which was attached to the sill, to bend downward and under the tender of the said engine, whereby the said John Jackson, while in the discharge of his duty, as aforesaid, through the negligence, carelessness, and wrongdoing of the said defendant, was crushed between said engine and freight cars, which came together, and his leg was violently mashed and torn, and plaintiff's intestate received such injuries as to cause his death, at the time above mentioned." At the close of the testimony the defendant made a motion for a

nonsuit on the ground that "there is not a syllable of testimony to sustain the allegation of negligence alleged in the complaint that we had a weak, defective sill on that occasion." His honor the presiding judge granted the following order: "On hearing the motion for a nonsuit in the above-stated cause, made on the ground that the evidence introduced by plaintiff was not sufficient to sustain the allegations of the complaint, and did not show that the defendant was negligent in the particular complained of. After hearing argument of counsel, it is ordered and adjudged that the motion be granted, the plaintiff be nonsuited."

The plaintiff appealed upon the following assignments of error:

"1. In granting the motion for nonsuit, holding that plaintiff had not introduced evidence of negligence on the part of the defendant; whereas plaintiff did establish by the evidence the negligence alleged in the complaint, to wit: (1) In having a defective and weak sill on the end of the tender, which broke while the deceased was attempting to couple it, thereby causing him to be crushed between the engine tender and the freight car; and (2) in carelessly, negligently, and wrongfully using such engine with such sill, the testimony showing that the accident was necessarily due to one of two things, as alleged in the complaint: First, either that the sill was totally unfit for use, as shown by its giving way; or, second, that it was subjected to undue and excessive force by the negligent 'using or management of the engine,' the decided weight of the evidence being that it was the former of the two alternatives, as the testimony was that there was nothing unusual in the rate of speed of the engine in making the coupling.

"2. In taking from the jury the determination of the question of fact whether it was probable, or even possible, under the testimony, for the accident, the details of which were proven, to have occurred otherwise than in the manner and by the negligence alleged in the complaint; and in holding, in effect, that it was indispensable that defendant should, in effort to recover, prove positively and directly, and not by inference or circumstance, that the sill was weak and out of repair."

It will not be necessary to consider the exceptions in detail, as the practical question presented by them is whether there was any evidence tending to sustain the allegations of negligence. Our construction of the complaint is that the only act of negligence specified as causing the injury was the defective sill. After carefully considering the testimony, we have failed to discover any facts from which it might be inferred that the sill was defective. It cannot be successfully contended that the sill was defective from the mere fact that it gave way while the train was being operated in the usual or ordinary manner.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. (dissenting). As there was evidence tending to show that the engine was operated with ordinary care, and as the evidence further tended to show that immediately after the injury the sill of the car with which the engine collided was split, and the bumper bent under, with broken knuckle, it was possible for the jury to have drawn the inference that such defects in sill and bumper existed before the injury, and caused the same, since such results do not usually result from collision with engines operated with due care. Under such circumstances, it ought to have been submitted to the jury to determine the issue of defective appliances as the cause of the injury, and nonsuit was improper.

(66 S. C. 171)

GREIG & JONES v. RICE et al.

(Supreme Court of South Carolina. May 22, 1903.)

FRAUDULENT CONVEYANCE—EVIDENCE—  
TRIAL—ISSUES—SUBROGATION.

1. Where a debtor, after attachment and suit brought, gave a deed to his brother-in-law, who paid money to him before witnesses at an out of the way place, the execution of a deed in the absence of grantee, before he had agreed to its terms, and investment by the grantor of the purchase money in property for the wife of the grantor, without payment of his creditors, with knowledge by the grantee of the insolvent condition of the grantor, show fraud as to creditors on the part of the grantor.

2. Where both legal and equitable issues arise in a case, the trial judge may properly first try whatever issue he believes will dispose of the controversy.

3. A fraudulent grantee is not subrogated to the rights of lienholders whom he paid out of the purchase money, though taking assignments from them of their liens.

Appeal from Common Pleas Circuit Court of Bamberg County; Buchanan, Judge.

Action by Greig & Jones against William Brooks Rice, J. B. Gilliam, H. B. Grimes, A. J. Bennett, Fred Summers, and James N. Wood. From judgment for plaintiffs, defendants appeal. Affirmed.

John R. Bellinger and Jas. F. Izlar, for appellants. Bellinger & Townsend, for respondents.

POPE, C. J. This extract taken from the case on appeal will be here considered as being a history of the action itself: "This action was commenced by service of the summons and complaint July 31, 1899, and the issues arising under the first cause of action were tried at the April, 1900, term of the court of common pleas for Bamberg county, before the Honorable George W. Gage, presiding judge, who rendered a decree in favor of the defendant, and refused the prayer of the complaint. This decree was filed May 10, 1900. From this decree

and judgment entered thereon the plaintiffs appealed to the Supreme Court, and the case was docketed for hearing at the November, 1900, term of the Supreme Court. On the first day of the said term the plaintiffs made a motion in the Supreme Court for an order suspending the said appeal, with leave to the appellants herein to move before the circuit court of common pleas for the county of Bamberg for a new trial upon the ground of after-discovered testimony, which motion was granted by the Supreme Court on the 30th day of November, 1900. At the December term of the circuit court for Bamberg county, the motion for a new trial on the ground of after-discovered testimony was made by the plaintiffs in the court of common pleas for Bamberg county, and granted by Hon. R. C. Watts, presiding judge. Pursuant to this order granting a new trial, the case came on to be heard at the April, 1901, term of said court of common pleas before the Honorable O. W. Buchanan, presiding judge. At the April term of court, 1900, an order of discontinuance of the action as against the defendants Joseph Carroll and Henry Zorn was taken by consent, and they were thus eliminated from the record."

At the hearing before Judge Buchanan, the testimony was taken in open court, being voluminous as offered by both sides to the controversy. Whereupon Judge Buchanan rendered the following decree:

"This is an action brought to set aside a conveyance as fraudulent, and for the possession of the property alleged to have been fraudulently conveyed. This case came on to be tried before Judge Gage, who found, from the evidence produced before him, that the defendant had not been guilty of any purpose to hinder, defeat, or defraud the plaintiffs herein. Upon appeal the Supreme Court sent it back, in order that a motion for a new trial should be made on circuit. This motion was heard before Judge Watts, who, after hearing the evidence produced, and after argument for and against the motion, thinking the newly-discovered evidence material, granted a new trial. It came before me at the April term of the Bamberg court, and the evidence, by agreement, was taken in open court before the judge. Some objection was sought to be made to the alleged improper joinder of causes of action. But if it had been properly and formally made as required by the Code, the cases of *Burch v. Brantley*, 20 S. C. 503, and *McMahan v. Dawkins*, 22 S. C. 320, showed joinder could be made as here set out. Indeed, on page 320 of the latter case, the following is found: "The complaint contained two causes of action—the first to set aside a deed of land for fraud, and the second to recover possession of the land. The one is equitable and the other legal. This, however, is not objectionable under the reformed procedure. In fact, the union of these

two actions in the same complaint has been especially recognized as the proper pleading, because it not only prevents circuity of action, but affords prompt relief.' To the objection that this joinder deprives the defendants of the right of a trial by a jury, there may be replied the language of the same case: 'But when they are thus combined they do not lose their distinctive features and characteristics, nor are the rules heretofore existing as to their trial changed or coalesced. On the contrary, what was equitable before still remains equitable, and what was legal is still legal, and the mode of trial is still preserved. These rules require in this state that the first cause of action should be tried by the judge, and the second by the jury, unless a jury trial was waived.' This court, therefore, is now to decide the equitable issue. The defendants Wood and Rice, against whom fraud is alleged, are residents of Georgia. The lands referred to as fraudulently conveyed are situated in South Carolina. The above parties answered, and the issues are made up. All men are presumed to be honest and faithful in their obligations to society, to speak the truth, and to do no fraud. 'Fraud is odious, and not to be presumed.' If there had been no presumption upon the subject, the reputation heretofore borne by Wood and Rice would cause the investigator to look closely and examine sharply into these charges against them; but if it be recalled that it is the act itself that makes one honest or guilty, and not what people think of it, the burden of a guilty act must fall upon the person who does it, and not upon others. In spite of all these presumptions, it is as well established as evidence can make it that James Wood, being insolvent, for the purpose of hindering, delaying, and defeating the debts of the plaintiffs herein, made the conveyance herein attacked, to his brother-in-law, William Brooks Rice, who knew, or ought to have known, what he was doing when he accepted the deed from Wood (made without his knowledge, if the statement is to be relied upon), before agreement as to the price or payment of money. And it does not make it any less because he refused to agree to reconvey the land to Wood when Wood again got into good circumstances. Nor that he was surprised by it. To hold that Wood and Rice were not acting together presupposes a wonderful mental obfuscation and stupidity. What did Wood mean when he told Jones, practically, that he would see that he did not get the South Carolina lands? For what purpose did Wood and Rice ostentatiously go through the form of counting out that amount of money in the presence of witnesses in that country store, and of having no witnesses in the hotel in Savannah? Truly the wisdom of the Supreme Court in sending this case back, and that of Judge Watts in granting a new trial, is amply vindicated by the evi-

dence here adduced. Can any sane man doubt what Wood intended? Who but an idiot would conclude that Rice did not know what Wood meant? True, they lived about a hundred miles apart, but did that keep them from knowing what concerned the other? Were they not brothers-in-law? Is it not fair to assume that there was the usual correspondence and communication between relatives? They were business men, and not idiots or irresponsibles. I yield to no one a higher idea or estimate of human nature. But because of such an idea or estimate of humanity I will not shut my eyes to the exception when I see it. I do not propose to stultify myself by saying I do not see what is thrust upon me from every standpoint or view point of the case here presented. Who ever expects men who intend to defeat their creditors to put such intention down in writing, and send it to the creditors or advertise it to the world? What might be a badge of fraud in one case might not be evidence of fraud in another case. It is by taking the case and all its parts together, and examining the evidence as other cases are examined, that a decision must be made, and fraud or proper conduct found.

"On the 5th day of August, 1895, Coskery & Davidson began an action against James N. Wood, and an attachment was issued against the lands of James N. Wood and notice of lis pendens filed. The land was attached. On the 10th October, 1895, Greig & Jones, the plaintiffs herein, commenced an action against Jas. N. Wood and B. J. Robertson, copartners in trade under firm name of Wood & Co. and Robertson, Wood & Co., and caused a warrant of attachment to be issued against the lands of James N. Wood, which said lands were attached. The above debt of Coskery & Davidson was for the sum of \$645.85 (judgment). The amount of the judgment recovered by Greig & Jones was \$14,457.42. Now, while the attachment suit of Coskery & Davidson was actually in existence (having been commenced on 5th August, 1895), the defendant James N. Wood conveyed all his visible real estate to his brother-in-law, William Brooks Rice. After the conversation, and probably to effectuate the threat as to the Carolina property mentioned by Wood to Jones, this deed of the same Carolina property, alleged to have been made on the 27th September, 1895, just five days after the commencement of the suit by Greig & Jones, finds its way to the register of mesne conveyance for Barnwell county. It is not clear when it was delivered. In the absence of evidence to the contrary, it is presumed to have been delivered on the day of its date. Afterwards judgment was entered on verdict of jury before Judge Watts for the sum of \$14,457.42. This judgment for Greig & Jones was rendered on 18th March, 1898. The judgment for Coskery & Davidson amounted to \$645.85, and was rendered on

20th day of November, 1897. These lands were advertised by the sheriff, put up and sold, and were bought in by the plaintiffs for the sum of \$350. The parties in possession refused to give possession to plaintiffs. The plaintiffs, having now exhausted their attempts to make their judgment, brought this action. I think there was a valid lien created by Coskery & Davidson attachment, and the sale could be referred to such judgment. The purchaser would stand in the shoes of the interest sold. There is no doubt as to the plaintiffs here being the purchasers. There is no doubt that the execution and judgment are not satisfied. Can there be any doubt that Rice had actual notice of the attachment of Jones & Greig against Wood at the time that he is said to have paid the money to Wood? Will the law not say that Rice had notice of the claim of the plaintiffs herein by reason of the attachment and filing of the lis pendens before he paid the money? I am not at all satisfied that there was any actual delivery of the deed of Wood to Rice until after the attachment of Greig & Jones. The defendants take this burden upon themselves. I am not satisfied that there was such a delivery before the 10th day of October. Hon. S. G. Mayfield says it was signed on 27th September, 1895, under instructions from Wood. Mr. Wood took it off with him. It afterwards came back to Mr. Mayfield on the 14th October, and was by him sent to the register of mesne conveyances for Barnwell county, and was by him recorded. Mr. Jones testified to the conversation with Wood about a month before certain notes (which were to mature October 1st) fell due, or within three weeks before suit was brought, in which he said: 'Mr. Wood told me that he would not pay them; that I couldn't make him pay them. He said that his property in Georgia had been mortgaged and out of his possession, and then I referred to the Carolina property. I told him, "Mr. Wood, that Carolina property is certainly subject to any debt." He said that it was not, and I said, "You will see whether or not it is." Doubtless, from the testimony of Mr. Mayfield, soon after this conversation he sent instructions to have the deed drawn up, leaving the date blank, taking the deed back with him to Savannah or his home. All information and details necessary for the project were given and prepared. The deed was then returned to be delivered or recorded. Rice says the deed was given him by Wood when in Savannah, and was kept by him until the 12th October, when his brother S. P. Rice sent it to Mr. Mayfield to be recorded. When did Wood give it to Rice—a day or so before he returned it to Mr. Mayfield, or immediately upon Mr. Wood's return to Carolina? Wood was evidently determined that the Carolina property should not answer for his debts. This was about all the property he owned at the time. In this connection it is well enough to note that

neither Wood nor Rice considered the trade to be closed and completed, for, if Rice is to be believed, while in Savannah, Wood wanted him to agree to reconvey the lands when his affairs got in a better condition, but he refused to agree to let him redeem them. 'You first say that Mr. Wood first wanted you to take the land, and, when he made this settlement with Greig, Jones & Co., to let him redeem the property?' 'Yes.' 'And you declined to do it?' 'Yes; he said, when he got in a condition.' True, Rice tries to locate the delivery and acceptance of the deed on the 28th or 30th day of September, but this testimony is very unsatisfactory.

"How can Rice, who accepts a deed of land under an attachment lien with the knowledge from Wood that he desired to convey his land to him (Rice) until the Greig & Jones matter is settled, claim to be a bona fide purchaser of such land under these circumstances? Surely a court must be very bold that would hold him to be a bona fide purchaser under such circumstances. Can it be said that at that time he thought Wood was solvent, when Wood was practically asking him to help him defeat his creditors, and offering him a deed of the only lands he had? True, at one time he had been worth, or was thought to have been worth, something like \$75,000. Rice knew Wood was worth no such sum at the time of the talk in Savannah. I do not doubt the testimony of those witnesses who said Wood was at one time reputed to be wealthy. From what I can gather from the testimony, this statement is true. But Wood and Rice both knew Wood was insolvent at this time, and Rice took this land under these circumstances. I need scarcely allude to the payment of the unusual amount of money in \$50 or \$100 bills at Stillson, in the presence of witnesses, when a check or a draft would have sufficed if it was a fair transaction, and to the payment of the money back to Rice by Wood in Savannah, further than to call attention to the signing of some instrument at the Stillson store at the time of the counting out of the money, which instrument has not been fully and properly accounted for in this action. I find, as a matter of fact, that Wood intended to hinder or defeat the claims of these creditors. I find that after telling Mr. Jones, practically, that he would see that the Carolina lands would not be liable for his debt, he instructed Mr. Mayfield to have drawn up the deed which was signed; that before it was signed by him he was told flatly by Mr. Mayfield that he would have nothing to do with drawing or signing a deed that would deprive his clients (Mrs. Willie Wood and her children) of their rights, or serve the effect of defeating their debt. He knew he was insolvent, and was trying to save something from the wreck—knew of the attempt to make the money. He proposed to a near relative to become the custodian of the title

of all his property until his difficulties were safely tided over; actually sells out to his brother-in-law, and realizes every dollar there is in it for himself, and pays nobody except the creditors secured by mortgage on the property; leaves the available proceeds of the sale in the hands of a purchaser, without interest or security, until it can be covered into his wife's name, and that wife the sister of the purchaser. Rice, in my judgment, knew of the whole circumstances. Rice is no ordinary man. He is a man of ability. Rice, of course, knew Wood's property was attached. He knew of Coskery & Davidson's proceedings. He knew of the Peacock, Hunt & Co. claim or mortgage of about \$6,000. He knew Wood was involved with Greig & Jones for a large sum. He is asked by Wood to hold the property from his creditors until he could arrange his affairs—until his difficulties were over. Wood was insolvent, and the plaintiffs' debt is yet unsatisfied. To require more than has been proven in this case would be equivalent to saying that such transactions are entitled to and will receive complete immunity at the hands of the courts. I therefore think this deed was given in violation of the law, and hold, as matter of law, it was intended to hinder and defeat creditors (and the creditors plaintiffs herein), and at the time Rice received the deed he knew of the purpose, and is not a bona fide purchaser of the land, and that it should be set aside.

"Wherefore it is ordered and decreed that the said deed is null and void as against the plaintiffs herein, and is set aside as of no effect, for the reasons hereinbefore set out. This disposes of the equitable issue. The issue for a jury will be tried before a jury."

To which the defendants made the following grounds of appeal, to wit:

"(1) Because his honor the circuit judge erred in finding that at the trial 'some objection was sought to be made to the alleged improper joinder of causes of action,' no such objection having been raised, whereas he should have found that the defendants objected at the trial to the hearing by the court of the equitable issues raised by the first cause of action alleged in the complaint, and insisted that, under the facts alleged in the complaint, the plaintiffs were confined to the second cause of action for the recovery of the possession of real property, and on legal issues raised by the said second cause of action the defendants were entitled to a trial by jury.

"(2) Because his honor the circuit judge erred in holding that the present action and the objection raised at the trial were ruled by the principles laid down in *Burch v. Brantley*, 20 S. C. 503, and *McMahan v. Dawkins*, 22 S. C. 320, and especially by what was said by the court in the latter case, whereas he should have held that the objection raised at the trial was not one as to

the improper joinder of causes of action, but whether or not the plaintiffs, having ignored the deed of conveyance from Wood to Rice of the real property in question as fraudulent and void, and having caused the said real property to be levied upon by the sheriff and sold under the execution issued upon their said judgment, and having at said sheriff's sale become the purchasers of said property, and having paid their bid and taken sheriff's title thereto, were not, under these alleged facts and circumstances, confined to their legal cause of action for the recovery of the possession of real property, and the defendants entitled to a jury trial on the issues raised by the legal cause of action, and that, such being the case, the principles laid down in the cases of *Burch v. Brantley*, *supra*, and *McMahan v. Dawkins*, *supra*, did not apply, and that, under the facts alleged, the objection of the defendants should be sustained, and their motion for a trial by jury should, on the legal cause of action, prevail.

"(3) Because his honor the circuit judge erred in holding that under the facts and circumstances of this case, as set forth in the plaintiffs' complaint, the equitable issues raised by the first cause of action should be first tried by the court, and in refusing to sustain the objections of the defendants, or to allow a trial by jury, as demanded on the legal cause of action stated in the complaint, and in proceeding to first hear and determine the equitable cause of action alleged in the complaint.

"(4) Because his honor the circuit judge erred in holding that the sheriff's sale of the real property in question under the execution issued upon the judgment of the plaintiffs against Wood could be referred to the Coskery & Davidson judgment, by reason of the fact that 'there was a valid lien created by the Coskery & Davidson attachment.'

"(5) Because his honor the circuit judge erred in holding 'that Rice had actual notice of the attachment of Greig & Jones against Wood at the time he is said to have paid the money to Wood,' whereas he should have held that, from all the facts and circumstances, Rice had no such notice, and paid the purchase price of the real property in dispute to Wood, believing that he was getting a valid title thereto, and that there was no lien by way of attachment upon the same, save that of Coskery & Davidson, which was afterwards, and before the attachment of the plaintiffs, discharged by Rice's paying and satisfying the judgment of Coskery & Davidson.

"(6) Because his honor the circuit judge erred in finding that there was no actual delivery of the deed of conveyance from Wood to Rice of the land in dispute before the 10th day of October, 1895, whereas he should have found from the uncontradicted testimony in the cause, and from all the facts and circumstances, that said deed of conveyance was actually delivered, and the purchase price of said land, as agreed on by the parties, paid by



the defendant Rice, before the levy of the attachment in the case of Greig & Jones v. Wood.

"(7) Because his honor the circuit judge erred in holding as follows: 'In this connection [delivery and recording of the deed], it is well enough to note that neither Wood nor Rice considered the trade to be closed and completed, for, if Rice is to be believed, while in Savannah, Wood wanted him to agree to reconvey the lands when his affairs got in better condition, but he refused to agree to let him redeem them. "You first say that Mr. Wood first wanted you to take the land, and, when he made his settlement with Greig & Jones, to let him redeem the property?" "Yes." "And you declined to do it?" "Yes; he said when he got in condition." True, Rice tries to locate the delivery and acceptance of the deed on the 28th or 30th day of September, but this testimony is very unsatisfactory. How can Rice, who accepts a deed of land under an attachment lien with the knowledge from Wood that he desired to convey this land to him [Rice] until the Greig & Jones matter is settled, claim to be a bona fide purchaser of such land under these circumstances? Surely a court must be very bold that would hold him to be a bona fide purchaser under such circumstances. Can it be said that at that time he thought Wood was solvent, when Wood was practically asking him to help him defeat his creditors, and offering him a deed of the only lands he had?' Whereas he should have held from the testimony that the deed from Wood to Rice of the lands in dispute was actually delivered and accepted by Rice on the day that Wood's wife renounced her dower upon the deed in the city of Savannah; that the purchase of the land and the delivery of the deed were without any condition or secret understanding between the parties whatsoever; that at that time Rice had no knowledge of the insolvency of Wood, or of his intent to defeat the debt of the plaintiffs or other of his creditors; that he paid the purchase price agreed, believing that he was getting a good and valid title to said lands, free from all incumbrances save the Cookery & Davidson judgment; that, when he took the deed and paid the purchase price of said lands, he considered the transaction closed and completed; and that Rice, not having notice of the insolvency of Wood, or of any intent on Wood's part to delay, hinder, and defraud his creditors, before accepting the deed and paying the purchase price of the lands, or of any facts calculated to put him (Rice) upon the inquiry, could occupy the position of a bona fide purchaser for value, without notice, and was therefore protected as such purchaser.

"(8) Because his honor the circuit judge erred in holding and deciding that, under the facts and circumstances of this case, Rice could not occupy the position of a bona fide purchaser for valuable consideration without notice, and that he had notice of the insolvency of Wood at the time of the purchase of the

said lands from Wood, and the payment of the purchase price therefor, and of the intent of Wood to defeat and defraud his creditors by conveying away said lands.

"(9) Because his honor the circuit judge erred in holding that, 'in spite of all the presumptions, it is as well established as evidence can make it that James N. Wood, being insolvent, for the purpose of hindering, delaying, and defeating the debt of the plaintiffs herein made the conveyance herein attacked to his brother-in-law, William Brooks Rice, who knew or ought to have known what he was doing when he accepted a deed from Wood (made without his knowledge, if his statement is to be relied upon), before agreement as to price or payment of money; and it does not make it any the less because he refused to agree to reconvey the land to Wood when Wood again got into good circumstances. Nor that he was surprised by it.' Whereas he should have held, from the evidence before him, that Rice was ignorant, at the time of the conveyance and of paying the purchase price of the land, of Wood's insolvency, and the conveyance being made by Wood with intent to delay, hinder, and defeat the debt of the plaintiffs, or other of Wood's creditors, and that there was nothing in the facts and circumstances sufficient to put Rice upon the inquiry; that Rice was also ignorant of what had passed between Jones and Wood as to the indebtedness of Wood to Greig & Jones, and as to the Carolina lands.

"(10) Because his honor the circuit judge erred in holding and concluding, as matter of law, that the deed of Wood to Rice 'was given in violation of the law,' and 'was intended to hinder and defeat creditors (and the creditors plaintiffs herein), and that at the time Rice received said deed he knew the purpose, and is not a bona fide purchaser of the land, and that it should be set aside.'

"(11) Because his honor the circuit judge erred in ordering, adjudging, and declaring that said deed 'is null and void as against the plaintiffs herein,' and in setting the same 'aside as of no effect,' for the reasons set out by him in said decree, or for any or either of them.

"(12) Because his honor erred in holding that Wood told Jones that he would see that he did not get the Carolina lands, no such statement having been made.

"(13) Because his honor erred in holding: 'Who but an idiot would conclude that Rice did not know what Wood meant? True, they lived about a hundred miles apart, but that did not keep them from knowing what concerned the other. Were they not brothers-in-law? Is it not fair to assume there was the usual correspondence and communication between relatives?' Whereas the testimony shows that there was no such correspondence and communication, and Rice swore positively that he did not know Wood's circumstances, and believed him solvent, and had had no communication with him; and,

against such testimony, it could not be assumed that there was correspondence and communication between them, especially for the purpose of presuming fraud, which his honor finds must be proved, not presumed.

"(14) Because his honor erred in virtually holding that it was a fraud, for which Rice should be held responsible, for Wood to have conveyed his property to Rice while the attachment of Coskery & Davidson was pending, whereas he should have held it could not be a fraud, since part of the purchase price was to go in payment of this very attachment, and was actually so paid.

"(15) Because his honor erred in holding that Rice had notice of the attachment of Greig & Jones against Wood when he paid the purchase money, whereas he should have held that the larger part of the purchase money was paid before such attachment was levied, and that no notice of it was had by Rice before he paid the balance.

"(16) Because his honor erred in not holding that the deed was delivered to Rice before the attachment of Greig & Jones was levied, because, as he found, the legal presumption was that it was delivered at its date, and the only testimony against this presumption was that of Rice and Wood, who swore that it was delivered in Savannah on September 28th, which was twelve days before the attachment.

"(17) Because his honor erred in holding that Wood was practically asking Rice, at the time he made the deed, to help him defeat his creditors; the testimony admitting of no such construction.

"(18) Because his honor erred in holding that Rice at that time knew that Wood was insolvent, whereas the testimony shows that he had no such knowledge.

"(19) Because his honor erred in holding that Rice knew that Wood was at the time involved with Greig & Jones in a large sum, whereas he should have found that at that time Wood had informed Rice that, upon a settlement between him and Greig & Jones, they would owe him at least \$15,000, and he believed this statement, and there was nothing to put him on inquiry, and the proceedings by Greig & Jones had not been instituted.

"(20) Because his honor erred in holding that Rice was asked by Wood to hold the property from his creditors until he could arrange his affairs—until his difficulties were over—the testimony not warranting any such conclusion.

"(21) Because, even if Wood did intend by this transaction to defraud his creditors, the testimony shows that Rice had no knowledge of such intent, and that he acted honestly in the matter; and if so, however fraudulently Wood might have acted, his fraud could not have vitiated the deed as to Rice, and he should have been protected in his purchase.

"(22) Because, in any event, Rice, having acted fairly, should be protected to the ex-

tent of the Coskery & Davidson judgment and the Peacock, Hunt & Co. mortgage, which sums were certainly paid by him in extinguishment of liens on the lands as a bona fide transaction—liens superior to that of Greig & Jones—and he should at least be subrogated to the rights of those lien creditors, even if he should be held not to be a bona fide purchaser as to the payment of the other \$4,000, which it is claimed he paid after he had notice of the Greig & Jones attachment.

"(23) Because the Coskery & Davidson judgment and the mortgage were liens superior to the attachment of the plaintiffs, and having been taken up by Rice, and assigned to him, and kept open, in what at the time he believed to be an honest transaction, he should be protected, at least, to the extent of such liens.

"(24) Because the equity of Rice, at least, to the extent of the said judgment and mortgage, is superior to the equity of the plaintiffs under a subsequent attachment and judgment, and his legal title should therefore prevail.

"(25) Because, even if Rice did have notice of the attachment of Greig & Jones when he paid the \$4,000, yet that was after his purchase, and after the deed had been made and delivered; and, whatever effect such knowledge might have on that payment, it could not affect the deed itself, or the sale of the land, as they must be judged by the facts as they existed in the mind of Rice at the time of the purchase, and the delivery of the deed.

"(26) Because the transaction was complete at the time of the delivery of the deed, Rice giving his note for the credit portion of the purchase money; and his subsequent payment of said note, even with the knowledge of the Greig & Jones attachment, could not relate back to the original transaction, so as to make it fraudulent, when at the time it was entered into it was free from fraud.

"(27) Because the payment of the \$4,000 was not a fraud upon the creditors of Wood, but was a payment of Rice's note to Wood, and was made in accordance with the terms of the agreement made when the land was conveyed.

"(28) Because, when said payment was made, Rice had no actual notice of the attachment of Greig & Jones, and, it having been levied after his purchase, he was not affected by constructive notice of it.

"(29) Because his honor erred in not holding that Fred Summers was a bona fide purchaser for value, without notice of any alleged fraud, and in not dismissing the complaint as to him.

"(30) Because the question of delivery of the deed from Wood to Rice at its date is not put in issue by the pleadings, the complaint itself alleging delivery.

"(31) Because the attachment and judg-

ment of Greig & Jones, having been levied on the lands when the legal title to them was in Rice under a bona fide sale, constituted no liens on said lands, and gave plaintiffs no rights as against said lands."

Before considering the exceptions *seriatim*, our own views and conclusions might be independently stated: That the defendant James N. Wood intended making the deed to land lying in Barnwell county (some 700 acres) to his codefendant, William Brooks Rice, in order to hinder, defraud, and delay the collection of the debts held by his creditors, admits of no doubt. The conversation that he held with Mr. Jones, of the firm of Greig & Jones, merchants in Savannah, shows a purpose on his part to defeat the rights of his creditors to appropriate under legal proceedings these lands to the payment of his debts. His haste on the 27th September, 1896, to execute a deed to said lands without the knowledge or consent and in the absence of the grantee William Brooks Rice, at a price which had not been agreed on between them, is another matter of evidence of such purpose. Together with the application by himself, as even he tells his story, of the sum of \$4,000 of such proceeds of the sale from his codefendant William Brooks Rice to the purchase of a railway bid off by his wife, Mrs. E. E. Wood, whose agent alone he admitted himself to have been, is another strong circumstance against him. In addition to these, some other matters of evidence will be referred to hereafter. Thus it is demonstrated that his (Wood's) plans and purposes and conduct were opposed to every principle of equity. It is admitted that if he had made sale of his lands to his codefendant William Brooks Rice, without any intention on the part of Rice to participate in this fraud, without any knowledge of the circumstances of this insolvency, and with no purpose to participate himself in Wood's determination to defraud his creditors, William Brooks Rice might be absolved from all the consequences of J. N. Wood's frauds. Still our minds are drifting to the conclusion that William Brooks Rice participated by a guilty knowledge in Wood's fraud, and a participation in all the frauds perpetrated by his codefendant J. N. Wood. Attention is called again to the fact that William Brooks Rice was not present when the deed was made, and did not agree that such deed should be made; that, while the deed was made in Barnwell county on the 27th day of September, 1896, William Brooks Rice was not notified then of its preparation and execution, nor until the 28th day of November, 1896, while in the city of Savannah, Ga. These circumstances in themselves require great credulity for their acceptance. Mr. William Brooks Rice himself testifies that, when his codefendant J. N. Wood first unfolded his scheme to sell him these lands, he had not agreed to the plans named in the deed. That William Brooks Rice did draw from the naval stores

company in Savannah, Ga., the sum of \$5,000 on the 28th day of September, 1896, there is no doubt. He did not pay said sum to J. N. Wood on the 29th September, 1896, but, in company with Wood, repaired to the house of the latter, some 45 miles distant, at a little place called "Woodbourne," where Wood resided, where William Brooks Rice obtained, without consideration, the satisfaction of a mortgage held by his half-sister, Mrs. E. E. Wood, to secure several thousand dollars owed to Mrs. Wood by her husband, J. N. Wood. While holding the deed executed to him by said J. N. Wood, he (Rice) proposed to pay the said sum of \$5,000 to Wood, and for that purpose both parties (Wood and Rice) went a distance of 4 miles, to the store of one Mr. Strickland, where, in the presence of said J. W. Strickland and J. E. Browne, the \$5,000 was counted by them, and the paper, of several pages, which J. N. Wood signed in the presence of witnesses, which said paper so signed by Wood, after Rice had paid Wood the said \$5,000, was handed by said Wood to the said Rice, and which said paper Mr. Rice put in his pocket. The witnesses are positive that Wood had signed this paper, because Rice paid the \$5,000 to Wood, and Wood afterwards spoke to these two witnesses about coming to South Carolina as witnesses to the paper that was signed at the store at that time. Rice and Wood, in their testimony, both admitted the payment of this \$5,000, but they deny that the execution of this paper had any connection with the payment of the money. It is a significant circumstance that neither Wood nor Rice has ever produced this paper, or given any explanation of the contents thereof. We are obliged to lay stress upon these circumstances. It was their duty to have explained what was in this paper executed by Wood before the payment of this money. Again, when they go to Savannah, the next day, Wood claimed to have repaid to Rice this \$5,000 in the Screven House, in said city of Savannah, without any witnesses thereto. Afterwards Rice claims to have paid over \$6,000 to Peacock, Hunt & Co., who had a mortgage on the Barnwell lands for that amount. Stress should be given to the fact that Wood's wife was a half-sister of W. B. Rice; that their relations were cordial; yet Rice denies that he had any knowledge of the insolvency of Wood, although he had a few months before had all his property in the state of Georgia sold under the foreclosure of a mortgage over property of Wood's in the state of Georgia. Yet Rice claims not to have known anything of the circumstances. The use by Wood of the \$4,000 in connection with the purchase by his wife of a small railroad was well known by William Brooks Rice, and this \$4,000 was a part of the purchase money of the Barnwell lands, as Wood and Rice testify. We might go forward and multiply items from the testimony which militates against the want of knowledge by Rice of the condition of his brother-in-law, Wood,

but we will not cumber the record by doing so. We will now pass upon these exceptions serialim:

1. We find no serious error in the circuit judge's decree, as complained of in the first exception, because it is evident from an inspection of the complaint itself that the trial of the equitable issue should have preceded the trial of the law issue. There is no fixed rule as to what issue shall be first tried, where both legal and equitable issues are set out in the complaint as distinct causes of action. Surely in this case it would have been unwise in the circuit judge to have tried a law issue involving the title to these lands, and then afterwards have tried the equitable issue, which, if successful, would have rendered nugatory all of the labor and expense involved in the trial of the legal issue. This exception is overruled.

2. Nor do we find that the circuit judge was in error as complained of in the second exception, because we could not see that there was any law in this state for a plaintiff to abandon the field of battle chosen by himself in order to foster the preferences of defendant. If the plaintiff had a right to the trial of this equitable issue, and the circuit judge so thought, there was no error in refusing to try the second issue, which is the legal issue.

3. For the same reason as above set forth, we overrule the third issue.

4. We do not conceive that the matter referred to in the fourth question was of any consequence, because what lien was acquired by the Coskery & Davidson attachment was of no consequence. The court below and this court are truly anxious in discovering what part Wood and what part Rice took, each for himself, in the sale by Wood and Rice of the Barnwell lands. We would not allow ourselves to jeopardize the good name of William Brooks Rice by what, in law and equity, he might have known under these attachment proceedings alone. This exception is overruled.

5. We do not think the circuit judge erred in holding as he did, as set out in this exception. A study of the testimony convinces us that Rice allowed himself, because of his interest in his sister and her husband, to become involved in the fraudulent conduct of the said J. N. Wood. This exception is overruled.

6. We think there is no vitality in this sixth exception, because it makes no difference, in our view, whether this deed was delivered on the 29th of September, 1896, or the 10th day of October, 1896. It certainly was delivered at some such date. Our conviction as to the result of this investigation hinges not upon the date of the delivery, but, rather, the purpose of the parties to the deed in its execution. This exception is overruled.

7. We see no error in the expression used by the circuit judge in his decree, as complained of in the seventh exception. We do

not think that the wife's renunciation of dower plays any part in the acceptance of the deed by Rice. This exception is overruled.

8. From a careful study of the testimony in this case, we must say that the holding of the circuit judge, as complained of in the eighth exception, is abundantly supported. This exception is overruled.

9. And for the same reflection set out under No. 8, we hold that the judge did not err as complained of in the ninth exception. This exception is overruled.

10. Nor do we feel, from a study of the testimony, that the circuit judge erred as complained of in the tenth exception. This exception is overruled.

11. This exception is too general to require any notice from us, except to announce that it is overruled.

12. It is quite true, as alleged in the twelfth exception, that Wood did not tell Jones that he would see that he did not get the Carolina lands, yet he did say that such lands were not liable to the payment of the plaintiff's debts. His exact language in answer to the witness Jones was: "If you sue, I'll put you to as much trouble as possible before you ever get it." Again, Jones said in his testimony: "I told him, 'Mr. Wood, that Carolina property is subject to any debt. You said that it was not.' And I said, 'You will see whether or not it is.'" And this conversation occurred before suit was brought, 10th of October, 1896. This exception is overruled.

13. We do not think that the circuit judge erred at all, except, possibly, his language may have been a little too strong. As we have before said, we are deeply impressed, and regretfully so, that William Brooks Rice participated fully in the misconduct of J. N. Wood. This exception is overruled.

14. We see no reversible error here, for, even granting that the expression of the circuit judge was erroneous, it played no part, really, in his conclusions. This exception is overruled.

15, 16, 17, 18, 19, 20, and 21. In our previous consideration of the subject-matter of this controversy, as the testimony relates to the same, we have announced our conclusions that the defendant William Brooks Rice participated in the wrong to the plaintiff knowingly and intentionally, and therefore these exceptions are overruled.

22. We cannot take the view of the appellants as set out in the twenty-second exception. While we still hold and do hold that these defendants have wronged the plaintiff, so that the deed executed on the 27th of September, 1896, should be set aside as null and void, we cannot subrogate Rice in any rights that Peacock, Hunter & Co. or that Coskery & Davidson had under their judgment. He must take the usual portion of the person dealing in fraud. This exception is overruled.

23 and 24. For the reasons given under

exception No. 22, we cannot sustain these two exceptions, and they are therefore overruled.

25, 26, 27, and 28. These several exceptions just named must be overruled, because they are utterly inconsistent with the conclusions heretofore announced by us.

29. We see no error here complained of, and it is therefore overruled.

30. This exception really involves no merit, because it plays no part in the conclusion at which we have arrived.

31. Nor do we think there is anything in this exception. It is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(66 S. C. 283)

### MOORE v. SCOTT.

(Supreme Court of South Carolina. April 14, 1903.)

#### TRUSTS—SALES—CONSENT OF LIFE TENANT.

1. Where a trustee was authorized to sell for reinvestment with the consent of the life tenant, and on the suggestion of the court of equity, at the instance of the creditors of the life tenant, on the allegation that the life tenant wished his interest applied to his debts, the trustees sell, and pay the interest to the creditors of the life tenant, and hold the corpus under investment for the contingent remaindermen, the deed so made carries a fee simple title, though the contingent remaindermen were not parties to the creditors' bill.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by Samuel L. Moore against James Scott. From judgment for defendant, plaintiff appeals. Affirmed.

Carey, McCullough & McSwain, for appellant. T. O. & A. H. Donaldson and Haynesworth, Parker & Patterson, for respondent.

POPE, C. J. On the 5th day of June, 1853, Samuel Moore, of Greenville district, in this state, executed the following deed of trust to one Thomas J. Sullivan, of Laurens district, of this state, to wit:

"Know all men by these presents, that I, Samuel Moore, of the district and state aforesaid, in consideration of the natural love and affection I entertain for my son Hewlett Sullivan Moore, and upon the further consideration of ten dollars to me paid by Thomas J. Sullivan, of Laurens district and state aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Thomas J. Sullivan, the lands, to wit [here follows a description of the property conveyed, including the land now in question]: A certain tract of land situated in Greenville district immediately on the Augusta road, cut off the tract known as the 'Lick Tract,' containing two hundred acres more or less, adjoining lands belonging to the estate of Tully Bolling and others. To have and to hold all and singular the said premises before mentioned un-

to the said Thomas J. Sullivan, his heirs and assigns, forever, and the said personalty unto the said Thomas J. Sullivan, his executors and administrators, both the said real and personal estate in trust nevertheless for the following uses and purposes hereinafter set forth and declared, to wit: To permit my son Hewlett Sullivan Moore to have the possession, use, and enjoyment of the said real and personal estate, including the increase of the female slaves, during his natural life, reserving, however, to the trustee the title thereto, with the power of supervision and control, to be exercised whenever in his judgment it may be necessary for the protection of the said property, for the benefit of the cestui qui trust, and also full power and authority to sell or exchange all or any part of the said property and its increase by and with the consent of my said son, whenever in the discretion of the said trustee it shall be most for the benefit of my said son, and to reinvest the proceeds of such sale in other property that will better suit my said son. The property so purchased or received in exchange to be held by the said trustee subject to the same power of exchange and sale, and upon the same trusts, uses, and limitations as the original property is subjected to by the provisions of this deed; and after the death of my said son, the said property and its increase is to be so continued in trust for the possession, use, and enjoyment of such child or children as he may leave surviving him, including the child or children of any deceased child, who will take the portion the deceased parent would be entitled to if living. But if my said son should leave only one child, and no grandchild, then the said property and its increase is to be so continued in trust for the sole possession, use, and enjoyment of such child. Should, however, my said son die without leaving any child or grandchild, in that event the said trustee is empowered to execute a valid title in fee simple for one-third of said property and its increase to such widow as he may leave surviving him, and the remaining two-thirds is to be continued in trust for the possession, use, and enjoyment of my son Dunklin De Witt Moore, and my daughter, Mary Jane Moore, to be equally partitioned between them, or between the survivor of them and the child or children of the deceased brother or sister, as the case may be; the child or children of such deceased taking the portion of such deceased parent. Though should the deceased brother or sister leave no child or children, in that event the whole of said property and its increase is to be so continued in trust for the sole possession, use, and enjoyment of the surviving brother or sister, as the case may be. Should, however, my said son Hewlett Sullivan Moore die without leaving any child or children, grandchildren, widow, or surviving brother or sister, or the child or children of one or both of them, then the said trustee is to sell the whole of the said

property and its increase, and distribute the proceeds thereof amongst the next living kin of my present wife, as if it were her property and she had died intestate." (Duly executed and probated.)

This deed was duly recorded in the office of the register of meane conveyances for Greenville district. The trustee, Thomas J. Sullivan, duly accepted said trust in writing. The life tenant, Hewlett S. Moore, occupied, with his wife and child, the present plaintiff, a dwelling house built on the 18-acre tract of land included in the trust deed in the then village of Laurens, S. C. However, from extravagant habits and use of liquor, Hewlett S. Moore fell behind in payment of his debts, and in the year 1857 he owed nearly \$6,000, and, from a sense of mortification at his failure, he left the state, and made his home in the state of Georgia. All the trust estate included in the deed of trust was taken possession of by Thomas J. Sullivan as trustee. In 1857 a bill in equity was filed by Neal and others, as plaintiffs, against Thomas J. Sullivan, as trustee, and Hewlett S. Moore, as defendants. The bill recited the foregoing facts, and alleged that the trustee would do nothing to pay the claims of the creditors of the said Hewlett S. Moore, notwithstanding he had taken possession of all the trust property after the said Moore abandoned the state of South Carolina; that all the property included in the life estate of Hewlett S. Moore was liable to pay his debts, much of which had been reduced to judgment, and for fees issued therein, and placed in the hands of the sheriff, who had returned nulla bona thereon; that said Hewlett S. Moore wished, and now wishes, that his property should be applied to the payment of his debts. The prayer of this bill was that such Thomas J. Sullivan might account for any rents and profits in his hands, and that the same, together with the life interest of the said Moore in the corpus of said estate, be decreed to be subject to the payment of the demands of the plaintiffs and other creditors of the said Moore. The defendant Hewlett S. Moore was served by publication, and, no answer being made, the usual order pro confesso was taken against him. The defendant T. J. Sullivan, as trustee, made a vigorous defense in his answer. He denied having any funds belonging to the life tenant in his hands, though he admitted that he had taken possession of all the trust property. He denied that the debts of these suing creditors were contracted for the benefit of the trust estate of Moore; that he was in no wise consulted or concerned in the contracting of these debts of Hewlett S. Moore. He submitted that the trust estate was not, and ought not to be, bound to pay the same. He denied that such trust estate was liable to levy or sale on account thereof, and that when the trustee accepted his office under the deed it was exclusively for the benefit of the beneficiaries said deed provided, and not for creditors

or strangers. Creditors of Hewlett S. Moore were called upon to prove their demands. Nearly \$6,000 were so proved. Chancellor Dargan made a decree in favor of the plaintiff under said bill in equity, in which he held, *inter alia*, that the interest of Hewlett S. Moore in the trust estate was liable to the claims of his creditors. He ordered the commissioner in equity for Laurens district to sell the fee-simple title in the several tracts of land contained in the deed of trust, and that the eight slaves be hired out each year by the trustee, Thomas J. Sullivan; that the commissioner hold the proceeds of sale and the hire of negroes until the further order of court; that the trustee enter into a bond, with two good sureties, in a sum sufficient to protect the interest of the parties; that the commissioner report a scheme for the investment of the proceeds of sale and the amount for the hire of the eight negroes; "and for the distribution of the funds so that the creditors of Hewlett S. Moore receive the interest thereof on the principal preserved for the remaindermen mentioned in the deed, June 13, 1857." From this decree Thomas J. Sullivan, as trustee, appealed, and one of the grounds of his appeal was that Chancellor Dargan had ordered a sale of the fee-simple title to the lands in question. When this appeal was considered by the court of appeals in equity, so much of the circuit decree which directed the commissioner in equity to sell the said lands was set aside, and that question was sent back to the circuit court, with directions to take testimony as to whether the fee or life estate in said lands and negroes were concerned; but holding, in the event of a sale, that the trustee, and not the commissioner, should sell the property and hold the proceeds, without any bond being required of the trustee. Much testimony was taken, and a variety of opinions were expressed by the witnesses. It was shown that the 200 acres of land now in question was entirely wooded land, and no revenue therefrom, and its fee-simple value was fixed at from \$800 to \$1,000. The cause then came on to be heard upon exceptions to the commissioner's report, accompanied by the testimony before Chancellor Wardlaw, who, by his decree, sustained the recommendation of the commissioner that the fee-simple title to the lands should be sold, and the negroes hired from year to year, applying the income from the interest in the purchase money of the lands and the hire of the negroes pro rata to the claims of the creditors of Hewlett S. Moore. An appeal from Chancellor Wardlaw's decree was taken, but only as to matters connected with the claims of creditors. In an opinion delivered by Chancellor Dargan for the court of appeals in equity, the decree of Chancellor Wardlaw as to the sale of the fee-simple title to the lands was affirmed. See *Neal v. Sullivan*, 10 Rich. Eq. 276, in which the court said "that the rights of those ultimately entitled must be consid-

ered, as well as the rights of creditors,' and in a conflict between the two the attempt should be to reconcile the interests of both, and not to defeat entirely or greatly impair the interest of either; the claims of the former being express, but contingent, and of the latter incidental, but accruing through the immediate object of bounty." So the lands were sold by the trustee, and the 200 acres of land now under controversy were purchased by Mrs. Jane C. Moore, the grandmother of the plaintiff. The following is the deed made by Thomas J. Sullivan, as trustee, to Mrs. Jane C. Moore:

"Know all men by these presents, that I, Thomas J. Sullivan, as trustee of Hewlett S. Moore, in pursuance of a decree of a court of equity, made in the case of H. S. Neal, assignee and others, against me and the said Hewlett S. Moore, in the court of equity in and for the district of Laurens and State aforesaid, after giving at least twenty-one days' public notice, did expose to sale at Lickville, in Greenville district and said state, a certain tract of land situated in Greenville district immediately on the Augusta road, cut off of the tract known as the 'Lick Tract,' containing two hundred acres, more or less, adjoining lands belonging to the estate of Tully Bolling and others, and more particularly described in a deed of trust from Samuel Moore to me, bearing date the first day of June, A. D. 1853, and at said sale on the 27th day of December, A. D. 1858, Jane C. Moore, being the highest bidder for said tract of land, the same was knocked off to her at the price of three hundred dollars, and the said Jane C. Moore, the purchaser, secured the purchase money by bond and security thereto, as the said decree directs, have, in consideration of the premises, granted, bargained, sold, and released, and by these presents, do grant, bargain, sell, and release, unto the said Jane C. Moore, the aforesaid tract of land; together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the said premises before mentioned unto the said Jane C. Moore, her heirs and assigns forever. Witness my hand and seal, this 17th day of November, in the year of our Lord one thousand eight hundred and sixty, and in the 85th year of the Independence of the United States of America. Thomas J. Sullivan [Seal] Trustee." (Properly executed.) The same character of deed, to wit, one in fee simple, with full warranty, is that of every deed down to and including that of James Scott, the present defendant. The life tenant, Hewlett Sullivan Moore, died on the 6th day of March, 1902.

At the hearing before his honor Judge Ernest Gary, there was some oral testimony, more for the purpose of identification of plaintiff as son of Hewlett S. Moore, deceased, than anything else. All the documentary evidence referred to herein was before his

honor Judge Gary, who directed the jury to find a verdict for the defendant. The judge used this language:

"From the view I take of this case, it is a question of law, and not of fact. It is a rule of this court that, where testimony is admitted—not disputed—that the court can direct a verdict, as there is no testimony for the jury to pass upon. If the facts are admitted or not denied, the court can direct a conclusion. In this case the testimony is documentary, and not disputed. It is not necessary that I should give you the history of the case, but I will simply make such remarks as I think necessary, giving my reasons for directing the verdict. It is a general rule of law that title to real estate is never floating in the atmosphere. Now, my difficulty has been, 'where was it fixed'? Where was the title fixed and embraced in the deed which has been introduced in evidence? It is well that that portion of the deed which disposes the title should be held in mind. The habendum clause of the deed is as follows [which is set out in the deed, ante]. Now, from my construction of that deed, the title of that real estate was in the trustee. That is where it is fixed; and the testator says that, even after the death of the life tenant, it is still to continue in trust—in the trustee. Now, in the interest of the life tenant and trustee, the court of equity for Laurens county made a certain decree, in which it was ordered that this property be sold. Having been sold under that order, the question now comes up, did the court have authority, not having the grandson, Samuel L. Moore, a party to the proceedings? That grandson now comes in, and claims that that order of sale is not binding upon him, as he was not made a party. If the title was in him, I would hold that, before his rights could be divested, that he should be made a party to the cause. The title would be in him, and it would be futile to pass upon it unless he was made a party. Now, the object of that rule is this: in order that the real owner, the beneficiary, should be present and assert his rights. But the grantor expressly said in that deed that his grandson or his son was not to represent the title. It was his wish and desire, expressed in the deed, that his trustee should hold that title and represent the interest of these parties, because, even after the death of the life tenant, Hewlett Sullivan Moore, the trust was still to continue in the trustee, and did not go to his grandson, but remained in him. Now, it remaining in him, that title was before the court of equity. My construction, after mature deliberation and much thought, is that the fee-simple title was in the trustee. That view has been very much shaken by the arguments of the attorneys for the plaintiff, but in a comparatively recent case, in which our present chief justice delivered a very elaborate opinion, he uses this language: 'It may be said that the trustee, who was vested with the fee in the legal estate, being

before the court, he could represent, and did represent, the interest of all the parties; and there is some countenance in this suggestion in the dictum of Chancellor Dargan in *William v. Holmes*, 4 Rich. Eq., at pages 490, 491; but I think a more correct view is taken by Chancellor Wardlaw in *Moore v. Hood*, 9 Rich. Eq., at page 325, 70 Am. Dec. 210, where he says: "The rule requiring beneficiaries to be parties where they are interested in the questions for adjudication is applicable, although the trustees have the legal title. For trustees are not the real owners of the trust estate, and are rather agents of the beneficiaries for the execution of certain trusts, and it is among their duties to require the real owners to be brought before the court." Now, that looks like it is directly opposite to the conclusion which I have reached, but in looking into this case in which that language was used I find that the trustee in that case did not have authority to sell, nor was the fee-simple title in the trustee, as in the present case here; and the other language of the chief justice seems to qualify that expression, and limit it to the cases where trustees were without authority to sell. He goes on to say: 'Any other view, it seems to me, would logically lead to the conclusion that the trustee might convey without any order of the court. The very object of applying to the court is to obtain authority for disposing of the interests of others. Those who are entitled to such interests must, if practicable, be made parties to any proceedings by which it is proposed to dispose of their interests.' Now, here there was no necessity in the present case for the trustee to apply to the court of equity to sell, as in the case of *Moseley v. Hankinson*, 22 S. C. 323, cited by counsel, in which the title was not in the trustee. Therefore my conclusion is that he had in his mind such estates as were given to trustees who had no authority, by the trust deed, to make a sale. Therefore the case in which he delivered that opinion, being in that language, I construed his remarks to be applicable to estates where the trustee had no authority to sell; or, in other words, where the fee-simple title was not in the trustee. Here, the grantor has put his title in the trustee. He has said that the title must remain in the trustee even after the death of the life tenant. The trustee and life tenant were parties to the proceeding, and I am forced to the conclusion that the title was before the court, and the decision of the court affected that title, and is binding upon the interest of those represented in said proceedings. My construction of this deed is that the fee-simple title was before the court, and could be disposed of by its decree; and that is the reason I assign directing you to find a verdict for the defendant in this case. Now, the court having ordered a sale, and the sale having been made under that order of the court, it carried with it the fee-simple title. That is why, in my construction of the

law, the plaintiff cannot prevail in this case. I take pleasure in stating that, whichever way I decide, it will go to the Supreme Court, and if I have done injustice to any of the litigants I am glad to know that it would there be corrected."

The jury found a verdict for defendant. After entry of judgment the plaintiff appealed to this court to reverse said judgment and grant a new trial, on the following grounds:

"(1) Error in holding that the land in dispute was sold by the court of equity for Laurens county, 'in the interest of the life tenant and trustee.' It being respectfully submitted that the record shows that the said land was sold in the interest of the creditors of Hewlett S. Moore, the life tenant.

"(2) Error in holding that the grantor, Samuel Moore, by his deed of trust to Thomas J. Sullivan, 'expressly said in that deed that his grandson or his son was not to represent the title.' It being respectfully submitted that the said deed of trust clothed the said son or grandson with the entire beneficial ownership.

"(3) Error in holding, under the trust deed of Samuel Moore to Thomas J. Sullivan, trustee, that 'after the death of the life tenant, Hewlett S. Moore, the trust was still to continue in the trustee, and did not go to his grandson, but remained in him.' It being respectfully submitted that after the death of the life tenant, the trustee having no other duties to perform, the statute executed the trust in the contingent remainderman, the grandson, and plaintiff in this case.

"(4) Error in holding that the legal title of the premises in dispute was before the court of equity in the case of *Neal v. Sullivan* to such an extent as would authorize the court to dispose of the said legal title in a proceeding to which the trustee and the life tenant alone were parties, the contingent remainderman, the plaintiff in this case, being in esse, and within the jurisdiction of the court.

"(5) Error in concluding that in the case of *Moseley v. Hankinson*, 22 S. C. 323, the court had in 'mind such estates as were given to trustees who had no authority by the trust deed to make a sale.' It being respectfully submitted that such authority cuts no figure in the case unless the trustee had exercised the same in the manner provided for in the deed of trust.

"(6) Error in holding that in the case of *Moseley v. Hankinson*, 22 S. C. 323, the fee-simple title was not in the trustee, as in the case at bar. It being respectfully submitted that the trustees in the case held the legal title for the purposes of performing the duties required by the deed of trust after the death of the life tenant, and for the purpose of preserving the contingent remainder therein created, and the court in that case expressly decided to this effect. In this connection, error in hereby distinguishing the



case of *Moseley v. Hankinson* from the case at bar.

"(7) Error in holding that, the legal title in this case being in the trustee, and the trustee and life tenant being before the court, the court could dispose of the said title so as to defeat the rights of this plaintiff, the contingent remainderman, under the said deed, who are in esse and within the jurisdiction of the court at the time the action in the case of *Neal v. Sullivan* was instituted.

"(8) Error in holding in this case that the trustee represented the contingent remainderman, who was in esse and within the jurisdiction of the court at the time the said action of *Neal v. Sullivan* was instituted. It being respectfully submitted that the said trustee was a mere agent for the real parties in interest, and not the beneficial owner.

"(9) Error in not holding that under the deed of Samuel Moore to Thomas J. Sullivan, trustee, the plaintiff in this case upon his birth took an interest in the said property, which interest was a valuable property right, and no court could divest him of the same by any action or proceeding thereafter instituted without making him a party thereto.

"(10) Error in not holding that to deprive one of his property by an action to which he was not a party would be to deprive him of his property without due process of law.

"(11) Error in holding, 'My construction of this deed is that the fee-simple title was before the court, and could be disposed of by its decree, and that is the reason I assign directing you to find a verdict for the defendant in this case.' The undisputed testimony being that at the time the action of *Neal v. Sullivan* was instituted the plaintiff, who was a contingent remainderman under the said deed, was in esse, and within the jurisdiction of the court, and was not made a party to the said proceeding.

"(12) Error in holding, 'Now the court having ordered the sale, and the sale having been made under that order of the court, it carried with it the fee-simple title.' It being respectfully submitted that the said order of court was binding upon this plaintiff, it appearing that he was not a party to the said proceeding.

"(13) Error in directing a verdict for the defendant. It appearing from the undisputed testimony that under the deed of Samuel Moore to Thomas J. Sullivan, trustee, the plaintiff in this action took an interest as contingent remainderman immediately upon his birth; that he could not be divested of this interest except by a judgment of the court to which he was a party, or by an exercise by the trustee of the power contained in the deed; that, it appearing that the said sale was made by the trustee, not in the exercise of the power contained in the said deed, but as an officer or agent of the court in a proceeding to which the plaintiff was no necessary party, the deed of Thomas J. Sullivan under the said order in the said case

passed only the life estate of the said Hewlett S. Moore, and, the said Hewlett S. Moore having died, this plaintiff became entitled, as remainderman, to said property.

"(14) Error in not holding that by the undisputed testimony the plaintiff had established the material allegations of his complaint, and, the defendant having offered no testimony to rebut his title, was, therefore, entitled to a verdict.

"(15) Error in not holding that under the cases of *Leroy v. Charleston*, 20 S. C. 71, *Moseley v. Hankinson*, 22 S. C. 323, and other cases reaffirming the doctrine therein declared, the plaintiff in this case was a necessary party to any proceeding by which it was sought to divest him of his interest in the said realty, and that no judgment of the court, or sale of the said property thereunder by virtue of any proceeding to which he was not a party could affect his interest."

1. There is no serious error, if any, pointed out in this exception in the judge saying that the sale of this 200 acres of land was made in the interest of the life tenant and trustee. It is to the interest of the life tenant, because property which was, before the date of the decree in *Neal v. Sullivan*, Trustee, 10 Rich. Eq. 276, unproductive, and therefore incapable of paying honest debts, after that decree became productive. Such was the life tenant's desire, and such, no doubt, was the desire of the trustee, when he saw that the law required it—the trustee, who up to the time of the decree had an idea of the trust estate which was utterly untenable.

2. Again, we see no error as here alleged. Samuel Moore, the donor, did not intend his son Hewlett S. Moore to have the title. Every expression in the deed of trust as to the trustee's title directly repudiated his son having title in any event, and his expression itself negated any title in the plaintiff as his grandson.

3. Nor do we see that the donor, Samuel Moore, by the terms of his deed, meant otherwise than to require the trustee to hold the title for whoever would be remaindermen. The law, by one of its rules, executed the use after the death of the life tenant on 6th March, 1902.

4. This exception presents a very interesting question of law. There is no doubt in our minds that if Samuel Moore's deed, made in 1853, had simply placed the title to this tract of land in Thomas J. Sullivan, his heirs and assigns, forever, in trust for Hewlett S. Moore for life, and after his death to such child or children as Hewlett S. Moore should have to survive him, then and in that event creditors of Hewlett S. Moore could not, by a bill in equity, to which alone Hewlett S. Moore and Thomas J. Sullivan, as trustee, were made parties defendant, have obtained a judgment for the sale of trust lands, when the remainderman was in esse, and thereby shut off the rights of such remainderman in esse, who was not a party to this action in equity. *Moseley*

v. Hankinson, 22 S. C. 323. Such a proposition, which looks to the destruction of the rights of a living person without the allowance to him of "his day in court," is repugnant to our ideas of justice. See citation of authorities in *Moseley v. Hankinson*, supra, at page 329. See *Leroy v. City of Charleston*, 20 S. C. 71, where this court directly passed upon this question, and held that contingent remaindermen must be made parties. If there was nothing else in this case, we could hardly entertain the doctrine of "communis error facit jus," or an invocation "of the doctrine governing rules of property." But it seems to us that there is more in this case than what we have recited already in considering this proposition of appellant. This deed of trust especially confides to this trustee, Thomas J. Sullivan, as trustee, the right to sell any of the trust property for reinvestment in other property, subject to like trusts and limitations at the instance of the life tenant, Hewlett S. Moore. Now, while Hewlett S. Moore did not specifically, in writing directed to Thomas J. Sullivan, as trustee, request a sale of the trust property for reinvestment, yet it was charged in the bill of equity, in the case of *Neal v. Sullivan and Moore* as defendants, "that it was and is now the wish and desire of the said Hewlett S. Moore that his property should be applied to his debts." This bill was taken pro confesso against Hewlett S. Moore, and it was not denied in the answer of Thomas J. Sullivan, as trustee. It was fixed law in this state at the date of the execution of the deed of trust by Samuel Moore in the year 1853 that, while such deed could prevent the lien of a judgment at law against such trust property, creditors could subject the interest of Hewlett S. Moore, the life tenant, to the payment of their debts, so far as the interest and estate of the life tenant could extend. If the property was in government bonds, the interest thereon would be adjudged applicable to claims of creditors. So, also, if the property interest of the life tenant was mingled with the interest of other persons, the court of equity would reach it for creditors. *Rivers v. Thayer*, 7 Rich. Eq. 136; *Tupper v. Fuller*, Id. 170; *Branch v. Glover* (decided in 1830) Id. 136, note. In the eyes of the law these provisions were incorporated in the deed of trust when executed by Samuel Moore. And, besides, it has been settled for centuries that trustees are amenable to the control of the court of equity in the discharge of their delicate duties. It is true this trustee was brought into the court of equity, and, although unwilling at first to have any change made in the status of the trust property, yet at his request, at the instance of the court of appeals, he was allowed, as trustee, to sell the trust lands for reinvestment. Herein lies the crucial point in this case. The deed of trust authorized the trustee to sell the whole or any part for reinvestment, with the concurrence of the life tenant. In *Moseley v. Hankinson*, supra, there was no

power of sale vested in the trustee. Here the trustee is allowed to sell. In *Moseley v. Hankinson* the court ordered the trustee to sell in the absence of said power in the deed creating the trust, without making the contingent remaindermen in esse parties. Here the court authorizes and directs the trustee, who has full power to sell by the trust deed, to sell as trustee, in which the life tenant acquiesces. Now, under the trust deed here involved, it is admitted that the donor clothes the trustee with full power to sell the whole trust property for reinvestment. It is sold for reinvestment by the trustees. There is no authority in any one affected by the limitations in the deed of trust to interfere but the life tenant. Contingent remaindermen have no power of interference. The plaintiff here admits that, if Thomas J. Sullivan, as trustee, had sold with the request of the life tenant, he would have been powerless to interfere. For 49 years the life tenant was silent. We overrule this exception.

5. We do not think there was any error as here complained, for the reasons just set forth under exception 4.

6. The views we have expressed under the fourth exception dispose of this, the sixth.

7. The views hereinbefore expressed dispose of this exception.

8. We see no force in this exception. Sullivan held the trust property. If changes were made therein by sale or exchange, he held the substituted property as trustee. He was bound to the exercise of good faith and his best judgment both for life tenant and contingent remaindermen.

9 and 10. This proposition is sound law when cases which fall within certain bounds are considered; but when a power of sale is provided in a deed of trust, and such power is exercised, the contingent remaindermen cannot complain.

11. We have already, in effect, answered this objection.

12. Under this deed of trust, when there was a power of sale in the trustee with no power in the remainderman to interfere, we do not see that the contingent remainderman was a necessary party.

13. We have already passed upon this exception.

14. There was no dispute as to the testimony. The issue of fact existed. The judge could, therefore, direct the verdict.

15. We have already passed upon this exception. All the exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

(May 18, 1903.)

PER CURIAM. After careful examination of the petition for a rehearing in this case, the court is satisfied that no material question either of law or fact has been disregarded or

overlooked. It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(66 S. C. 204)

**BARKSDALE v. CHARLESTON & W. C. RY. CO.**

(Supreme Court of South Carolina. April 28, 1903.)

**INJURY TO RAILROAD CONDUCTOR—INSPECTION OF CARS—KNOWLEDGE OF DEFECTS.**

1. It is not the duty of a railroad conductor to examine the cars turned over to him before taking them out on a train, where a car inspector is employed at the station by the railroad company.

2. Const. art. 9, § 15, providing that knowledge of defects in machinery shall be no defense in an action for injuries caused thereby, except as to conductors in charge of unsafe cars voluntarily operated by them, a conductor is not barred of his right to recover for injuries arising from defective cars, unless he would have regarded them as dangerous or unsafe if he had exercised ordinary prudence.

3. It is the duty of a freight conductor, after starting with a car and discovering defects in it, to exercise his best judgment as to whether he should carry it in his train or not.

Gary, A. J., and Jones, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; Watts, Judge.

Action by Walter E. Barksdale against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Simpson and Simpson & Cooper, for appellant. N. B. Dial, for respondent.

WOODS, J. The plaintiff in this action claims damages against the defendant, alleging that the defendant delivered to him, as one of its freight conductors, for transportation from Augusta, Ga., to Greenwood, S. C., a car old, worn out, and with flat wheels, and negligently loaded by defendant with lumber in an insecure and unsafe manner, with only two standards on each side, and with improper appliances and equipments; that, by reason of the defective cars and appliances and improper loading, the lumber became loose and disarranged, and was about to derail the train to which the car was attached, and cause a wreck; that, the train being without a bell cord or signal, or means by which he could stop it, plaintiff undertook to arrange the lumber so as to prevent disaster, and to save the lives of the railroad's employees and its property, and while so engaged the lumber was thrown against him, by reason of which he suffered great bodily injury. There were other allegations, not essential to the decision of the case as now presented. The defendant denied negligence on its part, charging the plaintiff's injury was caused by his own neg-

ligence, and further alleged that, if the injury was caused by any negligence of defendant, plaintiff contributed to it, and so could not recover. At the close of plaintiff's case, defendant moved for a nonsuit, "First, on the ground that it appears clearly from the testimony that whatever defects there were in the car in this loading were well known to the plaintiff; second, that the facts which have appeared here from the testimony of plaintiff, to my mind, show beyond a question that the plaintiff, even if the defendant was guilty of negligence, was himself guilty of contributory negligence, and therefore he cannot recover; third, that he had such knowledge of these defects."

The plaintiff had testified, in substance, that he did not examine the car before he left Augusta, it not being his duty to do so, because at that point the company had car inspectors; that he knew nothing of defects until after leaving Augusta, but carried the car several stations after he discovered them, thinking the trouble not serious enough to warrant him in dropping the car. The plaintiff further said it would have been a great deal safer if he had stopped trying to arrange the lumber when he saw it would not strike a car on the siding which the train was then passing, and that, if he had not continued in this, he thought the accident would not have occurred. It is on this testimony, as we understand, the motion for a nonsuit was based. If the defendant did not usually require its freight conductors at Augusta to examine the cars, but imposed that duty on another officer, then it is manifest the plaintiff could not be charged with negligence for failing to examine and ascertain the defects before taking the car, and the nonsuit could not be granted on that ground.

Nor do we think the motion should have been granted on the ground that plaintiff failed to cut out and leave it at a siding after he discovered the defects. The Constitution provides (article 9, § 15): "Knowledge of any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." It will be observed that in the first line of this section the terms used are "defective or unsafe," while, in the exception made as to conductors and engineers, they are "dangerous or unsafe." A conductor, therefore, is not precluded from recovering for an injury arising from voluntarily operating a defective car, unless it is so defective as to be dangerous or unsafe. This exception in the Constitution, we think, did not in any way change the limitation before existing upon the right of recovery of conductors and engineers for injuries arising from defects in engines and cars known to them. It was

1. See Master and Servant, vol. 24, Cent. Dig. § 714.

not the law before the adoption of the Constitution, and it was not made the law by the clause above quoted, that an engineer or conductor carries forward his train at his peril, on the discovery after he has started on his trip of any defect in his engine or cars which could possibly produce injury. Even slight defects under unforeseen conditions may produce disaster, but they could not for that reason be judicially declared sufficient to make the car or engine unsafe or dangerous. To defeat the claim of a conductor or engineer for injury in cases of this character, the knowledge must be of defects which the conductor or engineer believed to be dangerous or unsafe, or which he ought to have regarded dangerous or unsafe, in the exercise of ordinary prudence and reason. Any other view would not only be straining the meaning of words, but would be unreasonable, and result in an intolerable hardship both to the public and those charged with the conduct of railroads, for it would require an engineer or conductor, upon discovery of any slight defect of machinery, to stop his train or proceed at his peril.

1 Shearman & Redfield on Negligence, §§ 211, 214; *Lasure v. Mfg. Co.*, 18 S. C. 280; *Snow v. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Parker v. R. Co.*, 48 S. C. 384, 26 S. E. 669; *Bussey v. R. Co.*, 52 S. C. 443, 30 S. E. 477; *Bodie v. R. Co.*, 61 S. C. 478, 39 S. E. 715. The true rule is well stated in *Hurst v. R. Co.*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539: "When an employé has full knowledge of the risks of his situation, and accepts them, he assumes such risks as are incident to their discharge, and, if subsequently injured by such risks, he will not be entitled to recover damages for injuries sustained in consequence thereof, against his master, unless 'it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution.'" It was therefore a question for the jury to determine whether the defects in the car which the plaintiff says he discovered after he started on his trip were such that he regarded the car dangerous or unsafe, or such that he ought to have so regarded it in the exercise of ordinary prudence and judgment. If the defects were of this character, and the plaintiff was in charge of the car, and could have dropped it before the accident, he could not recover. The presiding judge could not determine this inquiry, and the motion for nonsuit was properly refused.

It is unnecessary to discuss any duty of the plaintiff as conductor to look out for and discover the alleged defects in the car after it left Augusta, for the plaintiff testified he actually did discover them before the accident occurred.

It follows, from the views expressed in considering the motion for nonsuit, that the exceptions to the charge covered by the second and fifth grounds of appeal, and the third

ground of appeal down to and including subdivision "b," must be overruled.

The presiding judge instructed the jury: "If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in good order and that the cars were properly loaded, and if plaintiff in this case was the conductor, and it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order (the train which was turned over to him in the city of Augusta loaded by the officials there), then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable." This was all appellant could ask as to the plaintiff's duty before leaving Augusta, but it does not cover his duty after the discovery of defects on the journey. The portion of the charge quoted would, I think, convey the impression to the jury that the plaintiff might continue to assume the car was not dangerous even after he had discovered on his journey the alleged defects, and it negatives the idea that he owed any duty to exercise judgment or discretion as to whether he should undertake to carry the car on after he knew of the defects. But it is argued that this erroneous impression made on the minds of the jury was removed by the general instructions given on the subject of contributory negligence, which were quite free from objection, and by the defendant's second request, which was given to the jury in the following words: "If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same, and took the risks of injury therefrom, then he cannot recover." I charge you that, taken in connection with what I have heretofore said to you along that line." As has been remarked, what had been before said on this point had, by implication, negatived the idea that there was any duty of the plaintiff to cease to operate dangerous machinery, if he had discovered the danger after leaving Augusta. The general statement made in this respect, standing alone, might be construed to cover the duty of the plaintiff in this regard both before he had commenced his trip and while he was on his journey, for it might

refer to one as well as the other; but, when it is remembered that the presiding judge had before practically excluded from the jury the consideration of any duty of the plaintiff to abandon a car discovered on the trip to be dangerous, I think the jury must reasonably have supposed he intended this statement also to refer only to any discovery of defects made before leaving Augusta. This conviction is much strengthened when we observe the presiding judge expressly says this instruction is given in connection with a portion of the charge which certainly tended to lead the jury to think they were to consider only such knowledge of defects as plaintiff had before leaving Augusta. The general statement of the law of contributory negligence could not cure the error, because it consisted in using language tending to produce the impression on the minds of the jury that this general law did not require the plaintiff to abandon a dangerous car unless he had discovered its defects before it was turned over to him. I do not lose sight of the fact that the defense of assumption of risk was not pleaded by defendant, nor of the distinction between that defense and contributory negligence. In *Bodie v. Ry. Co.*, 81 S. C. 478, 39 S. E. 715, Associate Justice Jones remarks: "The doctrine of assumption of risk by the employé is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference." This is followed by as clear a distinction between the two defenses as the nature of the subject will allow, concluding with this statement: "When, therefore, a case arises in which it is shown (upon proper pleadings) that the employé has assumed the risk from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employé's action is defeated because of his agreement, and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts, as applied to negligence; and, when such defense is established, the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury." The defense of assumption of risk and contributory negligence are so similar that they may fade into each other. The broad line of the difference is to be kept in view, but refined distinctions between them do not advance the administration of the law. Nearly every case of contributory negligence on the part of an employé involves, in a general sense, some assumption of risk, because, in order to be guilty of contributory negligence, there must be the risk of apparent danger. When a servant risks this danger in the discharge of duty imposed on him in the course of usual duty, this would be, in an exact sense, a case of assumption of risk. But if he improperly risks the danger, which becomes the proximate cause of the

injury, in doing that which is not imposed on him in the course of his usual duty, it would be contributory negligence. *Erskine v. Beet Sugar Co. (C. O.)* 71 Fed. 270; *Baird v. Ry. Co.*, 81 Iowa, 361, 13 N. W. 731, 16 N. W. 207; *Kilroy v. Foss*, 161 Mass. 138, 36 N. E. 746; *Le Bahn v. R. Co.*, 80 Hun, 116, 30 N. Y. Supp. 7; *So. Pacific Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 495. It is to be observed in the case now under consideration that the conductor had complete control of the train. The evidence on this point was to the effect that, so far from the company imposing upon him any duty to carry with his train a dangerous or unsafe car, he was directed by the company to cut out any car he regarded in that condition. Under these circumstances, the vital inquiry is whether he was guilty of contributory negligence in carrying forward the car, after he discovered the defects, of his own will, without any obligation being imposed upon him by the company to do so. If he did this without good reason, it would not be the assumption of a risk imposed in course of his employment, but carelessness and misconduct on his part in voluntarily carrying with the train a defective car. For this reason, I venture to think the defense of contributory negligence was the appropriate one under which this issue should have been submitted to the jury. As we have seen, if the plaintiff discovered defects in the car after he had started on his trip, and they were such as to induce the belief in his mind that the car was dangerous or unsafe, or if they would have made the car appear unsafe or dangerous to a man of ordinary prudence and reason in like situation, and if the plaintiff was in charge of the train, and had the opportunity to drop the car before the accident, he would then be operating a dangerous or unsafe car in his own charge; and if there was a voluntary operation by him of a dangerous or unsafe car, producing the injury, or contributing to it as a proximate cause, without which it would not have occurred, the plaintiff could not recover. The portions of the charge above quoted should, in my opinion, have been accompanied by a statement of this principle of law. The fourth exception and subdivisions "c" and "d" of the third exception cover this error, and I think they should be sustained, and a new trial ordered.

POPE, C. J., concurs.

GARY, A. J. (dissenting on one point). The assignments of error which, in the opinion of Mr. Justice WOODS, should be sustained, are subdivisions "c" and "d" of the third exception, and the fourth exception. They are as follows:

"Because the presiding judge erred in charging the jury as follows: 'If it was a rule of the company for the cars to be made up by the train master in the city of Augusta,

and turned over to the conductor who was to take them out of the city of Augusta, and that conductor had nothing to do with the making up of the train there, then the conductor of the train had a right to assume that suitable and safe appliances had been furnished him, and that the cars had been properly loaded when he took charge of them. If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in order and that the cars were properly loaded, and if the plaintiff in this case was the conductor, and if it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order—the train which was turned over to him in the city of Augusta, loaded by the officials there—then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable.' The error—(c) being the burden of defendant's defense—was, whatever may have been the obligations of the plaintiff in relation to taking the train out from the city of Augusta, he was bound to know, as conductor, and did know very soon after he started from Augusta, of the defects complained of, and because of such knowledge, and because of his conduct with reference to such alleged defects after knowledge of them, he was not entitled to recover; and the portion of the charge here complained of ignores the question of the existence of any defects after leaving the city of Augusta, and the obligation of the plaintiff with reference thereto, and it was therefore erroneous and greatly prejudicial to the defendant. (d) The charge, in effect, charged the jury that if it was not the duty of the plaintiff, as conductor, to see that the cars were safe and properly loaded when he left Augusta, no duty in this regard was afterwards placed upon him, and during the entire trip he might assume such cars and such loading continued to be safe and proper.

"(4) Because the presiding judge, while instructing the jury as to the law in relation to the knowledge of employes of defects in machinery committed to them, erred in charging as follows: 'If the conductor here was injured, and if he had knowledge of any defect or unsafe character or condition, machinery, ways, and appliances, and if he knew that the train of cars or anything ap-

pertaining to it was dangerous, and he voluntarily took charge of that train, then he assumed the risks incident to his position, and he cannot recover.' The error being in instructing the jury, in effect, that a conductor would be prevented from recovering if, having such knowledge, he voluntarily took charge of the defective train, and, inferentially, that such knowledge acquired after beginning to operate such train, however long before the accident, would have no such effect in preventing a recovery."

His honor the presiding judge charged the following requests presented by the defendant:

"(1) If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating, and the manner in which the lumber referred to in the complaint was loaded—and voluntarily operated the same and took risks of injury therefrom, then he cannot recover.' I charge you that, taken in connection with what I have heretofore said to you along that line.

"(2) If the jury believe from the evidence that the injury of the plaintiff was caused by his own negligence, and not by the negligence of the railway company, then they must find for the defendant railway company.' I have already charged you that, and I recharge it to you, as good law.

"(3) If the jury believe from the evidence that the injury of the plaintiff, Barksdale, was directly caused both by the negligence of the railroad company and the negligence of the plaintiff, Barksdale, then the plaintiff cannot recover, and the verdict must be for the defendant railway company.' I have already charged you that, and I recharge it to you."

His honor concludes his charge as follows: "Now, gentlemen, if, in your opinion, the plaintiff here was injured by negligence and carelessness of the railway company, and he did not contribute to his own injury, and the carelessness and negligence of the railway company was the direct and proximate cause of his injury, then your verdict will be for him in such sum as you think he has sustained, proportionate to the injury sustained by him. If you believe the plaintiff was injured, and that injury was brought about by his own carelessness and negligence, then your verdict will be for the defendant. Or if you believe the railway company was negligent, and that negligence was the direct and proximate cause of the injury of the plaintiff, and the plaintiff was also negligent, and his negligence contributed as a direct and proximate cause of the injury, and the injury sustained by him, if any were sustained by him, was an admixture of negligence of the railway company and the plaintiff himself, then your verdict will be for the defendant." The charge of the circuit judge must be viewed in two lights—first, as charging the law generally that

was applicable to the case; and, second, as charging specifically upon the questions presented by the requests. Furthermore, the entire charge must be considered in determining whether any particular portion thereof was erroneous. After quoting that portion of the charge set out in the third exception, commencing with the words, "If it was the duty of the conductor," Mr. Justice WOODS uses this language: "This was all appellant could ask as to the plaintiff's duty before leaving Augusta, but it does not cover his duty after the discovery of defects on the journey. The portion of the charge quoted would, I think, convey the impression to the jury that the plaintiff might continue to assume the car was not dangerous after he had discovered on his journey that he owed any duty to exercise judgment or discretion as to whether he should undertake to carry the car on after he knew of the defects." Conceding that this portion of the charge, standing alone, would convey the impression mentioned by Mr. Justice WOODS, and that it should have been accompanied by a statement of the principles announced in his opinion, let us see if the principles were elsewhere charged. The defendant's first request was: "If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same and took the risks of injury therefrom, then he cannot recover." The presiding judge said: "I charge you that, taken in connection with what I have heretofore said to you along that line." Mr. Justice WOODS, in considering the exception assigning error in the charge, holds that it was not erroneous, and we concur with him in this conclusion. If, then, there was no error in the manner in which the request was charged, we fail to see how the jury could have been misled into supposing that the plaintiff could recover if he knew of the defects and voluntarily operated the train. When that portion of the charge set out in the exception is considered in connection with the whole charge, and with the request which was specifically charged, it could not have misled the jury.

The court being equally divided upon the matter discussed above, the judgment of the circuit court must stand affirmed, under the Constitution.

JONES, J. I concur in the view of Mr. Justice GARY, that the judgment of the circuit court should be affirmed. As shown in the case of *Bodie v. R. Co.*, 61 S. C. 478, 39 S. E. 715, the defenses of "assumption of risk" and "contributory negligence" are distinct. Being affirmative defenses, they must be pleaded, to be available. 13 Ency. Pl. & Pr. 914. The defendant not having plead-

ed assumption of risk, it did not have any right to have the jury instructed with reference to such matter. In so far, therefore, as the circuit court undertook to instruct the jury in that regard, the appellant received favor, and not prejudice, and cannot complain if the court failed to cover every aspect of the doctrine of assumption of risk. The fact that a servant remains in the master's service after knowledge of the defective or unsafe condition of the machinery or appliances furnished him to operate, bears upon the defense of contributory negligence as well as upon the question of assumption of risk; but in neither case is it proper to instruct the jury, as matter of law, that a servant cannot recover for injuries sustained in the operation of defective or unsafe machinery or appliances after knowledge of such condition, but in all such cases it must be left to the jury, from all the circumstances, to determine the proper inference to be drawn from the continuance to operate after knowledge of the defective or unsafe condition. The charge of which the complaint is made, stated correctly, is as follows: "If it was the duty of the conductor to make up his train in the city of Augusta, and see that everything was in good order and that the cars were properly loaded, and if plaintiff in this case was the conductor, and it was his duty, in the city of Augusta, to see that everything was in good shape (in good order) when he left there; if he had knowledge of the fact that the cars were unsafe and unsuitable and dangerous—if he had knowledge of that fact, and moved those cars, then he assumed the duties incident to his office, being conductor, and he cannot recover. But if the duty was imposed upon the railroad authorities, and such authorities loaded that car and turned it over to him, and it was not his duty to investigate as to whether everything was safe and suitable and in good order—the train which was turned over to him in the city of Augusta, loaded by the officials there—then the conductor had a right to assume that safe and suitable appliances had been furnished, that the car turned over to him was properly loaded, and that the machinery to run it was safe, and that the appliances were safe and suitable. Now, under the Constitution of this state, a conductor of a train is excepted from other employes of the railroad company. If the conductor here was injured, and if he had knowledge of any defective or unsafe character or condition of the machinery, ways, or appliances, and if he knew that the train of cars, or anything appertaining to it, was dangerous or unsafe, and he voluntarily took charge of that train, then he assumed the risks incident to his position, and he cannot recover. If the cars were unsuitable, and the appliances were unsuitable and unsafe, and he had no knowledge of the danger he was running, or if he had no knowledge of the

fact that they were unsuitable or unsafe—if they were not plain to the eye, but the defects were hidden—then he would be entitled to recover, provided you think he was injured through the carelessness and negligence of the railroad, and he didn't by his own act contribute towards his injury. The defendant has requested me to charge you the following proposition of law: '(1) If the jury believe from the evidence that the plaintiff, Barksdale, knew of the defects alleged to be in the lumber car—the train he was operating—and the manner in which the lumber referred to in the complaint was loaded, and voluntarily operated the same, and took the risks of injury therefrom, then he cannot recover.' I charge you that, taken in connection with what I have heretofore said to you along that line." This charge, it seems to me, was too favorable to the appellant, first, in submitting to the jury whether plaintiff had assumed the risk in continuing to operate the cars after knowledge of their unsafe condition, when no such defense had been pleaded; and, second, in so far as the charge might be construed as relating to the plea of contributory negligence, in denying plaintiff's right to recover if he voluntarily took charge of the train and operated it after knowledge that it was unsafe, instead of leaving it to the jury to decide whether such facts, under the circumstances, warranted a conclusion that the plaintiff thereby proximately contributed to his injury. But when the whole charge to the jury is considered, and especially that portion relating directly to the matter of contributory negligence, it is manifest that defendant's issue of contributory negligence was fully, fairly, correctly, and explicitly submitted to the jury. It must also be observed that the objection urged against the charge relates to a mere omission to charge as to a matter not brought to the attention of the court by a specific request to charge the matter omitted.

Therefore, while I concur in the views of Associate Justice WOODS that the motion for a nonsuit was properly refused, I agree with Mr. Justice GARY that the judgment of the circuit court should be affirmed.

(66 S. C. 277)

#### EDWARDS v. SOUTHERN RY.

(Supreme Court of South Carolina. May 14, 1903.)

#### RAILROADS—OPERATION OF COMPETING LINES—RECOVERY OF PENALTY.

1. Act 1894, 21 St. at Large, p. 812, providing that no corporation shall purchase or lease any railroad in the state where such purchaser or lessee is interested in any competing line within or without the state, is not repealed by Const. 1895, art. 9, § 8, relating to the consolidation of railroad lines in the state; and a complaint that defendant railroad company has purchased the stock of a competing line under Act 1897, 22 St. at Large, p. 492, author-

izing the recovery of a penalty against any railroad company leasing or operating competing railroad lines within the state, states a good cause of action.

Appeal from Common Pleas Circuit Court of Lexington County; Townsend, Judge.

Action by Isaac Edwards against the Southern Railway. From order dismissing complaint on demurrer, plaintiff appeals. Reversed.

This is an action against the defendant for the penalty provided by statute for owning, leasing, or operating competing railroad lines within this state. The appeal herein is from an order sustaining a demurrer to the complaint. The complaint alleges: "(1) That the plaintiff is a resident and citizen of the county of Lexington, in said state. (2) That the Southern Railway Company is a corporation duly organized under the laws of the state of New Jersey, as this plaintiff is informed and believes, but which, under the provisions of section 8 of article 9 of the Constitution of this state, has become a domestic corporation of this state, and owning and operating several lines of railroad in the state of South Carolina, one of which extends from the city of Columbia, in the county of Richland, in said state, through the county of Lexington and through the town of Batesburg, in said county, to the city of Augusta, in the state of Georgia, known as the Charlotte, Columbia & Augusta Railroad; that the said Southern Railway Company, at the times hereinafter stated, also held by stock ownership or by lease a line of railroad, known as the South Carolina & Georgia Railroad, extending from the city of Columbia to the town of Branchville, in said state, thence from the town of Branchville by and through the town of Blackville, in said state, to the city of Augusta. (3) That, so owning and operating the said two lines of railroad, the defendant, the Southern Railway Company, on or about the 20th day of May, 1899, became the owner by purchase of the stock of all that line of railway running from Allendale, in Barnwell county, by and through the town of Barnwell, and by and through the town of Blackville, in Barnwell, by and through the town of Selvern, in Aiken county, to the town of Batesburg, in Lexington county, which, prior to that time, had been a competing line with the said Southern Railway at two points within the state of South Carolina, to wit, at Blackville, in the county of Barnwell, and at Batesburg, in the county of Lexington; and that the said Southern Railway, so owning the said railroads or holding the same by lease, has continued to operate the same since the said 20th day of May, 1899, within this state and through the said county of Lexington, contrary to the provisions of the act of the General Assembly approved the 2d day of March, 1897." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action in the



following particulars: "(1) The plaintiff can maintain this action only by virtue of the act of March 2, 1897. This action is confessedly brought under that statute, to which reference is made in paragraph 3 of the complaint. The complaint, therefore, to be sufficient, must allege all of the facts which bring plaintiff's case within the terms of the statute: (a) The defendant railroad company must own, have under lease, or operate a railroad or railroad lines within this state. (b) Such railroad company must also undertake to own, lease, or operate another railroad line within this state. (c) Both of such railroad lines must be competing lines with one another." His honor the circuit judge, in an order setting forth his reasons at length, sustained the demurrer, from which the plaintiff appealed.

E. F. Strother and R. W. Shand, for appellant. B. L. Abney, for respondent.

GARY, A. J. The first question to be considered is whether the act of 1894, hereinafter mentioned, was repealed by the Constitution of 1895. The act of 1894 provides that "no corporation, individual or association, or either or both, shall purchase or lease any railroad lying in whole or in part within this state, or any interest therein, or shall operate the same, where such purchaser or lessee already owns, operates or is interested in a line or lines of railroad which, either alone or in conjunction with other connecting railroads lying within or without this state, can compete between any two or more points within this state, and any such purchase, lease or acquisition is hereby declared to be null and void." 21 St. at Large, p. 812, § 2.

Section 8, art. 9, of the Constitution, is as follows:

"Sec. 8. The General Assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state; but in all cases where a railroad is to be built or operated, or is now being operated, in this state, and the same shall be partly in this state and partly in another state, or in other states, the owners or projectors thereof shall first become incorporated under the laws of this state; nor shall any foreign corporation or association lease or operate any railroad in this state, or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this state with others shall be allowed only where the consolidated company shall become a domestic corporation of this state. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license of this state or under any existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation, except upon the condition that the

owners or stockholders thereof shall first organize a corporation in this state under the laws thereof, and shall thereafter operate and manage the same and the business thereof under said domestic charter."

The act of 1897 is as follows:

"Section 1. That any railroad company owning, leasing or operating competing railroad lines within this state, in violation of law, shall be subject to a penalty of one hundred dollars for every day that such competing lines are owned, leased or operated, such penalty to be recovered in any court of competent jurisdiction in any county through which either of such competing lines may pass, by any citizen thereof who may sue for the same, one-half of such penalty to go to the party suing therefor and the other half to the state: provided, that the provisions of this act shall be without prejudice to any remedy which the state may be entitled to in its own behalf.

"Sec. 2. That all acts and parts of acts inconsistent with this act are hereby repealed." 22 St. at Large, p. 492.

Sections 10 and 11, article 17, of the Constitution, contain the following provisions:

"Sec. 10. All laws now in force in this state and not repugnant to this Constitution shall remain and be enforced until altered or repealed by the General Assembly, or shall expire by their own limitations.

"Sec. 11. That no inconvenience may arise from the change in the Constitution of this state, and in order to carry this Constitution into complete operation, it is hereby declared: First. That all laws in force in this state, at the time of the adoption of this Constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the General Assembly or expire of their own limitation. \* \* \* Third. The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in force until such legislation is had."

The act of 1894 defines what is meant by "competing railroads," and we are unable to find any provision in the Constitution with which it is inconsistent. In 1902 the General Assembly passed an act providing: "That the Code as submitted by the Code Commissioner of South Carolina \* \* \* be and the same is hereby declared to be the 'Code of Laws of South Carolina, 1902;' and the said Code is hereby declared to be the only statutory law of the state on the 14th day of January, 1902." The provisions of the act of 1894 are incorporated in section 2056 of the present Code of Laws, and are therefore now in force, thus showing that the General Assembly did not think that they had been repealed. The provisions of the act of 1894 could not properly have been included in the Code of Laws unless they formed a

part of the statute law at the time the Code of Laws was declared by the General Assembly to be the only statutory law of the state. Const. § 5, art. 6.

Having reached these conclusions, the court is satisfied that, when the act of 1897 is construed in connection with the act of 1894, the complaint states a good cause of action, and that the circuit judge erred in sustaining the demurrer.

It is the judgment of this court that the judgment of the circuit court be reversed.

On Rehearing.

(May 24, 1903.)

**PER CURIAM.** The only ground set forth in the petition for a rehearing which it is deemed necessary to consider specifically is that which assigns error on the part of the court in failing to consider section 7, art. 9, of the Constitution. That section is as follows: "No railroad or other transportation company, and no telegraph or other transmitting corporation, or the lessees, purchasers or managers of any such corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad, or other transportation, telegraph or other transmitting company owning or having under its control a parallel or competing line; and the question whether railroads or other transportation, telegraph or other transmitting companies, are parallel or competing lines, shall, when demanded by the party complainant, be decided by a jury, as in other civil causes." While this section is not mentioned in the opinion, it was, nevertheless, considered by the court, and the conclusion announced necessarily shows that the court did not consider that it repealed the act of 1894 mentioned in the opinion.

After careful consideration of the petition, and the court being satisfied that no material question of law or fact was either overlooked or disregarded, it is ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(66 S. C. 246)

**MERCER v. SOUTHERN RY.**

(Supreme Court of South Carolina. May 12, 1903.)

**APPEAL—REVIEW—INSTRUCTIONS—ACCIDENT AT CROSSING—SIGNALS—CONTRIBUTORY NEGLIGENCE.**

1. Where none of the testimony is printed in a case, the court cannot determine the applicability of the instructions.

2. An instruction that if the signals were not given at a crossing, and a person was killed, the railroad was liable, unless such person by his own carelessness contributed to his injury, and his negligence was the proximate cause of the injury, was proper.

3. An instruction, in an action for injuries at a crossing, that, whenever a railroad fails to

give the statutory signal, it violates the law, and if a man is killed by such failure, and he does not contribute towards his own injury, the railroad would be liable, was proper.

4. If a railroad company was careless and negligent, and a party killed at the crossing was also negligent, and the admixture of the negligence of both brought about the injury, the railroad company was not liable.

5. If a person injured at a crossing was intoxicated at the time, and the intoxication actually contributed to the injury, the railroad company was not liable.

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; Watts, Judge.

Action by Mary A. Mercer, administratrix of James W. Mercer, against the Southern Railway. From judgment for defendant, plaintiff appeals. Affirmed.

N. W. Hardin and Hall & Willis, for appellant. Butler & Osborne and C. P. Sanders, for respondent.

**POPE, C. J.** This appeal involves questions as to the correctness of the charge of the Honorable Richard C. Watts, as presiding judge, to the jury, on the trial before them. The cause of action is the alleged negligence of the defendant in failing to comply with the requirements of the statute law as to ringing the bell or blowing the whistle of the engine, beginning at a distance of 500 yards of a crossing by said railway over a public highway, and continuing to ring the bell or sound the whistle until after such highway had been passed by such engine, and also the neglect to have the headlight on the engine kept burning at that time, whereby, it being a dark and windy night, the plaintiff came in collision with said engine, and was instantly killed, to the plaintiff's damage \$1,950. The defendant denied all these allegations of fact, and also alleged that the death of the plaintiff, if he was killed by the railway train, was not owing to any fault or negligence of the defendant, but was due to the fault and negligence of plaintiff's intestate; that the intestate was guilty of contributory negligence, without which he would not have been killed; that the accident was the result of intestate's gross negligence. Testimony was offered by both sides. Judge Watts charged the jury. Verdict was for defendant. After judgment, plaintiff appealed on the following grounds:

"First. For that it is respectfully submitted his honor the circuit judge erred at the trial in this: Plaintiff requested his honor to instruct the jury as follows: 'It is negligence per se (of itself) for a railroad to fail to give the signals at crossings, as required by statute;' and he erred when he modified said request as follows: 'I charge you that, but don't charge you that in that language. I charge you, as a matter of law, that, whenever the railroad fails to give those signals at crossings as required by statute, it violates the statute law of the state; and if a man is killed by any failure on their part to com-

ply with the statute law of the state, and it is their carelessness and negligence that causes the death, and the party who is killed does not contribute towards his own injury, then the plaintiff would be entitled to recover under such circumstances.' The error herein being that the failure to give the signals is negligence per se, and it was error not to so charge. The plaintiff could recover unless Mercer was guilty of gross and willful negligence, and it was error to otherwise instruct the jury.

"Second. That he erred when he did not charge plaintiff's sixth request, without qualification, which was as follows: 'If the jury believes from the testimony that the signals were not given as required by statute, and that Mercer was killed upon the crossing, then they must find for the plaintiff, Mrs. Mercer, the mother, unless it is shown by the testimony that Jim Mercer at the time of the killing was guilty of gross or willful negligence;' and he erred when he qualified said request as follows: 'I charge you that she would be entitled to recover unless you are satisfied that he by his own carelessness and negligence contributed to his own injury, and that was the direct and proximate cause of the injury.'

"Third. That he erred when he charged the jury. 'Or, if the railroad was careless and negligent, and if the party killed was also careless and negligent, and if the admixture of the carelessness of the two brought about the injury, then the railroad is not liable;' whereas, it is submitted, as it was alleged that Mercer was killed at a public crossing on a dark night, and that no signals were given, or headlight upon the engine burning, that, if these allegations were established as true (and this was a question for the jury), then plaintiff must recover, unless the deceased was guilty of gross and willful negligence, and that such gross and willful negligence was the proximate cause of the injury.

"Fourth. That he erred when he charged the jury: 'Or, if the railroad was careless and negligent, and he was careless and negligent, and the carelessness and negligence of the two was the proximate or near cause of his injury, your verdict should be for the railroad;' whereas, it is submitted, he should have charged the jury that whoever's negligence—that of the deceased or defendant—was the proximate cause of the injury, against that one the verdict should have been rendered.

"Fifth. That he erred when he charged defendant's sixth request: 'If the jury find that the place in question was a public road crossing or traveled place, within the meaning of the statute, they must still find for the defendant, if they are satisfied that James Mercer was guilty of gross negligence, and such negligence as contributed to his injury;' whereas, it is submitted that if Mercer was killed at a crossing by defendant, and no sig-

nals were given, that the verdict must be for the plaintiff, unless Mercer was guilty of gross or willful negligence, and this negligence was the proximate cause of the injury, and it was error to say to the jury, 'guilty of gross negligence, and such negligence as contributed to the injury.'

"Seventh. That he erred when he did not instruct the jury plainly that if Mercer was killed upon a public crossing on defendant's track by one of its engines, and the testimony showed that the defendant did not give the signals as required by statute (which was negligence per se), and did not exercise due care, then plaintiff was entitled to recover, unless Mercer was guilty of gross or willful negligence, and this was the proximate cause of the injury.

"Eighth. That he erred when he instructed the jury, at request of defendant in sixteenth request, as follows: 'And if the intoxication actually contributed to the injury, the plaintiff cannot recover; the principle being that a person cannot voluntarily incapacitate himself from the ability to exercise ordinary care, and then recover for an injury to which a want of ordinary care on his part, while so intoxicated, proximately contributes.' If Mercer was killed at a public crossing, no signals being given, he must be guilty of gross and willful negligence, to defeat the action, and not 'want of ordinary care.'

We will now briefly pass upon these exceptions. We will first observe that the sixth is conspicuously absent from the "case" for appeal. Before taking up the other exceptions, it may be said: "Instructions to a jury must be based upon and be applicable to the pleadings and evidence." (*Italics ours.*) 11 Ency. Pleading & Practice, pp. 158, 159. In the "case" there is not a particle of testimony printed. How can we tell whether the charge of the trial judge is responsive to the pleadings and evidence, when the latter is not printed in the "case." We might, and possibly should, decline to go further, but, under the circumstances, will not apply so stern a rule.

1. Sections 2132 and 2139 of the Civil Code of South Carolina, relating as they do to the equipment of railway engines with bell and whistle and headlight, and the duty of the one in charge of the engine to ring the bell or blow the whistle within 500 yards of a crossing of a highway, street, or traveled place, as does section 2132, and also that any collision by a person or property with such engine of the railway on a crossing by it over a highway, street, or traveled place, in the absence of the foregoing signals by the railway company, in the absence of proof that such failure of the railway company did not contribute to the injury, the railway shall be liable for all damages by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or willful negligence, or was acting in violation of law,

and that such gross or willful negligence or unlawful act contributed to the injury, as provided in section 2139, have so often been before this court that it is hardly necessary to do more than to merely cite the numbers of such sections when injuries at railroad crossings of a highway, street, or traveled place are up for consideration. When the circuit judge considered in his charge the fourth request of plaintiff, he did not refuse to so charge. He used this language: "I charge you that, but I don't charge you that in that language." He went on, and, in a common-sense way, without quoting any Latin, explained to the jury what was meant by the request. His work was admirably done. There was no ambiguity in his language. No one could fail to understand what his language meant. This exception is overruled.

2. We overrule the second exception. There was no mistake of the judge, as shown by the exception itself. The circuit judge, in his charge, had to repeat the matter here involved several times, and in no instance did his language fail to convey the proper idea of what was meant by those statutory provisions. If he erred at all at this point, it was in favor of the plaintiff.

3. The circuit judge was endeavoring to impress upon the minds of the jurors the effect, in law, produced when the plaintiff and defendant concur in contributing to the disaster to plaintiff's intestate—trying to show to the jury that if the railway did not ring the bell or blow the whistle in 500 yards of the crossing in question, and yet the plaintiff, in addition to the want of ordinary care, by being guilty of gross or willful negligence, contributed to his injury, then, in law, the verdict should be for the defendant. We see no error here. It is a compliance with the statute itself. This exception must be overruled.

4. This exception is controlled by our preceding holdings, and is therefore overruled.

5. The language of the statute in question was embodied in his own language by the trial judge. This exception is overruled.

6. We find that the trial judge in his charge to the jury was very careful to convey to, and very successful in conveying to, the jury the meaning of our statute regulating such cases as the present. This ground of appeal is overruled.

8. We find that the language of the charge as here complained of was in accordance with law. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J., concurs in the result, as neither the testimony, nor a statement thereof, is set out in the record.

JONES, J. (dissenting). The main question in the appeal is whether the circuit court erred in instructing the jury as to the rule contributory negligence, as applicable un-

der section 2139, Civ. Code 1902. That section provides: "If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury."

Beginning at folio 23 of the "case," the judge charged: "If you are satisfied by the preponderance or weight of the testimony that Mercer was killed, and he was killed at a traveled place, and he was killed by the carelessness and negligence of the railroad company, and he did not by his own act contribute to his injury, then your verdict should be for the plaintiff for such damages as you think she has sustained under the testimony in the case—and that is for you—proportioned to the injury sustained. Now, the law is this: If any one is killed by a railroad company, and he by his own carelessness and negligence contributes to the killing, if he was careless and negligent himself, and by his carelessness and negligence contributed to his death, then the railroad is not liable. Or if the railroad was careless and negligent, and if the party killed was also careless and negligent, and if the admixture of the carelessness of the two brought about the injury, then the railroad is not liable. But wherever a party is killed through the carelessness and negligence of the railroad, and he did not by his own act contribute to the injury, the railroad is liable."

Again, beginning at folio 32, the judge charged: "If he was killed through any negligence and carelessness of the railroad, if there was any absence of due care and precaution on their part, and he did not by his own act contribute to his own injury, the plaintiff is entitled to recover her damages, not exceeding the amount sued for, \$1,950, as, in your opinion, is proportioned to the injury sustained by her. If, on the contrary, the railroad was negligent, and killed him, and he was careless and negligent on his part, and failed to observe due precaution and didn't do what a man under similar circumstances should have done—a man of ordinary reason and prudence should have done—or if he failed to do what a man under similar circumstances should have done, and he was a man of ordinary reason, and he by his own act contributed towards his injury, your verdict should be for the railroad: or if the railroad was careless and negligent, and he was careless and negligent, and the carelessness

and negligence of the two was the proximate or near cause of his injury, your verdict should be for the railroad. But if he was killed through the carelessness and negligence of the railroad, and he was not careless and negligent himself, then your verdict should be for the plaintiff for the amount, under the testimony, which you think proportioned to the injury sustained by her."

The foregoing fairly represents the main charge of the trial judge upon the point under consideration, and it is manifest therefrom that the jury were not instructed in accordance with the statute quoted, for, under these instructions, any ordinary negligence of plaintiff's intestate, which proximately contributed to his death, would defeat recovery, whereas, under the statute, such recovery would not be defeated by the contributory negligence of plaintiff's intestate, unless at the time of the collision he was guilty of gross or willful negligence, or conduct in violation of law, which proximately contributed to the injury. *Bowen v. Ry. Co.*, 58 S. C. 230, 36 S. E. 590. This error was further emphasized in responding to plaintiff's sixth request to charge, as follows: "'(6) If the jury believe from the testimony that the signals were not given as required by statute, and that Mercer was killed upon the crossing, then they must find for the plaintiff, Mrs. Mercer, the mother, unless it is shown by the testimony that Jim Mercer at the time of the killing was guilty of gross or willful negligence.' I charge you that she would be entitled to recover, unless you are satisfied that he by his own carelessness or negligence contributed to his own injury, and that was the direct and proximate cause of his injury." There is nothing in the whole charge which in any way attempted to instruct the jury as to this requirement of the statute, unless it be found in charging defendant's sixth request, as follows: "'(6) If the jury find that the place in question was a public road crossing or traveled place, within the meaning of the statute, and that the defendant did not ring its bell or blow its whistle as required by statute, they must still find for the defendant, if they are satisfied that James Mercer was guilty of gross negligence, and such negligence as contributed to his injury.' I charge you that." This isolated sentence ought not to be construed as removing the error pointed out. The proper construction of the whole charge, giving this last portion all the force it deserves, is that the plaintiff was not entitled to recover (1) if her intestate was guilty of ordinary negligence, proximately contributing to the injury; (2) if her intestate was guilty of gross negligence, proximately contributing to the injury. After the said charge of the defendant's sixth request, the court again impressed the jury in these words: "I charge you, gentlemen, as I have before charged you, that if the railroad was guilty of carelessness and negligence in killing Mercer, if they did kill him, and there

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was no negligence or carelessness on the part of Mercer, then your verdict should be for the plaintiff. If Mercer by his own carelessness and negligence contributed to his injury, then he cannot recover. Or if the railroad was careless and negligent, and the admixture of the carelessness of the two was the cause of Mercer's injury, if he was injured, your verdict should be for the railroad." It seems very clear to me that the jury could not but be impressed with the idea that ordinary negligence on the part of the plaintiff's intestate would defeat recovery if such negligence contributed proximately to the injury—a view in conflict with the provisions of the statute. The second, third, and seventh exceptions, raising this question, ought to be sustained, and the judgment of the circuit court ought to be reversed for such error.

The fact that the "case" does not state the testimony seems to me to be immaterial on this question. The "case" shows what were the issues under the pleadings, and the charge was applicable to such issues. Under such circumstances, a presumption arises that there was some testimony upon the issues which were submitted to the jury. This is not a case in which we are called upon to review findings of fact, and therefore the cases cited by respondent's counsel do not apply. The question of law raised is sufficiently presented by the pleadings, charge in submission of issues to the jury, and the exceptions thereto.

(101 Va. 632)

# RADFORD WEST END LAND CO. v. COWAN.

(Supreme Court of Appeals of Virginia. June 18, 1903.)

## CORPORATIONS—WINDING UP—SUIT BY STOCKHOLDER.

1. Acts Ex. Sess. 1901, p. 326, c. 298, providing that when the principal purpose for which a corporation is organized has failed, or its management has been abandoned by its officers, or it has become insolvent, or its assets are being consumed in expenses, without benefit or probable benefit to the stockholders, or its affairs are being grossly mismanaged, a stockholder may bring suit to wind it up, does not authorize such suit in the case of a corporation organized in 1890, which purchased 300 acres, now in the limits of a city, with the object of subdividing them into lots and selling them at a profit, where its expenses are not greater than its income, it is not wasting its assets, its management has not been abandoned, its affairs are not grossly mismanaged, and it is ready to sell when purchasers can be found, though the evidence is conflicting as to whether it will be for the benefit of its stockholders that it continue in business.

Appeal from Circuit Court, Montgomery County.

Suit by John T. Cowan against the Radford West End Land Company. Decree for plaintiff. Defendant appeals. Reversed.

W. B. Kegley, for appellant. A. A. Phlegar and Tompkins & Tompkins, for appellee.

KEITH, P. The bill in this case was filed by John T. Cowan to have the Radford West End Land Company dissolved, and its assets distributed. The statute (Acts Ex. Sess. 1901, p. 326, c. 298) under which the court took jurisdiction is as follows:

"Be it enacted by the General Assembly of Virginia, that whenever the principal purpose for which a mining or manufacturing company or a land and improvement company or a mercantile or commercial company incorporated in this state has failed, or the management of the company has been abandoned by its officers or board of directors, or the company has become insolvent, or its assets are being consumed in expenses, without benefit or probable benefit to the stockholders, or its affairs are being grossly mismanaged, it shall be lawful for any court having chancery jurisdiction to wind up such company and make such disposition of its assets as may be just and equitable in a suit brought by a stockholder or stockholders holding at least one-tenth of the capital stock of the company."

It appears that the corporation was chartered in 1890 with a minimum capital stock of \$85,000, and a maximum capital stock of \$500,000, to be divided into shares of \$100 each; that it purchased a tract of 300 acres of land now within the limits of the city of Radford, and its object was to subdivide this land into lots and to sell them at a profit. Eight hundred and fifty shares of stock were issued, of which number 100 shares fully paid and nonassessable, were issued to the plaintiff, and the remaining 750 shares to various other persons.

It appears that it owes no debts, that its expenses are not greater than its income, that it is not wasting its assets, that its management has not been abandoned by its officers or board of directors, and that its affairs are, under the circumstances, not grossly mismanaged. As to the future of the corporation, the evidence is conflicting. Some witnesses express the hope, and give their reasons for the opinion they entertain, that there will be a great improvement in the value of the land retained by the company, and that, with prudent management, the stockholders may reasonably expect to be reimbursed a considerable portion of the assessments which they have been required to pay. We cannot say that the purpose for which the corporation was organized has failed. It still owns land, which it is ready to sell whenever a purchaser can be found, and the proof is that the demand for small lots or parcels of land in that locality has increased. It still preserves its organization. We cannot say that it is insolvent, for it owes no debts; nor that its assets are being consumed in expenses, for its expenses are within its income; and the facts enumerated are sufficient to repel the charge of gross mismanagement. Whether it will be for the benefit of its stockholders that the company should

continue in business is, of course, uncertain; but, as we have seen, upon that point the evidence leaves the stockholders a reasonable expectation that present conditions will improve.

Under all the circumstances of the case, we are of opinion that the appellee does not bring himself within the terms of the act of assembly providing for winding up abandoned, insolvent, or unprofitable corporations at the suit of stockholders; and, without passing upon any other question raised in the record, the decree of the circuit court, for the reasons stated, must be reversed, and this court will make such decree as the circuit court ought to have rendered.

(101 Va. 829)

#### TAYLOR v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 18, 1908.)

#### CONSTITUTIONAL LAW—PROMULGATION OF CONSTITUTION—VALIDITY.

1. The Constitution of 1902, having been acknowledged and accepted by the officers administering the government, and by the people of the state, and being in force throughout the state without opposition, must be regarded as the existing Constitution, irrespective of the question as to whether or not the convention which promulgated the Constitution had power to do so without submitting it to the people for ratification or rejection.

Error to County Court, Augusta County.

One Taylor was convicted of housebreaking with intent to commit larceny, and brings error. Affirmed.

W. S. Timberlake, for plaintiff in error.  
A. C. Braxton and R. C. Catlett, for the Commonwealth.

HARRISON, J. An indictment was found against the plaintiff in error, charging him with house breaking with intent to commit larceny. Upon his arraignment he tendered a plea of guilty to the charge, and thereupon, with the consent of the attorney for the commonwealth, entered of record, the court, without the consent of the plaintiff in error, proceeded to hear and determine the case without the intervention of a jury, and upon such hearing adjudged the prisoner guilty of a felony as charged in the indictment, and sentenced him to confinement in the State Reformatory; further providing that, should the prisoner be refused admission to the reformatory, he should, in that event, be committed to the State Penitentiary, to be confined therein and treated in the manner prescribed by law for the period of one year. From this judgment application was made to the judge of the circuit court of Augusta county for a writ of error, which was refused, and thereupon a writ of error was awarded to this court.

The contention is that the court had no authority, and therefore no power, to adjudge the plaintiff in error guilty of a felony, and

to sentence him without the intervention of a jury. It is conceded that the proceeding complained of was in strict conformity to the provisions of section 8, art. 1, of the new Constitution of the state of Virginia, ordained and promulgated by a constitutional convention assembled in Richmond during the years 1901-2; but it is insisted that this Constitution is invalid, and without force or effect in the state; that the Constitution adopted in the year 1869, which provides in section 10, art. 1, that in all criminal prosecutions a man hath a right to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, is the only legal and valid Constitution existing throughout the state of Virginia; that the provisions of section 10, art. 1, thereof, have never been legally modified or repealed, and that the plaintiff in error was entitled to have his case heard and determined in accordance with those provisions.

The sole ground urged in support of the contention that the Constitution proclaimed in 1902 is invalid is that it was ordained and promulgated by the convention without being submitted for ratification or rejection by the people of the commonwealth.

The Constitution of 1902 was ordained and proclaimed by a convention duly called by direct vote of the people of the state to revise and amend the Constitution of 1869. The result of the work of that convention has been recognized, accepted, and acted upon as the only valid Constitution of the state by the Governor in swearing fidelity to it and proclaiming it, as directed thereby; by the Legislature in its formal official act adopting a joint resolution, July 15, 1902, recognizing the Constitution ordained by the convention which assembled in the city of Richmond on the 12th day of June, 1901, as the Constitution of Virginia; by the individual oaths of its members to support it, and by its having been engaged for nearly a year in legislating under it and putting its provisions into operation; by the judiciary in taking the oath prescribed thereby to support it, and by enforcing its provisions; and by the people in their primary capacity by peacefully accepting it and acquiescing in it, by registering as voters under it to the extent of thousands throughout the state, and by voting, under its provisions, at a general election for their representatives in the Congress of the United States.

The Constitution having been thus acknowledged and accepted by the officers administering the government and by the people of the state, and being, as a matter of fact, in force throughout the state, and there being no government in existence under the Constitution of 1869 opposing or denying its validity, we have no difficulty in holding that the Constitution in question, which went into effect at noon on the 10th day of July, 1902, is the only rightful, valid, and existing Con-

stitution of this state, and that to it all the citizens of Virginia owe their obedience and loyal allegiance.

We do not wish to be understood as acquiescing in the contention of the prisoner that the convention of 1901-2 was without power to promulgate the Constitution it ordained. We have expressed no opinion upon that subject for two reasons: (1) Because the library at hand is not sufficient to enable us properly to investigate and consider the question; and (2) because, if it were conceded that the convention was without power to promulgate the Constitution, it would not alter the result in this case, inasmuch as the Constitution of 1902 has become the fundamental law of the state, as already shown, by being acknowledged and accepted by the government and people of the state.

There is no error in the judgment complained of, and it is affirmed.

(101 Va. 635)

#### DARDEN v. THOMPSON.

(Supreme Court of Appeals of Virginia. June 18, 1903.)

##### PILOT LAWS—DISCRIMINATION—INLAND PORTS.

1. Section 4237 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2903], providing against any discrimination in the rates of pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, does not require a state to enact a uniform system of pilot regulations operating alike upon all her ports, without regard to their local peculiarities or necessities.

2. Pilotage is local, and not national, and a state can establish a compulsory system of pilotage as to vessels coming from the sea into her inland ports and as to vessels going from her inland ports to the sea, without also establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively.

3. The pilot regulations embraced in sections 1965, 1969, of Code, operate alike upon all vessels under the same circumstances and conditions, without regard to the ports from which they come or to which they may go.

Error to Corporation Court of Norfolk.

Action by Darden against Thompson, master of the schooner Wm. Neely. Judgment for defendant, and plaintiff brings error. Reversed.

R. O. Marshall, Brooke & Elliott, and John W. Daniel, for plaintiff in error. Hughes & Little, for defendant in error.

BUCHANAN, J. The plaintiff in error, who was the plaintiff in the trial court, filed his declaration, which was afterwards amended, in which he averred that he was a licensed pilot under the laws of this state; that on the 1st day of August, 1902, off Cape Henry, he offered his services as pilot to the defendant, the master of the Wm. Neely, a schooner, belonging to residents and citizens of Maine, and engaged in coastwise trade

between Virginia and New England (and not holding a coastwise pilot license), which was making her way at that time from the sea near Cape Henry to Norfolk, Va., whither she was bound; that his services were declined; that demand was then and there made upon the defendant for their value, to wit, \$87.75, which demand was refused by the defendant, who refused and still refuses to pay or deposit the same as required by the statute in such case made and provided; and that by reason of the premises a right of action has accrued to the plaintiff to recover the said sum.

The defendant's demurrer to the declaration was sustained, and final judgment rendered in his favor. To that judgment this writ of error was awarded.

Whilst a number of grounds of demurrer was assigned, only one was considered by the trial court, and only one is relied on here, and that is that the pilot laws of Virginia, upon which the declaration is based, are inoperative and void, because in conflict with section 4237 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2903], which provides that: "No regulations or provisions shall be adopted by any state which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discriminations are annulled and abrogated."

The sections of the Virginia Code upon which this action is based are as follows:

"1963. The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point; and any such vessel, outward bound, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south: provided however, that any registered vessel arriving within the line of Cape Henry, bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or towboat to tow his vessel to her port of destination: provided, that in no instance

shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty three. This provision shall apply only to inward bound vessels."

"1969. Pilots shall have pilotage at the following rates: For every vessel owned by a citizen of the United States, and for every vessel owned by a citizen or subject of any foreign state, whose vessels are by treaty placed on the same footing as vessels of the United States, if the vessel be spoken or boarded to the eastward of Cape Henry, there shall be paid for each foot the vessel draws, as follows: From sea to Smith's Point, West Point, Newport News, Norfolk or any place between Smith's Point, West Point, Newport News, or Norfolk, vessels drawing ten feet and under, two dollars and fifty cents; vessels drawing thirteen feet and over ten feet, three dollars; vessels drawing fourteen feet and over thirteen feet, three dollars and fifty cents; vessels drawing sixteen feet and over fourteen feet, four dollars; vessels drawing over sixteen feet, four dollars and fifty cents. If the vessel be board or spoken twenty miles or more eastward of Cape Henry, twenty-five cents per foot shall be added to the foregoing rates. There shall be paid the same pilotage from Smith's Point, West Point, Newport News, or Norfolk, or any intermediate point to sea, as from sea to those places; and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot; from Newport News to Richmond, or any place between Jamestown and Richmond, two dollars and fifty cents per foot; and the same rates of pilotage shall be paid from said places, respectively, down. Vessels coming from sea to Hampton Roads and thence to any port in Maryland, shall be subject to the same rate of pilotage as vessels bound from Newport News to sea. All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one-half pilotage in and one-half out: provided however, that if such vessel coming to Hampton Roads, seeking, is afterwards chartered to load in any port or place in this state, she shall pay the usual pilotage in and out as though she had come to a direct port. All steamers calling in any port or place in this state for the sole purpose of coaling, shall only pay one-half pilotage in and one-half pilotage out. All vessels that go from Norfolk to Newport News to load or finish loading, and all vessels that go from Newport News to Norfolk to load or finishing loading, shall, if they take a pilot (which shall be optional with the master), pay a fee of ten



dollars to the pilot for transporting any such vessel to or from either place."

By the provisions of the sections of the Code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, and all such vessels outward bound to the sea from Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, are subject to the compulsory regulations and rates therein provided. All vessels are subject to the same regulations, and, under the same circumstances and conditions, are required to pay the same fees.

There is clearly nothing in those statutes which expressly makes any discrimination between such vessels. But the contention of the defendant is that our pilotage system violates section 4237 of the Revised Statutes [U. S. Comp. St. 1901. p. 2903], since it imposes no pilotage rates between Virginia ports, nor between Virginia ports and Maryland ports which can be reached without going to sea, nor upon vessels bound to or from any point upon the Potomac river, thereby throwing the whole burden of keeping up the compulsory pilotage system upon interstate, and not upon both internal and interstate, commerce, as was intended by section 4237.

That contention raises the question whether or not a state can establish a compulsory system of pilotage as to vessels coming from the sea into her inland ports and as to vessels going from her inland ports to the sea without also establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively, or between her inland ports and the ports of another state which can be reached without going to sea. If she cannot, then a state may be compelled to burden commerce with a pilot system upon her inland waters where such a system is not needed, in order that she may establish the system where it is absolutely necessary for the protection of life and property. That she is not required to do this is plain, we think, from the nature of the subject and from the declarations of Congress and the Supreme Court of the United States on the subject.

By an act of Congress of August 7, 1789, § 4, c. 9, 1 Stat. 54, it was declared "that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress."

In the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, 13 L. Ed. 996, it was said that: "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly

various, subjects, quite unlike in their nature; some imperatively demanding a single, uniform rule operating equally upon the commerce of the United States in every port, and some—like the subject [pilotage] now in question—as imperatively demanding that diversity which alone can meet the local necessities of navigation. \* \* \* The act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of the subject is such that, until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local, and not national; that it is likely to be best provided for not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. \* \* \* The practice of the states and of the national government has been in conformity with this declaration from the origin of the national government until this time (1851); and the nature of the object, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity of different systems of regulations, drawn from local knowledge and experience, and conformed to local wants."

The decision from which we have quoted was made prior to the enactment of section 4237 of the Revised Statutes [U. S. Comp. St. 1901, p. 2903], but in the subsequent case of *In re Alexander McNeil*, 13 Wall. 236, 242, 20 L. Ed. 624, that section and the prior acts of Congress on the subject of pilotage are referred to, and the decision in the case of *Cooley v. Board of Wardens* approved. In following that case the court said, "We are entirely satisfied with that adjudication, and reaffirm the doctrines which it lays down."

None of the decisions of the Supreme Court to which we have referred indicate any change in the views of that court that pilotage "is local, and not national; that it is likely to be best provided for not by one system or plan of regulations, but by as many as the legislatures of the several states should deem applicable to the local peculiarities of the ports within their limits." None of them seem to us to indicate that the effect of section 4237 of the Revised Statutes was to require a state, if it legislated at all upon the subject, to enact a uniform system of pilot regulations operating alike upon all her ports, without regard to their local peculiarities or necessities.

The state statute which was held in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, to be in conflict with section 4237 of the Revised Statutes, expressly excepted from its operation the coasting vessels of the state of Georgia and the vessels trading between the ports of that state and the ports of South Carolina and Florida, when, but for the exception in the statute,

such vessels would have been subject to the same compulsory pilot regulations. Under precisely the same circumstances and conditions pilot fees were required from vessels coming from ports other than those of Georgia, South Carolina, and Florida, whilst the vessels of those three states were exempted therefrom.

The sections of the Virginia statute in question do not exempt vessels trading between the inland ports of Virginia or vessels trading between the inland ports of Virginia and the ports of Maryland which can be reached without going to sea. Such vessels do not come within the operation of the compulsory pilot laws of the state, because they do not pass through the capes. There is no discrimination in their favor unless, as before said, the state cannot have compulsory pilot regulations as to vessels coming into her inland ports from the sea and going from those ports to the sea without also having a compulsory pilot system as to vessels trading between her inland ports respectively and between such ports and the ports of Maryland which can be reached without going to sea.

Neither, in our opinion, does section 1990 of the Code, which provides that no vessel bound to or from any point on the Potomac river shall be required to pay pilotage, conflict with the act of Congress (section 4237, Rev. St.). That section was probably enacted for the purpose of conforming our pilot regulations to the congressional provision now found in section 4236 of the Revised Statutes, which provides "that the master of any vessel coming into or going out of any port situate upon the waters which are the boundary between two states may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot the vessel to or from such port." But whether it was or not, the exemption from the compulsory pilot regulations of the state provided for by it do not make any discrimination as to vessels or ports. All vessels bound to or from any point on the Potomac are exempted, no matter to what points they are bound or from what ports they may come.

The pilot regulations of this state, whether compulsory or optional, operate alike upon all vessels under the same circumstances and conditions, without regard to the ports from which they come or to which they go.

We are of opinion, therefore, that the pilot regulations of this state, upon which the plaintiff's action is based, are not in conflict with the acts of Congress upon the subject; that the plaintiff's declaration stated a good cause of action; and that the trial court erred in sustaining the demurrer thereto.

The judgment complained of must be reversed, the demurrer overruled, and the cause remanded, with leave to the defendant to plead, if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

(101 Va. 516)

**PARSONS v. MAURY & MAURY.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**ATTORNEYS—SERVICES—BROKERS—APPEAL—RULES OF DECISION.**

1. Under Code, § 3484, providing that when a case at law is decided without the intervention of a jury, and the party excepts to the decision as contrary to the evidence, and the evidence is certified, the rule of decision in the appellate court shall be as on a demurrer to the evidence by the party excepting, the appellant is considered as admitting his adversaries' evidence and all just inferences therefrom, and as waiving his own evidence which conflicts therewith, and all inferences from his own evidence, though not in conflict with his adversaries', which do not necessarily result therefrom.

2. Where defendants, who were attorneys, were engaged to represent plaintiff in the sale of state coupon bonds, to procure them to be received in payment of taxes, and conduct litigation against the state then pending in the United States Supreme Court to set aside statutes passed by the state which rendered such coupons and bonds unavailable, and it was understood by the parties that defendants were to enter into a long and difficult effort to compel the state to receive such coupons in payment of taxes, defendants were not mere brokers, and the value of their services was not to be determined on that basis.

Error to Circuit Court of City of Richmond.

Action by Edwin Parsons against Maury & Maury. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Williams, Bryan & Williams, for plaintiff in error. Chas. S. Stringfellow, for defendants in error.

KEITH, P. Edwin Parsons sued Maury & Maury in assumpsit in the circuit court of the city of Richmond; defendants pleaded the general issue and set-off; and, the whole matter of law and fact having been submitted to the court without the intervention of a jury, a judgment was entered for the defendants, which is now before us for review.

This litigation grows out of a controversy between the state of Virginia and the holders of her bonds issued under an act passed in 1871, bearing coupons receivable in payment of all taxes due the state. A large block of these bonds was held by Edwin Parsons, deceased, under whom Edwin Parsons, the plaintiff in error, claims as assignee.

The people of Virginia were firmly convinced that a great wrong had been perpetrated upon them by the act of 1871. They were satisfied that under its provisions a debt far in excess of what they ought to pay had been assumed, and a tax sufficient to meet the interest upon the debt as fixed by that act, and to discharge the absolutely essential functions of government, would be oppressive and ruinous. There was a strong impression also that many forged and spurious bonds were in existence, the coupons from which were being foisted upon her tax collectors. Whether these opinions and convictions were well founded or not, it is now idle to inquire. They were so universally entertained that

the Legislature of the state passed laws forbidding the reception of coupons by tax collectors, and from time to time passed other acts to enforce the policy of the state in this respect, and to hinder and embarrass in every possible way the forcing of tax-receivable coupons into the treasury of the state, in payment of taxes, debts, and demands, instead of current money. These efforts upon the part of the state were met upon the part of her creditors by suits in the state and federal courts, many of which found their way to the Court of Appeals of the state and the Supreme Court of the United States. The contest went on for years. Every success upon the part of the coupon holder before the courts was met and checked by some new act which would for the time at least serve to delay the creditor. Finally the Court of Appeals of Virginia at the March term, 1894, in the case of *Commonwealth v. McCullough*, reported in 90 Va. 597, 19 S. E. 114, held that the acts of March 30, 1871, and March 28, 1879, under which bonds were issued, having coupons thereto attached, receivable at and after maturity for debts, dues, and demands due the state, were wholly unconstitutional and void. From this decision an appeal was taken to the Supreme Court of the United States, where it was finally decided December 5, 1898 (19 Sup. Ct. 134), the Court of Appeals of Virginia being reversed. Justice Brewer, who delivered the opinion, says:

"Perhaps no litigation has been more severely contested, or has presented more intricate and troublesome questions, than that which has arisen under the coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and federal courts, not a few of which finally came to this court." Then follows a list of 15 cases, illustrative of various questions arising under the coupon legislation of the state, which found their way to the Supreme Court. The cases in the state courts and inferior federal tribunals were almost without limit.

Edwin Parsons, deceased, as we have seen, was the owner of a large number of coupon bonds. He determined to compel the state to carry out her contract with him. In order to do so it was necessary that he should first find a market for his coupons, that is to say, a Virginia taxpayer who would buy his coupons and then enter into litigation with the state to compel their reception in accordance with the contract. To this end he employed the firm of Maury & Maury. His bargain with them was that they were to take the coupons, place them with taxpayers, and account to him for 50 cents on the dollar of the face value of the coupons, and all over and above which the Maurys were able to realize to be retained as compensation for their services. The taxpayer, of course, required a considerable reduction from the face value of the coupons in order to induce him to pay taxes

in coupons rather than in money, and it was the duty of the Maurys also to conduct whatever litigation was necessary in order to compel the taxpayers of the state to receive the coupons, and to protect the taxpayer from the consequences of his efforts to compel their reception. The relation between the Maurys and Parsons continued during many years, down to the death of Edwin Parsons, deceased, which occurred in August, 1895. This was after the decision of the Supreme Court of the state in *Commonwealth v. McCullough*, and before its reversal by the Supreme Court of the United States. Between those periods the use of coupons in payment of taxes had entirely ceased. During the pendency of the litigation to which we have referred, efforts were being made for a settlement of the differences between the state and her creditors, which culminated in the act of February 20, 1892, under which almost the whole of the outstanding debt was refunded. Edwin Parsons was not inclined to accept the settlement proposed. He determined to keep up the fight, and instructed his attorneys to that effect, and up to the time of his death he adhered to this resolution. The correspondence printed in the record shows that he was keenly alive to the whole situation; that he was incensed by the course pursued by the state, and resolute to enforce his rights through the courts; and that he felt a special interest in securing the reversal of the case of *McCullough v. Commonwealth*. After his death his administrators gave instructions to the same effect, but afterwards determined to withdraw the bonds from the hands of Maury & Maury, and to fund them under the act of February 20, 1892. In February, 1896, Maury & Maury had in their possession \$59,000 of coupons, \$45,000 of which had already been tendered in payment of taxes. With respect to those coupons there is no controversy. They also had in their possession bonds belonging to Parsons, upon which there were matured coupons amounting to \$60,642. These coupons had not been detached. These bonds had been placed with Maury & Maury under their contract with Edwin Parsons, deceased, with authority to detach the coupons as they matured, and take necessary steps to realize upon them by having them tendered in payment of taxes. The bonds with these coupons attached were returned to the administrator of Edwin Parsons, deceased, in accordance with their demand, the Maurys reserving all their rights under their contract with respect to them. In addition to the \$60,642 of coupons which had matured at the time they were delivered up by the Maurys, six semiannual installments of 3 per cent. coupons accrued while the *McCullough* Case was pending in the Supreme Court of the United States—\$40,428—which, added to the \$60,642, made a total of \$101,070 of coupons withdrawn from the hands of Maury & Maury.

The declaration of the plaintiff claims that there was due on the 14th of March, 1896, the sum of \$28,909.50 for coupons sold by the defendants and unaccounted for. The offset filed by Maury & Maury is as follows:

"Amount due and owing to the said defendants on account of profits and compensation to which they are entitled, and which they would have realized under and by virtue of an agreement made between the said defendants and Edwin Parsons (deceased) in his lifetime, in respect to \$224,600, face value of consol bonds of the state issued under the act of assembly of the state, approved March 30, 1871, and coupons belonging to said consol bonds, which bonds and coupons were placed in the hands of the said defendants by the said Edwin Parsons, deceased, in his lifetime, and afterwards wrongfully withdrawn from the hands of the said defendants by the administrators of the said Edwin Parsons (deceased); and for fees and compensation to which the said defendants are entitled for legal services in sundry matters, and especially for obtaining a writ of error from the Supreme Court of the United States to the Supreme Court of Appeals of Virginia in the case of McCullough against the State of Virginia, and securing a reversal of the judgment of the said Court of Appeals of Virginia in the said case, together with interest at the rate of six per cent. (6 per cent.) per annum, from the 15th day of January, 1890, until payment, \$50,000."

And the judgment of the court is in the following terms: "This day came again the parties, plaintiff and defendants, by their attorneys, and both parties waiving a jury, and agreeing that the whole matters of law and fact arising in this cause should be submitted to and determined by the court, and the court having maturely considered all of the evidence adduced and the argument of counsel, and being of opinion that the offsets proved by the said defendants are at least equal in amount to the claim of the said plaintiff, and the said defendants expressly waiving any claim for judgment in their favor for any excess of their offsets over and above, it is considered by the court, upon the issues joined, that the plaintiff take nothing by his bill, and that the defendants go thereof without day, and recover against the said plaintiff their costs in this behalf expended."

This judgment stands before us as upon a demurrer to the evidence, under section 3484 of the Code, by virtue of which "the party demurring is considered as admitting his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result

therefrom." Johnson's Adm'r v. Chesapeake & O. Ry. Co., 91 Va. 171, 21 S. E. 238.

Applying this rule of decision to the decision before us, the judgment must be affirmed. Maury & Maury were not, as plaintiff in error contends, mere brokers with respect to these coupons. They were that and more. They were attorneys engaged in an arduous and difficult task which tested the resources of the most alert, diligent, successful, and learned attorneys. They were required to combat all the resources which a state can wield, backed by an unyielding and well-nigh unanimous public opinion. When they entered into the service of Parsons, we gather from the voluminous correspondence in the record that it was not to collect this or that coupon, not to conduct this or that suit, but that it was mutually understood that they were engaged to enter upon a long, difficult, harassing, and systematic effort to compel the state to receive in payment of taxes coupons upon bonds which had many years to run, which bonds were confided to defendants in error, the coupons to be detached and used as they deemed most wise and judicious. It is not pretended that they did not render faithful and efficient service. The duties imposed were onerous and exacting, and must indeed have engaged almost their exclusive attention.

Without undertaking to discuss in detail the evidence presented in the record, we cannot say that the judgment is without evidence, or so manifestly contrary to the weight of evidence as to require its reversal.

The judgment of the circuit court is affirmed.

(101 Va. 579)

**MILLHISER MFG. CO. v. GALLEGO  
MILLS CO. et al.**

(Supreme Court of Appeals of Virginia. June 11, 1903.)

**CORPORATIONS — TREASURY BONDS — WAREHOUSE RECEIPTS — TRANSFER — TITLE TO PROPERTY — COMMON-LAW RULE — STATUTORY MODIFICATION — MATERIALMAN'S LIEN.**

1. Where a portion of the bonds issued by a corporation and secured by a mortgage were held by the corporation as treasury bonds, they were not, while so held, a part of the personal property of the corporation, within Code 1887, § 2485, giving to laborers and persons furnishing material to manufacturing corporations a lien on the real and personal property of such corporations.

2. At common law, the transfer of a warehouse receipt as collateral security for a loan vests in the transferee the absolute property in the goods represented by the receipt.

3. Code 1887, § 1791, provides that warehouse and other storehouse receipts, with the word "negotiable" on the face thereof, issued by any person keeping a "licensed" warehouse or other "licensed" place of storage, shall be transferable by indorsement and delivery, and any person to whom such receipt is so indorsed and delivered shall be deemed the owner of the property specified therein, etc. Section 1792 et seq. provides certain penalties for the issuance of licensed warehouse receipts by any one not

the keeper of a regularly licensed warehouse, and otherwise regulates the conduct of the business of licensed warehouses. *Held*, that section 1791, construed in connection with the sections following, does not, by its specification of "licensed" warehouses, abrogate, as to unlicensed warehouses, the rule of the common law that delivery of a warehouse receipt vests title in the goods, but that section is merely declaratory of the common law as to licensed warehouses, leaving the rule as to unlicensed warehouses unchanged.

4. A warehouseman may issue warehouse receipts for his own property stored in the warehouse, and pledge such receipts as collateral security for his own debt.

5. Code 1887, § 2485, giving a lien on the property of manufacturing corporations to persons furnishing supplies, does not create a lien, in favor of a party so furnishing supplies, on goods which have, prior to the claim of such lien, been deposited by a corporation in warehouses, and pledged, by delivery of the warehouse receipts, as collateral security for money borrowed by the corporation.

#### Appeal from Chancery Court of Richmond.

Action by the Richard Grant Company against the Gallego Mills Company and others, to which the Millhiser Manufacturing Company and others became parties by petition. From the judgment, the Millhiser Manufacturing Company appeals. Modified.

H. R. Pollard, James Cannon, O. B. Roller, and Mr. Martz, for appellant. A. W. Patterson, H. Taylor, Jr., C. U. Williams, B. T. Crump, R. L. Montague, Coke & Puckrell, C. S. Stringfellow, and F. McCutchen, for appellees.

CARDWELL, J. The Gallego Mills Company was chartered by the circuit court of the city of Richmond February 9, 1895, to carry on the business of manufacturing flour, meal, etc. Authority was given the company to purchase of C. L. Todd and Cyrus Rossieux, partners doing business under the firm name and style of the Gallego Mills, the plant of this partnership, the stock on hand, etc., and the brick warehouse connected with the Gallego Mills by a bridge, and the lot upon which it stands, situated northeast of the mill. To acquire the plant, the stock on hand, etc., and the warehouse, together with lot upon which it stands, authority was given to the new corporation to issue bonds to the amount of \$200,000, secured by a first mortgage on the real estate, etc., of the mortgagor, of which \$125,000, face value, and certain capital stock, were to be delivered to Todd & Bossieux, as the purchase price.

This new corporation organized at once under its charter, and proceeded to conduct the business (1) of manufacturing flour, meal, etc., for sale by wholesale, and (2) as a keeper of a public warehouse for the storage of goods, wares, merchandise, etc., until in 1897, when the Richard Grant Company, a corporation, filed its original, amended, and supplemental bills against the Gallego Mills Company and others, the general object of which was to enforce a lien for supplies furnished the Gallego Mills Company, ascertain

all the liens upon its property, their priorities, etc., and sell the property of the defendant corporation, and apply proceeds to the satisfaction of its debts, and in the meantime to preserve the property by the appointment of a receiver, etc. A receiver was appointed, and proceedings taken looking to the winding up of the affairs of the defendant corporation, a sale of its assets, etc. The Millhiser Manufacturing Company and James Keister, by their respective petitions, became parties to the suit, claiming a lien under sections 2485 and 2486 of the Code of Virginia on the property, etc., of the Gallego Mills Company, for certain supplies furnished the defendant company; the claim of the Millhiser Company being for supplies in the shape of cloth sacks, and that of James Keister for supplies in the shape of staves.

In the conduct of its business, as a manufacturer of flour, meal, etc., which was extensive, large amounts of ready money were necessary, and the required funds could only be obtained through the banks and capitalists. Large amounts of grain were purchased by the company, which were deposited with the Chesapeake & Ohio Railway Company, in its elevator at Richmond, and certificates therefor issued, and flour in large quantities from time to time sold or pledged to the banks or others furnishing the money needed by the company in the conduct of its milling business, and deposited in the company's warehouse, and receipts therefor issued to the buyer or the lender of the money; and it was the custom of the company to raise money for the prosecution of its business by transferring and delivering certificates for wheat deposited in the Chesapeake & Ohio Railway Company's elevator to banks or other parties who would furnish the needed funds, the effect of which certificates and receipts, as understood between the parties, being that the wheat or flour they represented should be thereafter the property of the holder of the certificate or receipt, subject only to the stipulations contained therein.

This method of doing business was not peculiar to this corporation, and is and has been the common practice among all manufacturing establishments of any great size. It had been carried on by this company from its organization, and these elevator certificates and warehouse receipts were regarded and treated by the banks and others as an unquestionable basis of credit. At the time of the institution of this suit, there were in the hands of the appellees elevator certificates and warehouse receipts for large quantities of wheat and flour deposited as before stated, for which the holders thereof had parted with their money, and it is conceded that they did so in good faith.

It further appears that, when the Gallego Mills Company was organized and acquired the milling property, it executed a mortgage upon its property to secure certain bonds, aggregating \$200,000, of which \$125,000 rep-

resented unpaid purchase money, and the remaining \$75,000 were left in the treasury of the company unissued, and are spoken of in the record as "treasury bonds." Subsequently these "treasury bonds" were negotiated with certain banks and Holt & Co., appellees, and were held by them at the institution of this suit.

The questions raised in the court below were whether the supply lien creditors, under the statute, or the banks and others, similarly situated, had priority, as to time and right, in respect to the property represented by (1) the "treasury bonds," (2) the warehouse receipts, and (3) the elevator certificates; and the court held that the holders of the elevator certificates had priority over the supply lien creditors, with respect to the wheat represented by these certificates, but referred the cause to a commissioner to inquire and report whether labor and supply claimants, or the holders of the "treasury bonds" and warehouse receipts (for flour), had a prior lien on the bonds and flour. The commissioner reported against the holders of the "treasury bonds" and of the warehouse receipts, and in favor of the labor and supply claimants, and, upon exceptions to the report, the court overruled the commissioner in so far as he gave priority to the lien of the labor and supply claimants on the "treasury bonds," but sustained and confirmed his report to the extent that it gave the supply lien creditors a paramount lien upon the flour represented by the warehouse receipts.

Upon appeal by the Millhiser Manufacturing Company and James Keister from the decrees of the lower court in respect to (1) the wheat represented by the elevator receipts, and (2) the "treasury bonds," and by the cross-error assigned, under rule 9, by the banks holding the warehouse receipts for flour, all three of the questions above referred to are presented for our determination.

The case has been argued at great length, and with learning and ability, though the argument has taken a much wider range than is necessary to a decision of the questions presented. It is therefore impossible, within proper limits, to review all the collateral positions taken, or to trace principles remotely bearing upon the questions, through the wilderness of the cases cited. Nor is it necessary.

While we do not deem it at all material, it is perhaps worthy of mention that the "treasury bonds" were issued to those now holding them prior to the furnishing of the supplies by appellants for which they assert a lien on the bonds under the statute. It is not questioned that the bonds were acquired by their present holders in good faith and for value. In no sense whatever were those bonds ever the property of the Gallego Mills Company. Until issued they were of no value and represented nothing, and after issue they only became a part of its obliga-

tions and liabilities. Had they never been issued, and remained in the company's possession until after the supplies had been furnished, the supplymen would have had no lien on them, as they would have been no part of the company's personal property, subject to the lien of supply creditors. When they were in fact issued and negotiated, then the holders thereof became mortgagees, and as such are expressly protected by the terms of section 2485 of the Code of 1887, inasmuch as no claim for supplies had been asserted by appellants under the statute until the bonds had been issued and transferred. We are therefore of opinion that the lower court was plainly right in its decision that the holders of these bonds held title thereto paramount to any lien thereon in favor of appellants.

The two remaining branches of the case involve a question as to the proper interpretation to be given to the two statutes—the one, section 1791 of the Code of 1887, concerning warehouse receipts; and the other, section 2485, as amended February 13, 1892 (Poll. Supp. p. 268), as to supply liens. Section 1791 is as follows:

"Transfer of Receipts Issued by Licensed Warehouses. Warehouse or other storage receipts, with the word 'negotiable' plainly written or stamped on the face thereof, issued by any person keeping a licensed warehouse or other licensed place of storage in this state for goods, wares, merchandise, cotton, grain, flour, tobacco, lumber, iron, or other commodity stored with such person, shall be transferable by endorsement and delivery, whether the property specified in such receipt be owned by the person issuing the same or another; and any person to whom such receipt is so endorsed and delivered shall be deemed the owner of the property specified therein, so far as may be necessary to give effect to any sale to such person, or to any pledge or lien for his benefit, created or secured by such transfer, whether the receipt or endorsement be admitted to record or not, subject, however, to storage and other charges of the person keeping such place of storage."

Without setting out section 2485, and conceding for the purposes of this case that it applies to a corporation duly chartered for two or more distinct purposes, and doing business under authority of its charter (1) as a manufacturer of flour, meal, etc., and (2) as the keeper of a public warehouse for the storing of goods and merchandise, by this statute supply creditors have a lien on all the personal property of such a corporation, except that forming a part of its plant, and a lien on all the real property of the corporation, whether part of the plant or not, subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance executed and recorded prior to the date on which the supplies were furnished; i. e., a prior lien on all the property.

real and personal, belonging to the corporation, subject, however, to liens created by deeds or instruments in writing properly recorded prior to the date of the supplies furnished; also upon all the personal property of the company not used in the plant they have a prior lien; on all the real estate, whether used in the plant or not, and apparently on all the personal property used in the plant, a lien inferior to a lien by deed of trust, mortgage, etc.; but whether this lien can override and supplant in this case the right of the holders of the elevator certificates and warehouse receipts, in respect to the property represented by the certificates and receipts, respectively, must depend upon the interpretation to be given to section 1791 of the Code, *supra*. That section and the other sections of chapter 82 of the Code of 1887 are in *pari materia*, and therefore the chapter is to be considered in its entirety, in order to gather the true intent of the lawmakers.

Section 1792, as it originally appeared in the Code, simply provided against the issue of any warehouse or other storage receipt unless the property therein mentioned shall be actually in store, and against the issuance of receipts in duplicate. As amended by Acts 1895-96, p. 516 (Poll. Supp. p. 216), this section (1792) provides that no person shall issue any such licensed warehouse or other licensed storage receipt unless he be the keeper of a regularly licensed warehouse or other licensed place of storage in this state for goods, wares, merchandise, etc., stored with such person, and shall have paid to the commonwealth the tax for such license, and unless the property therein mentioned be actually in store, etc., and further providing that "it shall be the duty of such person keeping such licensed warehouse or licensed place of storage to cause to be posted prominently over the door of his place of business a sign indicating that such warehouse or place of storage is duly licensed; and such person shall also cause to be written or stamped in plain letters upon the bill heads and envelopes used by him in said business words indicating that the warehouse or place of storage kept by him is duly licensed. Any person violating the provision of this act shall be deemed guilty of a misdemeanor, and upon conviction fined," etc. Section 1793 contains a prohibition against the sale by a warehouseman, or the removal of the property beyond his control without the surrender of the storage receipt therefor. Section 1794 declares the delivery of grain to a warehouseman to be a bailment, and not a sale, although the grain may be mixed with other grain belonging to the warehouseman or other person. Section 1795 declares fraudulent removal of the property stored to be larceny, and section 1796 defines forgery of a warehouse receipt, and prescribes the penalty therefor.

Now, if this statute is to be construed as

abrogating the common law concerning warehouse and other storage receipts, then this case is with appellants in respect to the elevator certificates and warehouse receipts, as it is not pretended that either the elevator or the warehouse is conducted as a licensed warehouse under the statute (chapter 82, *supra*). In other words, if the effect of this statute is to render all warehouse or other storage certificates or receipts issued by a warehouseman, or others keeping a place for the storage of goods, wares, merchandise, etc., who have not complied with the provisions of section 1791 et seq. of chapter 82, ineffectual to pass to the holder of such certificate or receipt the legal right and title to and the possession of the property specified therein, as at common law, the title to and possession of the wheat represented by the elevator certificates, and the flour represented by the warehouse receipts, in question here, remained with the Gallego Mills Company, so far as the appellants are concerned, and their supply liens, by virtue of sections 2485 and 2486 of the Code of 1887, attached thereto, and as a prior lien thereon.

We give here the form of the elevator certificates, so far as material, and of the warehouse receipts, in question, copied into the record; the others as agreed, being of the same tenor and effect:

"Richmond Elevator, Richmond, Va.,

"Jan. 21, 1896.

"Received in store from B. & O. No. 36, 896, eight hundred and thirty and <sup>10</sup>/<sub>100</sub> bushels of No. 3 spring wheat, subject to the order hereon of Mr. R. H. Gray, agent R. & P., and surrender of this receipt and payment of charges.

"And it is agreed by the holder of this receipt that the grain herein mentioned may be stored with other grain of the same quality by inspection," etc., " \* \* \* at owner's risk.

T. C. Malford, Manager.

"W. B. Waldron, Agent."

"The Gallego Mills Company, Richmond, Virginia. Warehouse Receipts.

"No. 412.

"We have this day received in store for and on account of Union Bank, Richmond, Va., one hundred (100) (Patent Marked 21, 339) Barrels Flour, to be held subject to the order of said Bank, and to be delivered only on the surrender of this receipt.

"The Gallego Mills Company,

"C. L. Todd, President,

"H. D. Riddick, Shipping Clerk,

"Grain Receiver."

The flour represented by the warehouse receipts was, as we have seen, stored in the warehouse of the Gallego Mills Company, owned and kept by the company under authority of its charter, and the wheat represented by the elevator receipts was stored in the Chesapeake & Ohio elevator building

in the city of Richmond, run as a station of the Chesapeake & Ohio Railway Company, the successor in title to the property and franchises of the Louisa Railroad Company, whose charter authorized the company to have warehouses, depots, etc. So that the Gallego Mills Company conducted a public warehouse for the storage of goods, wares, and merchandise, separate and distinct from its establishment as a manufacturer of flour, meal, etc., under authority of its charter; and the Chesapeake & Ohio Railway Company, pursuant to its charter powers, conducts its elevator in the city of Richmond as a public depository—a depot or warehouse for the storage of grain committed to its keeping. The fact that the Gallego Mills Company did not happen to store in its warehouse the goods of other merchants and manufacturers, but stored alone, as seems to have been the case, the products of the business conducted by it as a milling concern, which had been sold or pledged and transferred both as to title and possession, is, as we think, wholly immaterial, and can have no bearing upon the right of the holders of the warehouse receipts for the flour in question “to be delivered only on the surrender of the receipt.”

When the learned chancellor below sustained the right of the holders of the elevator certificates to the wheat represented by them, the right of the holders of the warehouse receipts to the flour they represented should also have been upheld. Both are, to all intents and purposes, warehouse receipts, according to the common law; and each is an acknowledgment by the issuer that he holds the goods of the depositor, which he will deliver upon the order of the depositor or upon the surrender of the receipt. The purchaser of such a receipt, or the lender of money upon it as collateral, gets the legal title to and the possession of the goods, if it was so intended by the depositor of the goods and the issuer of the receipt when the deposit was made and the receipt issued. 2 Dan. on Neg. Inst. (5th Ed.) p. 743; *Citizens' Banking Co. v. Peacock*, etc., *infra*; *Alabama State Bk. v. Barnes*, 82 Ala. 615, 2 South. 349; *Kavanagh v. Railroad Co.*, 78 Ga. 274, 2 S. E. 636; *McEwen v. R. Co.*, 33 Ind. 377, 378, 5 Am. Rep. 216; *Halliday v. Hamilton*, 11 Wall. 560, 20 L. Ed. 214; *Means v. Bank*, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107; *Rice v. Cutler*, 17 Wis. 362, 84 Am. Dec. 747; *Rosenham v. Batjer*, 154 Pa. 544, 25 Atl. 754; *Gibson v. Bank*, 11 Ohio St. 317; *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699; *Fidelity Co. v. Roanoke Iron Co.*, *infra*.

In *Alabama State Bank v. Barnes*, *supra*, it is said: “It may be regarded as now settled that a warehouseman having property of his own stored in his warehouse may, in the absence of statutory enactments, issue receipts therefor, and pledge the property as

collateral security for his own debt by the delivery of said receipts.” See, also, *Bank v. Hibbard*, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; *Cochran v. Rippey*, 13 Bush. 495; *Parshall v. Eggert*, 54 N. Y. 18; *Smith v. Capital Co. Elevator* (Kan. App.) 58 Pac. 483; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. 825; *Broadwell v. Howard*, 71 Ill. 305; *Nat. Bank v. Wilder*, *supra*.

A place adapted to the reception and storage of goods and merchandise is a warehouse at common law. *Bouvier's L. D.* 1211.

In *Citizens' Banking Co. v. Peacock et al.*, 103 Ga. 171, 29 S. E. 752, the form of the warehouse receipt under consideration contained a stipulation that the cotton represented was “subject to the presentation of this receipt only on paying customary expenses and all advances, acts of Providence and fire excepted,” and it was held that this stipulation made the cotton represented by the receipt the property and subject to the control of a bona fide holder of the receipt. The opinion says: “Such a paper, while not made negotiable by our law, is quasi negotiable, and may pass from hand to hand by delivery, because of the fact that, by express stipulation, delivery of the cotton which it represents is made subject to presentation of the receipt.”

Colebrook, in his work on *Collateral Securities*, quoted with approval in the case just referred to (section 413), says: “The transfer for value, as collateral security, of warehouse receipts, by indorsement and delivery, or by delivery only, where such receipts are made payable to ‘holder,’ or ‘only upon return of this receipt,’ vests the legal title and possession of the property in the pledgee, and is equivalent to an actual delivery of the property.”

Again, it is said in *Citizens' Banking Co. v. Peacock et al.*, *supra*: “Where a warehouse receipt, in the form of those which were in evidence in this case, is delivered as collateral security to another person to be held as a pledge for the payment of a debt, the effect of such delivery is to constitute the warehouseman the bailee of the person receiving such receipt in pledge; and this is true although the warehouseman has no notice of the transfer. *Coleb. Coll. § 413*, and authorities cited under note 2. This is so from the nature of the contract entered into originally, between the depositor and the warehouseman, and because the property passes by the transfer to the pledgee under the law merchant independently of any statute.” In that case *Rice v. Cutler*, *supra*, is cited, wherein it was held that “even where, in the language of the statute, such receipt may be transferred by indorsement and delivery, the provision is regarded as permissive only, and is without effect upon the right to transfer by delivery existing independently of the statute.”

In the leading case of *Gibson v. Stevens*, 8 How. 384, 12 L. Ed. 1123, Chief Justice



Taney, delivering the opinion of the court, said: "The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff, the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property, and the warehouseman from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidence of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself. This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. \* \* \* Nor, as respects the legal title, can there be any distinction between the advance made by Gibson and the case of an actual purchaser, and the legal title was conveyed to him to protect his advances."

That case has been frequently cited with approval by the United States Supreme Court, as well as by the courts of a number of the states, and among the cases referred to are *Means v. Bank*, 146 U. S. 627, 13 Sup. Ct. 186, 36 L. Ed. 1107, and *Merchants', etc., Bank v. Hibbard*, supra. In the last-named case, which is directly in point, it is held that "a warehouseman having property of his own in store may pass title to it by the execution and delivery of an ordinary warehouse receipt. He may also pledge it by such a receipt to secure the payment of his own indebtedness. And where the property is wheat, the pledge is not inoperative by reason of the wheat being part of a larger mass, and not separated or distinguished when the receipt is given." In the opinion by Cooley, J., it is said: "We have already said that it is conceded a warehouseman may transfer title to property in his warehouse by the delivery of the customary warehouse receipt. In such cases there is no constructive delivery of the property, whereby to perfect the sale, except such as is implied from the delivery of the receipt; and where the property represented is only part of a large mass, as was the case here, there could not well be any other constructive delivery. But for the convenient transaction of the commerce of the country, it has been found necessary to recognize and sanction this method of transfer, and vast quantities of grain are daily sold by means of such receipt."

That eminent jurist, discussing in the same case the question whether a constructive transfer of possession that is recognized in the case of a sale should be held inoperative in case of an attempted pledge, says: "If a merchant may buy grain in store, and receive

transfer of title in a warehouse receipt, he would be very likely, if he had occasion to receive grain in pledge, to suppose a similar receipt to be sufficient for that purpose. No reason would occur to him why it should be otherwise, and this because there would in fact be no reason, except one purely technical, depending on nice legal distinctions. When that is found to be the case, any proposition to establish a distinction should be rejected, decisively and without hesitation, for the laws of trade are made and exist for the protection and convenience of trade, and they should not tolerate rules which have the effect to border the chambers of commerce with legal pitfalls."

Miller, J., in *McNeil v. Hill*, 1 Woolw., at page 97, Fed. Cas. No. 8,914, states the law as to warehouse receipts as follows: "Instruments of this kind are *sui generis*. From long use in trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property as would a bill of sale."

The doctrine upheld by the preceding authorities, that a warehouse receipt vests in a bona fide purchaser of it for value, or in a bona fide pledgee for value, the legal title to and possession of the property represented by the receipt, rests not upon the theory of a symbolical delivery of the property, but upon the principles of equitable estoppel, whereby one who has armed another with such indicia of title to the property that he may deceive innocent third parties, and make them believe he is the real owner, will be estopped to set up any claim of title to the property as against one who is a bona fide purchaser of it without notice. This doctrine was enunciated in *Wright v. Campbell*, 4 Burrows, 2046, received pronounced judicial sanction in the case of *Lickbarrow v. Mason*, 2 Durnford & East. 63, 2 Smith's L. C. (9th Ed.) 1045 et seq., repeatedly cited with approval, and never criticised, so far as we have been able to find, by text-writers, as well as in the decided cases. See, also, *McNeil v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, where the doctrine is elucidated, and a very instructive opinion delivered.

Having considered the nature and effect of the warehouse receipts and elevator certificates involved in this case, and reached the conclusion that they, like a bill of lading, at common law, represent the goods therein, and the transfer of the ownership as well as the right of possession is made as effectually by their transfer and delivery as it can be by a physical delivery of the goods, we are brought directly to the question whether or not chapter 82 of the Code abrogates the common law with respect to such receipts or certificates, and invalidates them, and all of like character, where not issued by a licensed warehouse, whose owner or proprietor has complied with the statute.

At an early day in England, statutes were

enacted which greatly enlarged the effect of such instruments; and in Virginia, by the act of 1874 (Acts 1874, p. 233, c. 211), they were made negotiable, under certain rules and regulations, and in some of the other states they are negotiable by indorsement and delivery; but we have been unable to find any case holding that, by reason of the statute enlarging the effect of such instruments, their quasi negotiability is destroyed, and that their transfer and delivery do not vest in a bona fide holder for value the ownership and right of possession of the goods they represent, where it is stated on the receipt that the goods stored are to be delivered "only on the surrender of this receipt," or upon the "surrender of this receipt," etc.

Section 1791 and other sections of chapter 82 of the Code originated in the act of April 16, 1874, *supra*, the title of which is, "An act to prescribe how hypothecation of products and commodities shall be made, and to prohibit the hypothecation of consignment except on conditions." Chapter 82 is under the head, "of Warehouse and Storage Receipts," and the title to section 1792, as amended by the act of February 27, 1896 (Acts 1895-96, p. 516), is, "When Receipts not to be Issued; Duplicate Receipts"—and provides that no person shall issue any such licensed warehouse or other licensed storage receipt unless he be the keeper of a regularly licensed warehouse or other licensed place of storage in this state for goods, wares, merchandise, etc., or other commodity stored with such person, and shall have duly paid to the commonwealth the tax for such license, and unless the property therein mentioned shall be actually in store, etc.

This is all that there is in the statute which could be interpreted as abrogating the common law with respect to warehouse and other storage receipts issued by a person or corporation other than a licensed warehouse keeper who had complied with the provisions of the statute.

"Not merely does an old statute give place to a new one, but, where the common law and the statute differ, the common law gives place to the statute, if expressed in negative terms. And in like manner an ancient custom may be abrogated and destroyed by the express provisions of a statute, or where inconsistent with and repugnant to its positive language. But the law and customs of England cannot be changed without an act of Parliament, for this: that the law of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament.

"Statutes, however, are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare. Therefore, in all general matters, the law presumes the act did not intend to make any alteration, for, if Parliament had had that design, they would have expressed it in the act." Broom's L. M. (7th Ed.) 32, 33, and authorities cited.

In *Jackson v. Bradt*, 2 Caines, 169, Chancellor Kent delivering the opinion, it was held that if a statute, without any negative words, declare that all former deeds shall have in evidence a certain effect, "provided" such and such requisites are complied with, this does not prevent their being used as testimony in the same manner as if the act had never been passed.

Courts have held certain instruments negotiable, "transferable by delivery," and "payable to such person as may from time to time be the holder," although they did not conform to the statute prescribing the qualities and incidents of commercial paper, and that to them must be applied "the principles which belonged to bills of exchange and negotiable notes." *Arents v. Commonwealth*, 18 Grat. 750; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271; *McGahey v. State of Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.

In *Ala. St. Bank v. Barnes*, *supra*, the contention was made that, as the receipt given by a warehouseman for his own cotton was not indorsed as provided by statute, it did not convey title or confer a special property or operate a constructive delivery of possession of the cotton; and the court held that under the statute, as construed by former decisions, an indorsement of the receipt was necessary to convey the legal title, but the opinion proceeds: "The section is enabling, and was specially designed to provide the mode, in respect to such documents, of passing the legal title, so as to enable the real owner to prosecute an action thereon in his own name. So far as it relates to the passing of the title by the delivery of warehouse receipts and similar documents, the statute is an innovation on the mercantile law, and will not be construed as abrogating or modifying it, further than is expressed, or is absolutely required to effectuate the purposes. By section 6 of the act (Acts 1880-81, p. 134),

\* \* \* being the other statute relied on, warehouse receipts given for cotton may be transferred by indorsement; and any person to whom it may be so transferred shall be deemed and taken to be the owner of the property, so far as to give validity to any pledge, lien, or transfer made or created by such person; and no cotton shall be delivered except on surrender and cancellation of the original receipt, or the indorsement thereon of the delivery in case of partial delivery. \* \* \* This statute does not imperatively require indorsement. The intention is to protect the warehouseman against a mistake or wrongful delivery, and to protect the holder for value of such indorsed receipts against latent equities and rights. The statute, being permissive, does not prevent the passing of title and delivery of possession in any mode previously effectual. \* \* \*

Certain sections of the Code, as amended from time to time, prescribe the mode of applying for license to transact business in

this state, the amount to be paid as a condition precedent to the right to transact a business requiring a license, and the punishment for conducting such business without a license; but we know of no principle of law which invalidates negotiable paper in the hands of a bona fide holder merely because it was issued by a person or corporation in the conduct of a business without conforming to the provisions of the statutes prescribing the license necessary as a condition precedent to the transaction of the business, and the manner in which it is to be conducted, or that renders ineffectual and void the title to property which such person or corporation so in default may have sold and delivered to innocent persons. If such person or corporation has so offended against the license laws, it is a matter between the offender and the commonwealth, punishment for which is prescribed, but innocent persons who may have dealt with the offender cannot be made to suffer because of his dereliction.

In *Eastern B. & L. Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298, this court held: "Although an act of assembly makes it a misdemeanor for an agent, officer, or employé of certain foreign corporations to do business in this state, without complying with the provisions of the act, contracts made with such corporations in violation of such act will not be declared void, but will be enforced, in the absence of any evidence of intention on the part of the Legislature that such contracts should be void."

Our conclusion upon this branch of the case is that the holders of the warehouse receipts and elevator certificates took by the transfer and delivery of the receipts or certificates the legal right to and possession of the property they respectively represent, the Gallego Mills Company retaining but an equitable interest in the surplus, if any remain after satisfying the claims of such holders; and the only remaining question is, do the supply lien claims asserted by appellants under sections 2485 and 2486, override the right to and possession of the property represented by the receipts and certificates, and vested in the appellees as the holders thereof?

It will not be contended that the registry laws of the state have any application to a sale and delivery of personal property, and the question of "priority" can only arise between claimants asserting a lien upon the property of their debtor.

It is not liens that the appellees are asserting upon the flour and wheat in question, but the legal title—the right of property made complete by possession, and for value, in due course of trade.

In *Va. Del. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893, cited for appellants, the controversy was between "supply creditors" and mortgage bondholders of the Roanoke Rolling Mills Company, and the only point decided of interest here,

or having any bearing on the case in hand, is that section 2485 of the Code, as originally enacted, was not contrary to amendment 14 to the Constitution of the United States, as being special and class legislation. The correctness of that decision we have no occasion to question.

In *Fidelity Ins., Trust & Safe Deposit Co. v. Roanoke I. Co.*, 81 Fed. 439, section 2485, supra, as amended (Acts 1891-92), came under review of the Circuit Court of the United States for the Western District of Virginia. In that case, Crocker Bros., iron brokers of New York, made advances upon iron manufactured by the iron company, which iron was marked and stored in the name of Crocker Bros. upon a lot in Roanoke. Certain creditors of the iron company asserted a lien upon this iron for supplies under sections 2485 and 2486 of the Code of 1887, and the question was directly presented whether this iron was a part of the personal property of the Roanoke Iron Company, "other than that forming a part of its plant," and, as such, subject to a lien in favor of the supply claimants. And while accepting as a correct interpretation the view taken in *Va. Del. Co. v. Crozer I. Co.*, supra, that section 2485 did not contravene the fourteenth amendment to the Constitution of the United States, as special or class legislation, the opinion by Simonton, J., concurred in by Paul, J., says: "It is evident, from the reason of the thing and from the words of the statute, that no lien can be acquired by any person furnishing supplies until he has furnished the supplies, and then the lien can only attach on the property at the time and thereafter the property of the company. If, therefore, this property ceased to be the property of the Roanoke Iron Company before the supplies were furnished, clearly there is no lien. This iron was transferred from the possession of the Roanoke Iron Company and delivered to Crocker Bros., with a bill of lading, which was a muniment of title. *Means v. Bank*, 146 U. S. 627 [18 Sup. Ct. 186, 38 L. Ed. 1107]. Thereafter the iron passed to them. Under the terms of the contract appearing in the letter quoted above, no provision was made for the return of the iron in specie, in whole or in part, to the iron company. It was to be held by Crocker Bros., to be sold by them, to be kept in their actual possession, and so ready for delivery. The first proceeds of the sale were to go to their advances; then all charges were to be deducted; and, after an account for these was made up, then the iron company had a right to the net balance, if any. Even were this the ordinary case of a consignment to a factor selling under a *del credere* commission, the title to the iron would have passed to Crocker Bros., and out of the iron company. \* \* \* But in the present case the iron was delivered to Crocker Bros. for the purpose of obtaining a loan of money. It was delivered with the

formality for the passage of the legal as well as the beneficial title to Crocker Bros. True, sales of it were to follow, not, however, under the direction of and for the benefit of the Roanoke Iron Company, but under the control and direction of, and to reimburse, Crocker Bros. Over these sales no control whatever was reserved to the iron company. There is some ambiguity in the contract, upon the question whether Crocker Bros. could look to any other means of reimbursement than these sales. What of the property, then, was left in the Roanoke Iron Co.? It had the right to an account from Crocker Bros., and on such account a demand for the balance of money appearing due thereon—the balance, a result after reimbursing the loans and payment of expenses. That is the only interest the iron company had in the transaction."

There was another branch of that case, in which the controversy was between the Philadelphia Warehouse Company asserting a lien on several thousand tons of pig iron and muck bar, of the product of the Roanoke Iron Company, and "supply creditors," the former claiming a prior lien on the iron for advances or loans to the iron company under a general contract; but it was held that the "supply creditors" had the prior lien, because the Philadelphia Warehouse Company did not have the legal title to and possession of the property before the supply liens attached; the possession being with the iron company, with a reserved right in its contract with the warehouse company to sell the iron at will, provided only that it replaced the iron sold from time to time with other iron of like quality and quantity. This was properly regarded as a mere contract for the loan of money, secured by a lien on personal property, and not as a sale and delivery of the property.

It is obvious that the decision of the court in the first branch of the case, to the effect that Crocker Bros., by virtue of the bill of lading or storage receipt they held, had title to the iron it represented, superior to any lien the supply creditors had under the statute, does not rest upon compliance with the provisions of chapter 82 of the Code, *supra*, as to licensed warehouses, etc., but upon the common-law validity and effect of bills of lading, warehouse, and other storage receipts, upholding the doctrine that the bona fide transfer and delivery for value of such an instrument vests in the holder thereof the legal title to and possession of the property the instrument represents, and it could not thereafter be made subject to a lien in favor of supply claimants or attaching creditors.

While it is doubtless true, as claimed in the argument of the case for appellants, that, in the enactment of the labor and supply lien statute under consideration, the Legislature had in view the twofold purpose, first, to "increase the industries of the state, develop its resources, and add to its wealth and prosperity," by fostering and encouraging corpo-

rate enterprises, and affording producing companies a source of credit, whereby they might obtain the labor and raw material necessary to the operation of their plants, without which labor and supplies such companies would be unable to commence their operations; and, second, to "guard property rights of other individuals and corporations" who should be willing to furnish their supplies on credit—will it be contended that a construction of the statute which would allow a supplyman to file his claim in the clerk's office after the title to property has passed to a purchaser or a lender of money to a manufacturing company, as in the case at bar, and permit the claim thus filed to reach back and take from the purchaser or the lender of money property that had already become his, would be in furtherance of, or consonant with, the purposes of the statute? Such a construction of the statute would be disastrous to the laborer, the supplymen, the manufacturer, and others conducting industrial enterprises in this state, alike, as doubtless many of the manufacturing plants and other industries employing labor and daily purchasing supplies would be forced to close their doors, since it may be said, as a matter of common knowledge, many of them have only a moderate capital, and do business chiefly by borrowing money of banks and capitalists upon warehouse and other storage receipts, representing the products of the manufacturing concern, or other personal property not forming a part of the plant, as a basis of credit. Such receipts, as we have seen, are valid at common law as collateral for loans, and heretofore have served as a basis of credit, enabling manufacturing concerns to increase their business far beyond what they could do if left to borrow upon their credit only.

It is of the highest importance, as has often been repeated by law writers and the highest courts of both England and America, to protect commercial credit, and this can only be done where commercial paper is held inviolable in the hands of bona fide holders. It has also been often repeated that courts should be especially careful not to throw doubt upon mercantile usages and the customs of business men.

In *Lickbarrow v. Mason*, *supra*, Buller, J., after remarking that he did not think the case open to any arguments of policy or convenience, continued: "But, if it should be thought so, I beg leave to say, that in all mercantile transactions, one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible."

Until the Legislature, in plain and unmistakable terms, abrogates the common law with respect to warehouse and other storage receipts, such receipts, whether issued by a warehouseman complying with the provisions of chapter 82 of the Code of 1887, or not, are to be regarded as having the nature and effect given them at common law, *viz.*, that a

bona fide holder for value of such a receipt, like a holder of a bill of lading, takes the same title to the goods the instrument represents as if the goods themselves had been actually delivered to him, and this is so whether the transfer and delivery of the instrument be a sale or pledge as a collateral for a loan of money.

Without legislative enactment plainly expressing an intention to abrogate the common law with respect to the warehouse receipts and elevator certificates involved in this case, it is not within the power of the courts to take from them the nature and effect they are regarded as having at common law.

We regard the statute (chapter 82 of the Code of 1887) supra as merely declaratory of the common law as applied to licensed warehouses under that statute, adding such provisions as were deemed essential for the better protection of the holders of such receipts; not a sentence or a word, even, of negation of the common law, being contained in the statute.

Upon the whole case, we are of opinion that the only error committed by the lower court in its decrees appealed from lies in the decree of June 27, 1899, overruling the exceptions of appellees the Union Bank and Savings Bank, of Richmond, Va., to so much of the report of Commissioner Guy of February 24, 1899, as gives priority in point of time and right to the supply claims filed in the cause by appellants over the warehouse certificates for flour which were issued by the Gallego Mills Company in its character of warehouseman, and not as manufacturer, and held by appellees the Union Bank and Savings Bank of Richmond, Va. Therefore said decree of June 27, 1899, will be in this respect amended, and, as amended, it, as well as the other decrees appealed from, will be affirmed.

(101 Va. 605)

**ROANOKE CEMETERY CO. v. GOODWIN**  
et al.

(Supreme Court of Appeals of Virginia. June 18, 1903.)

**CEMETERY ASSOCIATION — BURIAL LOTS — RIGHTS OF PURCHASER—REASONABLENESS OF REGULATIONS—VISITORIAL POWERS OF COURTS—RESTRAINT OF TRADE.**

1. A purchaser of a burial lot from a cemetery association acquires merely a right to use the lot for burial purposes, subject to the control of the association.

2. A purchaser of a burial lot from a cemetery association takes it with notice of the limitations placed on his title by the laws of the land, and the charter, constitution, and by-laws of the association made in pursuance thereof.

3. Though a burial lot in a cemetery be conveyed by a warranty deed, the purchaser only acquires the right to use it for the purposes to which it was dedicated.

4. Under Acts 1875-76, p. 38, c. 47, authorizing cemetery associations to appoint superintendents, with the exclusive right to direct the opening of graves, and Code 1887, § 1412, empowering the trustees of cemetery associations

to make proper regulations for the burial of the dead, the sale of lots, etc., a cemetery association, invested by its charter with general powers as to the operation and control of its cemetery, has authority to adopt regulations requiring purchasers of lots to agree to be bound by its rules and to pay the superintendent the specified fees for the opening and filling of graves, irrespective of whether he does the work, such fees being reasonable and uniform.

5. The visitorial power of a court over a cemetery association does not authorize it to substitute its own business judgment for that of the association, and determine the manner in which grave fees shall be paid, and the amounts thereof.

6. The rules of a cemetery association, giving its superintendent a practical monopoly of the opening of graves in the cemetery, are not in restraint of trade.

**Appeal from Circuit Court, Roanoke County.**

Bill by the Roanoke Cemetery Company against F. P. Goodwin and others for an injunction. From a decree dissolving a temporary injunction and dismissing the bill, complainant appeals. Reversed, and injunction issued.

A. A. Phlegar and W. W. Moffett, for appellant. R. C. Stearnes, for appellees.

WHITTLE, J. The Roanoke Cemetery Company was incorporated at August term, 1869, of the circuit court of Roanoke county, and invested with all general powers, and subject to all general restrictions, then in force or which might thereafter be enacted by the General Assembly of Virginia, for the operation and control of cemetery companies.

Article 14 of its constitution provides: "That the board of directors shall appoint a superintendent whose duties and emoluments shall be prescribed by the board."

On August 15, 1875, a regulation was adopted that: "The superintendent shall furnish a certificate of selection to each person selecting a lot, which shall be presented to the treasurer, whose duty it shall be to require the party named in such certificate to comply with the terms of sale prescribed by the board of directors, and after indorsing said certificate of selection, to refer the same to the superintendent. This action shall entitle the said party to own and occupy the lot specified, but only upon the terms and conditions prescribed by the company."

A resolution was adopted June 21, 1889, by which it is made the duty of the superintendent to dig the graves, have them filled after interment, and remove all dirt from the lots, for which service he is to be paid by the owner of the lot on which the grave is dug a fee of \$3 for the grave of a child, and \$4 for the grave of an adult, which charges are denominated "grave fees," and constitute the compensation of the superintendent for all services rendered the company.

By a general revision of the regulations and by-laws of the company, in May, 1896 the duties of the superintendent in respect to digging graves are somewhat increased, his

¶ 1. See *Cemeteries*, vol. 9, Cent. Dig. § 18.

fee for graves of adults is fixed at \$5, and it is provided that he shall be entitled to the "grave fees," no matter by whom the work might be done.

On December 27, 1894, the Messrs. Bowles selected and paid for a lot in the cemetery, and obtained a receipt in full therefor from the treasurer, but no other certificate of purchase was given them.

By Acts 1875-76, p. 38, c. 47, cemetery associations are authorized to appoint superintendents, with the exclusive right to direct the opening of graves, and, by section 1412 of the Code of 1887, the trustees and their successors are empowered to "make such rules and regulations as they may deem proper for the burial of the dead, \* \* \* the sale of lots," etc.; and, independently of these statutory enactments, the company, by the general law, has authority to make reasonable rules and regulations for the management of its affairs and disposition of its property.

At the date of the purchase of the lot in question, the purchasers knew, as a matter of law, that the company had power to make such rules and regulations; and they also knew, as a matter of fact, of the existence of the regulation of which they now complain. That fact is practically admitted by their answer to the bill; and, two days before the lot was paid for, Joseph R. Bowles paid a "grave fee" to the superintendent for the burial of his child.

In the latter part of the year 1900, the Messrs. Bowles undertook to have a grave opened upon their lot, by appellee Goodwin, for the burial of a child, over the objection of the company and in violation of its rules. Whereupon appellant obtained an injunction from the circuit court of Roanoke county, enjoining the opening of that particular grave, and also enjoining appellee Goodwin, an undertaker, from opening any other graves in future in the cemetery inclosure, except in accordance with its rules, regulations, and by-laws.

Appellees insist that the rules and regulations of the company in respect to opening graves are unreasonable and unjust, and tend to create a monopoly of the undertaker's business in favor of the superintendent; and also that the fees allowed for his services are excessive.

Evidence was taken to show that Goodwin opened the grave referred to at the instance of the Messrs. Bowles, without the consent of the superintendent or the company, and that payment of the grave fee to the superintendent was refused.

The financial condition of the company was shown, and also the cost of opening, filling, and packing graves and removing the dirt. While the actual cost of that work is proved to be considerably less than the grave fees allowed by the rules of that company, it is shown that the fees are as low or lower than other companies charge for the similar

service, and that it is customary for cemetery companies to charge such fees.

Goodwin is neither a stockholder nor lot owner in the cemetery, and bases his contention solely on the ground that the rule of the company is an unjust discrimination against him as an undertaker.

At the hearing the court decreed:

(1) That the terms of burial in the lots of the cemetery should be reasonable and necessary for the purpose for which the said company was organized.

(2) That while it was and is necessary that the company should have a competent superintendent to see that graves are properly dug, especially as to depth, and the grounds kept in an orderly and slightly condition, for which services a proper salary should be paid to said officer, yet the said salary should be paid out of the general funds of the company, especially of a company in the good financial condition of this one.

(3) That under such supervision the rules of the said company should provide for the opening of graves, and other duties pertaining to interments, by others than the agents of said company, and particularly by competent and regular undertakers, without discriminations or preferences, either direct or indirect. Provided, if said graves are opened, tamped, and the surplus earth removed, either by the agent of the company or by a lot owner or his agent, the trustees shall have the right to require a reasonable deposit to be made with its treasury before the grave is opened, which deposit shall be sufficient to save the company from expense, and which shall be returned to the lot owner in case he or his agents perform the said services in a proper manner, under the supervision of the superintendent.

(4) That where such services of opening graves, refilling them, etc., are performed by the superintendent or other agent of the company, any charge beyond actual cost is unreasonable and unnecessary.

(5) That the grave fee of \$5 sought to be charged in this case was unreasonable and unnecessary.

The injunction was dissolved and the bill dismissed, and the parties required to pay their respective costs. From that decree this appeal was allowed.

Appellees assign as cross-error the failure of the court to sustain their contention that Peter S. and Joseph R. Bowles purchased the lot in controversy without reservations or exceptions, and that they are the absolute owners thereof in fee simple.

The theory of the defense, so far as those appellees are concerned, is founded upon a misconception of the property rights of lot owners in a private incorporated cemetery.

The purchaser of a lot from such an association holds it by a peculiar title. He acquires no absolute interest in or dominion over such lot, but merely a qualified and

usufructuary right for the purposes to which the lots are diverted and for which they are set apart by the company. Their holding is in the nature of an easement, with the exclusive right to bury in the lots, subject to the general proprietorship and control of the association, in whom the legal title is lodged. All purchasers from such companies are affected with notice of the limitations placed upon their holdings by the laws of the land, and the charter, constitution, and by-laws of the company made in pursuance thereof. *Taylor on Private Corp.* § 195.

It is settled law that a funeral deed is not essential to confer the exclusive right to the use of a lot in a cemetery on the purchaser for burial purposes; and, on the other hand, if the lot be conveyed by deed absolute in form, such purchaser only acquires the right or privilege of using the lot for purposes to which it is dedicated. *Gardner v. Swan Point Cem. (R. L.)* 40 Atl. 871, 78 Am. St. Rep. 808.

It is apparent, from the foregoing statement of the law applicable to the facts of this case, that the decree complained of is erroneous and cannot be sustained. The rules and regulations assailed by appellees are neither in conflict with the charter, nor the statutes applicable to such companies. They are reasonable, and equal in their application to all owners of lots in the cemetery, and are therefore valid. 3 *Clark & Marshall on Private Corp.* p. 1938. As remarked, appellees acquired their lot with both constructive and actual notice of the rules and regulations of the company, and must hold and use it subject to and in conformity with those rules and regulations.

The case of *Ritchey v. Canton*, 48 Ill. App. 185, is authority, if authority be needed, for that proposition. That case holds that a fee-simple owner of a lot in a cemetery, which subsequently passes under the control of a city, cannot be deprived of a pre-existing right by an ordinance of the city. But it expressly decides that the rule is otherwise in respect to subsequent purchasers, and that such purchasers are bound by the ordinance. See, also, *Mount Moriah Cemetery Ass'n v. Commonwealth of Penn. (Pa.)* 22 Am. Rep. 743.

The decree is amenable to the further objection that it undertakes to prescribe rules and regulations for the management of the affairs of the company, to the extent even of determining the fund out of which the salary of the superintendent shall be paid. It is not permissible for a court to thus substitute its own business discretion and judgment for that of the company; its visitorial powers have no such scope. 1 *Clark & Marshall*, p. 547.

In the case of *Town of Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523, this court said: "The court, by its decree, not merely perpetually enjoined the town from performing the work in the manner it proposed, but went even further and fixed permanently what the

grade of the sidewalk in front of the residence of the appellee should be, and minutely prescribed the manner in which the town should do the work. This was plainly beyond the jurisdiction and power of the court. The result of such interference by a court of equity would be to control absolutely the council of a city or town in the exercise of the legislative functions plainly conferred upon it by the charter of the city or town, and to be exercised by the council according to its discretion; to usurp powers expressly conferred upon the council, and to substitute the discretion of the court."

The contention, on behalf of appellee Goodwin, that the rules and regulations in question are in restraint of trade, is without merit. That doctrine has no application to the case of a private cemetery conducting its affairs in its own way, and by agents of its own selection, for the bona fide purpose of effectuating the objects for which the company was organized.

It follows from these views that the decree appealed from must be reversed, and this court will enter a decree perpetuating the injunction.

(101 Va. 627)

BALTIMORE DENTAL ASS'N v. FULLER.  
(Supreme Court of Appeals of Virginia. June 18, 1908.)

LANDLORD AND TENANT—NOTICE TO TERMINATE TENANCY—CONDITIONAL NOTICE—ESTOPPEL—TENANCY FROM YEAR TO YEAR.

1. A notice given a tenant by the landlord that the landlord would not renew the lease unless the tenant made certain repairs, etc., was insufficient to terminate the tenancy, not being unconditional.

2. A tenant may be estopped by his acts from denying the sufficiency of an otherwise insufficient notice to quit.

3. The estoppel can only arise where the conduct of the tenant has been such as to mislead the landlord to his prejudice.

4. A tenant for a year, who holds over after the term, is a tenant from year to year.

5. A notice to terminate a lease from year to year must be given 90 days before the day of month when tenancy commenced under the lease.

Error to Corporation Court of Roanoke.

Action by A. M. Fuller against B. Dobson, trading as the Baltimore Dental Association. Judgment for plaintiff, and defendant brings error. Reversed.

Scott & Staples and H. M. Ford, for plaintiff in error. Moomaw & Woods, for defendant in error.

KEITH, P. Fuller instituted an action of unlawful detainer in the corporation court for the city of Roanoke, in which he complains that one B. Dobson, trading as the Baltimore Dental Association, unlawfully withheld from him certain premises known as rooms 10 and 11 in the Tipton Law Build-

¶ 4. See *Landlord and Tenant*, vol. 21, Cent. Dig. § 278.

ing in the city of Roanoke. The defendant pleaded not guilty, and there was a verdict of the jury against him, upon which the court entered judgment. Upon the petition of the defendant a writ of error was awarded him by one of the judges of this court, and the case is now before us upon errors assigned in that petition.

It appears that in July, 1899, Fuller rented to the defendant the premises in dispute for the term of one year at a rental of \$120 per year, payable in monthly installments of \$10 each. The defendant took possession of the premises on the 24th of July, and has continued to hold the same without any further contract or agreement, and has paid all the rent accruing thereon up to the 24th of July, 1902. It thus appears that after the expiration of the first year of the lease the tenancy became one from year to year, and that the defendant was entitled to a notice to quit under the statute. Some disagreement having arisen between the plaintiff and defendant with respect to replacing glass which had been broken in the doors and windows upon the premises, the landlord requiring the tenant to make the repairs, and the tenant failing to do so in compliance with the demand, on March 7, 1902, one Gregory, acting as the agent of Fuller, addressed a letter to the Baltimore Dental Association as follows:

"On account of your failure to repair the damage done by the manager of your office or your employes to one front window and one glass door of the rooms occupied by you, and on account of the great annoyance you have caused the Snyder-Stoll Co. by allowing water to run down in their store, damaging their goods, on numerous occasions, I beg to advise you that, if the broken glass is not replaced promptly, and satisfactory assurance given that there will be no further annoyance to the Snyder-Stoll Co. by your allowing water to run down on them from your premises, I shall not wish to renew your lease after the expiration of the current year, which, as you know, expires with the 23rd day of July, 1902."

And on May 15th the following letter:

"I wrote you on the 7th of March that, unless you promptly repaired the damage to the office occupied by you, namely, 1 window pane broken in the front window and one glass broken in the door of your back room, and then gave satisfactory assurance that you would not allow water to run down on the Snyder-Stoll Co. again, I would not wish to renew your lease at the expiration of the current year on July 23, 1902. As you failed to comply with the requirements in that notice, I hereby give you formal notice that you thereby forfeited your right to renew your lease after the expiration of the current year, and that I shall then require the premises to be surrendered in as good order and repair as they were when you entered upon them, reasonable wear and tear alone except-

ed, and that does not include the breaking of glass in the windows and doors."

On May 16th the Baltimore Dental Association, through Dobson, its president, wrote a letter to Gregory, in which he denies having received the letter of March 7th, or that he had ever heard of any complaint from the Snyder-Stoll Company, adding: "Therefore I shall take no cognizance of the same, but I am always willing to pay any damages caused by the negligence of my employes, and will have the glass repaired when I get time to go to Roanoke, which I hope will be in a few days."

The letter of March 7th, granting that it was received by the defendant, was not sufficient notice to quit. It was conditional, while it is well settled that the notice to terminate a tenancy must be explicit and positive. Taylor's Landlord & Ten. § 483.

It may be conceded that a tenant may be estopped by his acts from denying the sufficiency of an otherwise insufficient notice, but, if that be so, the estoppel can only arise where the conduct of the tenant has been such as to mislead the landlord to his prejudice. The tenant in this case was entitled to three months' notice to quit. That notice, under the facts of this case, must have been given three months before the 24th day of July; that is to say, on or before the 24th day of April, 1902. The notice of March 7th being insufficient, we are unable to discover anything said or done by the defendant which induced the plaintiff to rely upon that notice, and caused the failure to give a sufficient notice within the time prescribed by law. On the contrary, the conduct of the parties, the communications, verbal and written, which appear in the record as having taken place between plaintiff and defendant, and which are claimed as operating to estop the defendant to set up a want of notice, all took place subsequent to the 24th day of April, and could not, therefore, have been prejudicial to the plaintiff.

Upon the trial the court was asked by the defendant to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that in June or July, 1899, the plaintiff leased to the defendant the premises in question for one year commencing July 24, 1899, and that thereafter the defendant remained in possession from that time to the present, without any further contract, the law converts the tenancy into a lease from year to year, and it can only be determined by the plaintiff by a notice in writing, given by the plaintiff to the defendant ninety days before the 24th of July, of any year."

The court refused to give the instruction as asked for by the defendant, but amended the same by adding thereto the words, "or by acts of both parties," and, further, of its own motion instructed the jury as follows:

"The court instructs the jury that, not-



withstanding the notices given by the plaintiff to the defendant to surrender the premises were insufficient to terminate the lease in question, yet if the jury believe from the evidence that, after receiving said notice, it became the defendant's intention to surrender the premises in accordance with said notice, and he, by words or conduct, communicated such intention to the plaintiff or his agent, then the defendant is held to have waived his right to demand the three-months notice as required by law."

We are of opinion, for reasons already sufficiently stated, that instruction No. 1 should have been given as asked for by defendant, and that the facts of the case do not warrant the amendment thereto, or the instruction given by the court of its own motion.

Upon the whole case, we are of opinion that the judgment of the hustings court must be reversed.

(53 W. Va. 539)

**WHEELING & E. G. R. CO. v. ATKINSON**  
et al.

(Supreme Court of Appeals of West Virginia.  
June 6, 1908.)

**EMINENT DOMAIN—ERROR—INTERLOCUTORY JUDGMENT.**

1. The syllabi in the cases of *Pack v. Railroad Co.*, 5 W. Va. 118, and *Bridge & Terminal Co. v. Steel & Iron Co.*, 24 S. E. 651, 41 W. Va. 747, approved.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by the Wheeling & Elm Grove Railroad Company against David T. Atkinson and others. Judgment for plaintiff. Defendants bring error. Dismissed.

Henry M. Russell, for plaintiffs in error.  
Hubbard & Hubbard, for defendant in error.

McWHORTER, P. On the 17th of April, 1902, the Wheeling & Elm Grove Railroad Company served notice upon David T. Atkinson, Elizabeth Atkinson, William Erskine, trustee, and Elizabeth S. Yates, that on Saturday, the 3d day of May, 1902, it would file its petition in the circuit court of Ohio county for the appointment of commissioners to ascertain a just compensation to the said defendants, as the owners thereof, for a certain strip of real estate situate in the district of Liberty, of said county, and to have such other proceedings by the said court as might be necessary to vest in said railroad company the title in fee simple to said strip of land, to be used by it for its railroad purposes and for public use, under the provisions of the statutes relating thereto, and describing the said real estate proposed to be taken. On the 3d of May the applicant filed its petition accordingly; "and, it appearing that the case is one in which the said petitioner has lawful right to take private property for the purposes stated in the application," the court proceeded

to appoint commissioners "to ascertain what will be a just compensation to the persons entitled thereto for the strip of land described in the said petition, and proposed to be taken. There being no appearance on behalf of the said defendants, the commissioners have been selected by the court in the manner provided for in section 11, c. 42, of the Code of 1899 of the state." On the 14th of May, same month, the parties appeared, and the defendants tendered three special pleas in writing, numbered 1, 2, and 3. The petitioner, by its attorney, objected to these pleas, which objections, being argued, were taken under advice of the court. The defendants thereupon moved the court to set aside the ex parte appointment of commissioners theretofore made, which was overruled by the court, and defendants excepted to such ruling; and the defendants then moved that the commissioners be stayed from proceeding to act under said appointment until the questions arising on said pleas should be disposed of, which motion was also overruled, and defendants excepted thereto. On the 15th day of May, 1902, the commissioners qualified and proceeded to perform the services for which they were appointed, and filed their report with the clerk of the court on the 20th day of May. On the 22d day of May the court sustained the objections to plea No. 1 and plea No. 2, and refused to allow the same to be filed, to which ruling the defendants excepted, and the court overruled the objections to plea No. 3, and the same was filed, and to which the petitioner replied generally, and the trial of the issue thereon was continued to another day. The defendants objected to the filing of the report, which objection was overruled, and defendants excepted. The defendants also filed exceptions to the report and demanded that the compensation to be paid be ascertained by a jury, which motion was granted, and the matters arising thereon continued to another day. Petitioner then asked leave to pay into court the sum of \$200.10, the sum ascertained by said report, with legal interest until the day of payment. Defendants objected to the payment, and to any action upon said report, on the ground that the petitioner ought not to be permitted to take possession of their property, upon the payment of such sum into court or otherwise, until the issue upon said special plea No. 3 should be determined in favor of petitioner. The court overruled the objection, and the defendants excepted. The petitioner then paid the said sum into court, and it was ascertained by the court that the petitioner might, notwithstanding the pendency of further proceedings, enter upon, take, and use for the purpose specified in the application, the land described in the petition, and proposed to be so taken, to which ruling the defendants excepted. Defendants obtained a writ of error and supersedeas.

The first question arising in this case is whether the order to which the defendants take their writ is a final order, or is it an

interlocutory order, to which a writ of error will not lie? The defendants rely upon *Bridge Co. v. Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009, as holding that the order appointing commissioners is final, and cite the same case in 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967, where it is said: "The judgment appears to have been considered by that court [meaning the Supreme Court of this state] so far final as to justify an appeal from it; and, if the Supreme Court of a state holds the judgment of an inferior court of a state to be final, we can hardly consider it in another light in exercising our appellate jurisdiction." It appears from the opinion of the Supreme Court of the United States, very clearly, that that court did not, as an independent proposition, regard it as a final judgment; but this court, having entertained the writ of error, treated it as such for the purposes of the case, while in fact the question never was raised in this court; and in *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, it is held that an order of the circuit court of the United States appointing commissioners to assess damages for land taken by the bridge company in N. J. is not a final judgment upon which a writ of error will lie. The last case cited distinguishes it from the *Bridge Co.* Case in 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967, in that it based its decision on the action of the Supreme Court of this state, and says, referring to the last-mentioned case: "To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States, for if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the circuit court of the United States." And the writ of error was dismissed for want of jurisdiction. In *Postal Telegraph Cable Co. v. Railroad Co.*, 87 Va. 349, 12 S. E. 613, it is held: "Judgment obtained by telegraph company, appointing commissioners to fix a just compensation for land of railroad company, proposed to be taken for the purpose of the former in condemnation proceedings, is not final and appealable." And the same is held in *Ludlow v. City of Norfolk*, 87 Va. 319, 12 S. E. 612. In the case of *Pack v. Railroad Co.*, 5 W. Va. 118, it is held that proceedings under the statute for taking lands for the use of internal improvement companies is not a chancery, but a law, proceeding, and no appeal can be taken from an interlocutory order therein; and in the syllabus (point 2) it is held: "Upon the coming in of a report of commissioners, which fact is entered of rec-

ord, and the payment into court of the sum fixed as just compensation to landowners, the defendants, the landowners, move to set aside the original order appointing commissioners, which motion is overruled, and from this they appeal; and it is held that, the court not having acted upon the report, there is no final judgment, and therefore the appeal cannot properly be taken." Defendants' counsel contend that at the time of the decision of that case there was no such constitutional provision as now exists. The question is well settled by this court in a later case, and long since the adoption of our present Constitution, where the question is very fully discussed by Judge Holt, who wrote the opinion of the court, and which case does not seem to have been cited by counsel, although it decides this case. I refer to the case of *Bridge & Terminal Co. v. Steel & Iron Co.*, 41 W. Va. 747, 24 S. E. 651. The syllabus reads as follows: "In a proceeding, under chapter 42 of the Code, to condemn land for the purposes of a railroad company, the court makes an order that the applicant has the lawful right to take the land in question for the purposes stated in the application, upon the payment of just compensation, and appoints commissioners to ascertain such compensation. To this order the owner of the land obtains a writ of error, with superseas. Held, such order is not final, but interlocutory; that there is no statute expressly authorizing such a writ to such order, and the same will be dismissed as improvidently allowed." In discussing the case, Judge Holt says: "At the fall term, 1895, in the case of *Railway Co. v. McKell*, a writ of error was allowed to an order made in the same stage of the proceeding as the order appealed from in this case. Appellee moved to dismiss the writ as improvidently allowed, and on full discussion by the counsel, and a careful consideration by the court, the conclusion was reached that the decision of the point in *Pack v. Railroad Co.*, 5 W. Va. 118, was right, and the motion to dismiss was sustained."

For the reasons here given, the writ of error in this case must be dismissed as improvidently awarded.

(58 W. Va. 543)

**PHILLIPS v. PINEY COAL & COKE CO.**  
(Supreme Court of West Virginia. June 6, 1903.)

**EQUITY—LACHES—DEMURRER—MARRIED WOMAN.**

1. A bill is bad on demurrer when it appears therefrom that there have been unreasonable delay and laches on the part of the complainant in asserting the rights which are sought to be enforced.

2. A court of equity will not assist one who has slept upon his rights and shows no excuse for his laches in asserting them.

3. Under the statutes of this state, a married woman being authorized to act in respect to

¶ 3. See *Equity*, vol. 19, Cent. Dig. § 241.

her separate estate as if she were unmarried, she is equally subject to the imputation and consequences of laches as if she were a feme sole.

(Syllabus by the Court.)

Appeal from Circuit Court, Raleigh County; J. M. Sanders, Judge.

Action by Nannie L. Phillips against the Piney Coal & Coke Company and others. Judgment for plaintiff. Defendant Piney Coal & Coke Company appeals. Reversed.

Brown, Jackson & Knight, for appellant. J. H. McGinnis and J. W. McCreery, for appellee.

McWHORTER, P. Wilson Phillips was the owner of a tract of 435 acres of land in Raleigh county, and, desiring to convey to his wife 200 acres of the said tract, he and his wife on the 27th of May, 1879, by deed of that date, conveyed to Peter R. Wilson, the father of Nannie L. Phillips, the wife of the grantor, a part of said tract, described as follows: "Commencing at the mouth of a branch on Soak creek; thence following the stream until it empties into the waters of Piney river; then following the course of the waters of Piney river for the distance of two hundred and fifty poles; thence running in a northwesterly direction till it strikes the public road; thence following said road in a southeasterly direction till it strikes the branch of said creek, to place of beginning, containing two hundred acres more or less." At that time the grantor lived in Pennsylvania, and the description of the land was made according to the recollection of the grantor. On the same day, and by deed executed on the same sheet of paper, Peter R. Wilson and Louisa, his wife, conveyed, with general warranty, to Nannie L. Phillips, the same "piece of land described in the first page of this deed," etc.; but the call running from the end of the 250 poles in the last named deed was made to read, "thence running in a southwesterly direction until it strikes the public road," instead of "northwesterly," as in first deed. On the 8th day of January, 1890, Wilson Phillips and Nannie L. Phillips, his wife, conveyed to Azel Ford the tract of 435 acres, describing the whole tract by metes and bounds, but "excepting from the above boundary a tract of land now owned by said Nannie L. Phillips and conveyed to her by Peter R. Wilson and wife by deed dated the twenty-seventh day of May, A. D. 1879"; then describing the land so excepted by the same description set out in the deed from Peter R. Wilson and wife to Nannie L. Phillips, which deed to Ford was recorded February 27, 1890. And by deed dated the 3d day of March, 1890, said Ford and wife conveyed, with general warranty, the said tract of land conveyed to him by said deed of the 8th of January, 1890, to Logan Bullitt, of Philadelphia, with covenants "to execute further assurances of their said lands and other property, rights, privileges and ease-

ments aforesaid as may be required," which deed was recorded March 10, 1890. By deed dated the 5th day of May, 1898, said Bullitt, and his wife conveyed said land to the Piney Coal Company of Raleigh county, with like further assurances, which deed was recorded on the 12th day of May, 1898. At the March rules, 1900, process having been issued January 2, 1900, Nannie L. Phillips filed her bill in the circuit court of Raleigh county against the Piney Coal Company, Logan, Bullitt, Azel Ford, and Wilson Phillips, praying that said deed of January 8, 1890, made by Wilson Phillips and herself to Azel Ford, be reformed so as to run in a northwesterly direction till it strikes the public road, so as to give her the land described in the deed from her husband and herself to Peter R. Wilson, and as laid down by Milton Curtis on a plat filed with the bill as an exhibit—she having had the same surveyed by said Curtis—and for general relief. The defendant, Piney Coal Company, filed its demurrer in writing to plaintiff's bill, setting up, among other things, for cause of demurrer, that the said bill and exhibits show affirmatively that the tract of land claimed by plaintiff cannot be located, bounded, and described as claimed by her, and that plaintiff had been guilty of laches in waiting 10 years before bringing her suit, and suffering successive transfers of the land in controversy to be made in the meanwhile, and should therefore be denied relief; also that said bill failed to show how demurrant claimed said tract of land should be located, bounded, and described, or what land, if any, of said plaintiff, demurrant claimed. Defendants Ford and Bullitt also demurred to the bill, which demurrers were overruled. The defendants Piney Coal Company, Bullitt, and Ford, filed their several answers to the plaintiff's bill, denying the material allegations thereof, to which answers plaintiff replied generally. Defendant Wilson Phillips also filed his answer, admitting the allegations of the plaintiff's bill, and asked that proper relief be granted in the premises to all the parties according to the facts given in the case. Depositions were taken and filed by the respective parties, and on the 6th day of November a decree was rendered reforming the several deeds from Peter R. Wilson to Nannie Phillips, and from Phillips and wife to Ford, from Ford to Bullitt, and from Bullitt to the Piney Coal Company, and appointing a surveyor to go upon the land and lay off the two hundred acres more or less, to the plaintiff, according to the description given in the deed from Wilson Phillips and wife to Peter R. Wilson, on May 27, 1879; the said surveyor to give the parties to the suit 15 days' notice of the time of doing such work. From which decree the Piney Coal Company appealed.

The first question to be disposed of is the assigned error in overruling the demurrer. It is claimed that the plaintiff was guilty of

gross laches in the delay that she made in bringing her suit; being quite 10 years after the date of the deed to Azel Ford, and with no reasonable or sufficient explanation of such delay. Plaintiff held under a deed dated the 27th of May, 1879, which was admitted to record July 6, 1879, so that from the time the mistake was made to the date of the institution of the suit was within a few months of 21 years; but whether she could be guilty of laches, as between herself and her husband, it is immaterial here, as the time which elapsed after making the deed to Ford is sufficient to be fatal to her case, if a married woman can be guilty of laches. The only explanation that she attempts, in her bill, to make of her long delay of 10 years, is that as soon as she ascertained that the defendant set up any claim to her tract of land described in the deed of May 27, 1879, she caused a survey to be made. She fails to even allege that she did not know of the mistake in the deed all the time. She does not say when she first knew of it. Was it not her duty to know of this mistake, when her deed had been in her possession and of record all that time? Is she not bound to know what is in her deed? *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836. In the latter case, Justice Grier, at page 94, 2 Wall., and 17 L. Ed. 836, says: "Now, the principles upon which courts of equity act in such cases are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision: 'Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time, and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused, but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came

to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' " All this time plaintiff remained passive, permitting a succession of conveyances of the property according to the description in the conveyance made by her husband and herself to Ford, so that the property has passed into several hands since their conveyance. In *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507, it is held (Syl., point 3): "He who elects to set aside his contract for fraud must bring suit for the property without unreasonable delay after discovery of the fraud, unless there be good reason to excuse it; otherwise his delay will deny him relief." And point 4, in same syllabus: "The defense of laches may be made by demurrer when the facts manifesting it appear in the bill." This question of laches is well discussed in the case last cited, at page 229, 34 W. Va., and at page 511, 12 S. E., after citing *Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815, where it is held: "Where it appears by the bill that the remedy is barred by lapse of time, or, by reason of laches, he is not entitled to relief, the defendant may, by demurrer, avail himself of the objection." The judge, speaking for the court, says: "I am convinced that this defense of laches is alone a complete bar to the plaintiff's bill." The option dates April 19, 1881, the deed November 12, 1881, the suit in May, 1887, a period of more than six years from the date of the option, and five and a half from the date of the deed. Decisions of this court furnish emphatic authority on this subject. *Trader v. Jarvis*, 23 W. Va. 100, holds that 'delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as evidence of assent, acquiescence, or waiver; and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced in a court of equity.' There was a delay of nearly seven years there." In *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219, it is held: "A bill is bad on demurrer where it appears therefrom that there have been unreasonable delay and laches on the part of the complainant, or those under whom he claims, in asserting the rights which he seeks to enforce." And in *Spedel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718: "A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them." And in *Greenlees v. Greenlees*, 62 Ala. 330: "It is settled in this state that, in courts of equity, lapse of time, rendering a demand stale, or statute of limitations, the bill disclosing that the claim or demand is obnoxious to either, may be taken advantage of by answer or demurrer as

well as by plea." See, also, *Bercy v. Lavretta*, 63 Ala. 374; *Sublette v. Tinney*, 9 Cal. 423. In 18 Am. & E. E. L. 107 (2d Ed.): "If a married woman is authorized to act in respect to her separate estate as if she were unmarried, she is equally subject to the imputation and consequences of laches as if she were a feme sole." In *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17 (I quote from the opinion because it is so applicable to the case at bar under the changed conditions created by our statutes, as affecting the rights of married women): "At common law, while a married woman remained under the disability of coverture, she could not be guilty of laches. In equity, she is considered in all respects as a feme sole in respect to property settled to her sole and separate use. Under the Constitution of this state, her real and personal property, acquired in any manner, are and remain her separate estate and property so long as she may choose, and can be devised, bequeathed, or conveyed by her the same as if she were a feme sole, and are not subject to the debts of her husband. Under our statutes, property owned by her at the time of her marriage, or acquired by her afterwards, is and remains her sole and separate property, and can be used by her in her own name, and is not subject to the interference or control of her husband. She can bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services, on her sole and separate account; and her earnings from her trade, business, labor, or services are her sole and separate property, and can be used or invested by her in her own name. No bargain or contract made by her in respect to her separate property, or in or about her trade or business, under the statutes of this state, is binding upon her husband, or renders him or his property in any way liable therefor. She can be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her, and can maintain an action in her own name for or on account of her sole or separate estate or property, business or services, or for damages against any person or body corporate for any injury to her person, character, or property. In an action brought or defended by her in her name, her husband or his property is not liable for the costs thereof or the recovery therein. Whenever judgment is recovered against her, it can be enforced against her sole and separate property to the same extent and in the same manner as if she were sole. The statutes clothe her with the same property rights, and, with few exceptions, subject her to the same liabilities, as her husband. She can manage her own property, and bind herself by contract, with the exception of contracts to convey land, in respect to her property, separate trade, or business, as fully and to the same extent as

he can. Vested with the rights of property and the right to sue and be sued possessed by her husband, she is subject to the same rules which restrict and control his rights. For this reason, it has been held by this court that she is barred by the statute of limitations which prescribes the time within which actions to recover land sold at judicial sales shall be commenced. For the same reason, she can be guilty of laches. The disabilities of coverture in respect to her separate property having been removed, she is to the same extent relieved of its consequences: *Steines v. Manhattan Life Ins. Co.* (C. C.) 34 Fed. 441, 444; *Burkle v. Levy*, 70 Cal. 250, 254, 11 Pac. 643; *Morrow v. Goudchaux*, 41 La. Ann. 711, 6 South. 563; *Lewis v. Barber*, 21 Ill. App. 638, 641."

For the reasons herein given, the decree must be reversed, and this court, proceeding to render such decree as the circuit court should have rendered, doth sustain the demurrer and dismiss the bill.

Reversed and bill dismissed.

(53 W. Va. 536)

BOGGS v. GREENBRIER GROCERY CO.  
et al.

(Supreme Court of Appeals of West Virginia.  
June 6, 1903.)

THREATS—ACTION FOR DAMAGES—DECLARATION.

1. W. H. B. filed his declaration against N. H. S. and G. G. Co. for damages, alleging that defendant N. H. S., by threatening to have R., the son of plaintiff, arrested for a felony, and have him sent to the penitentiary, forced and induced plaintiff to release the levy of an execution on certain property of said R., who was plaintiff's execution debtor, and turn the property so released over to defendants, who took possession thereof; but failed to allege in the declaration on what felonious charge defendant S. claimed the said R. could be so arrested or prosecuted, and that R. was innocent of such charge. *Held*, declaration bad on demurrer for want of such allegation.

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by William H. Boggs against the Greenbrier Grocery Company and N. H. Slack. Judgment for plaintiff. Defendants bring error. Reversed.

Williams & Dice, for plaintiffs in error.  
John W. Arbuckle, for defendant in error.

McWHORTER, P. William H. Boggs instituted in the circuit court of Greenbrier county his action at law against the Greenbrier Grocery Company, a corporation, and N. H. Slack. In the declaration as well as the summons it is called an action in trespass on the case. It contains allegations in slander, but it sufficiently appears from the whole declaration together that it is an action to recover damages against the defendants named for forcing the plaintiff to release certain property from levy levied upon by

virtue of an execution issued upon a judgment in favor of the plaintiff against one R. H. Boggs, who was the son of the plaintiff, in order that the defendants might take possession of the property so levied upon, which they did, the plaintiff being induced to so release his levy by threats made by the said Slack. The defendants representing to plaintiff that his son, the said R. H. Boggs, was indebted to them to the amount of several hundred dollars, and that, unless plaintiff would go security for the said R. H. Boggs for the said indebtedness, and would release the said lien and levy and surrender the said property to the defendants, said defendant Slack would have said R. H. Boggs immediately arrested for felony, and sent right away to the penitentiary, and imprisoned therein, and would make plaintiff sign a bigger bond to get R. H. Boggs released; that they had plenty by which they could have said R. H. Boggs arrested and sent to the penitentiary; and that by reason of said threats the plaintiff became and was much distressed and disturbed in mind, and, being ignorant, inexperienced, and unadvised, was so scared, excited, and frightened, and was by reason of said threats overcome, impelled, and unlawfully forced to release said property from said lien and levy, and surrendered the same to defendants, and directed the officer to return the execution to the justice, and said defendants immediately took possession of said property without legal process, and took and carried the same away, and converted it to their own use. While the declaration seems to be partly a declaration in slander, with some indications of a declaration in trover and conversion, yet this may be very properly treated as surplage, and enough can be gathered from the allegations to predicate the same upon the plaintiff being forced and induced by the threats of said Slack to release his lien, and permit the property to go into the hands of the defendants; but the allegations of such threats are insufficient, in that they fail to allege any specific charges against the said R. H. Boggs which would constitute a criminal act for which the said Boggs could be prosecuted. A threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby. *Knapp v. Hyde*, 60 Barb. 80. "A threat of imprisonment is not duress unless the imprisonment be unlawful." *Hammon on Contracts*, § 135, p. 193, and cases there cited; and at bottom of same page: "A threat of imprisonment for an offense of which the person threatened is innocent is as to him a threat of unlawful imprisonment, even though the person making the threat believes the other guilty." *Giddings v. Bank*, 104 Iowa, 676, 74 N. W. 21. In quite all the very many authorities I have examined on this subject the threat complained of was made with reference to specific charges, thus informing the person threatened of the

ground of the threat. *Wharton's Prec. of Ind. and Pleas*, p. 378. As far as the declaration shows in case at bar, there was no intimation accompanying the threat of any specified charges, or that any particular crime had been committed for which the said R. H. Boggs could be arrested or prosecuted. The declaration should allege, in connection with the threat, the charges upon which the defendant threatened the arrest, and, further, that the person threatened to be so prosecuted was innocent of said charge.

The declaration being bad on demurrer, the judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded to the circuit court, with leave to plaintiff to amend his declaration, if so advised.

(53 W. Va. 370)

**KNIGHT v. ZAHNHISER BROS. & STEN**  
et al.

(Supreme Court of Appeals of West Virginia.  
April 25, 1903.)

**PROHIBITION—WANT OF JURISDICTION—PROCEDURE—APPEAL—JUSTICE OF THE PEACE.**

1. As a general rule, where prohibition is sought to prohibit an inferior court from entertaining a matter for want of jurisdiction, exceptions must first be made in the lower court to its jurisdiction.

2. A justice having jurisdiction of a proceeding, prohibition does not lie. Resort must be had to an appeal where it lies.

(Syllabus by the Court.)

Error to Circuit Court, Braxton County;  
W. G. Bennett, Judge.

Action by John B. Knight against Zahniser Bros. & Sten and another. Judgment for defendants, and plaintiff brings error. Affirmed.

B. P. & V. B. Hall, for plaintiff in error.  
W. E. Hammond, for defendants in error.

BRANNON, J. John B. Knight sued Zahniser Bros. & Sten for debt before D. C. Wellen, a justice of Braxton county, and, the defendants being nonresidents, an attachment was issued against their estate. Judgment was given September 23, 1898, by the justice for the plaintiff, and under an order of sale the attached effects were sold. Before the sale Zahniser Bros. & Sten moved Justice Wellen to grant a new trial or rehearing, they not having appeared to the action; but the justice refused to do so, as shown by his docket. Later a peremptory mandamus was awarded by the circuit court of Braxton commanding Justice Wellen to rehear the action; but he entered no order touching it. The petition for prohibition says that he had removed from the county and vacated his office of justice before the motion for a rehearing, and before the institution of the proceeding in mandamus. The matter lay asleep until November 2,

¶ 1. See *Prohibition*, vol. 40, Cent. Dig. § 66.

1901, when Zahniser Bros. & Sten moved G. R. Gibson, successor of Wellen as justice, to rehear the action. Thereupon Knight applied to and obtained from Hon. W. G. Bennett, circuit judge, a rule against Justice Gibson and Zahniser Bros. & Sten to prohibit rehearing the case before the justice. Upon the return of the rule, the circuit court of Braxton, upon demurrer to Knight's petition, and upon a motion to discharge the rule, entered judgment discharging the rule and denying the prohibition, and Knight sued out a writ of error.

We need not discuss all the points gone over by counsel, because the solution of the case before us is governed by the points now to be stated, rendering it unnecessary and improper to pass on the points alluded to.

No exception to the jurisdiction of Justice Gibson was made to him before the application for the prohibition. In 16 Ency. Pl. & Prac. 1123, we find this matter: "Applications for the writ of prohibition are premature until exception has been taken to the jurisdiction of the lower court and overruled, and will be refused, if this has not been done, for it is invariably presumed that courts will give the parties the relief to which they show themselves entitled." I grant that this is not jurisdictional; but it is, and ought to be, imperative practice. Why should not relief be first sought in the court alleged to have no jurisdiction, the proper place to present the question in the first instance? The case of Board of Education v. Holt, 51 W. Va. 435, 41 S. E. 337, proceeds on this rule. It is laid down by all the authorities except Com. v. Latham, 85 Va. 632, 8 S. E. 488, citing no authority.

Again, Justice Gibson had jurisdiction to decide for or against the application for rehearing. I have observed no point or matter presented in the briefs not proper for his consideration as entering into the question of granting a rehearing, and cognizable upon an appeal from his court to the circuit court, and therefore prohibition does not lie. When he decides, though he may decide erroneously, yet he decides within the scope of his jurisdiction, and an appeal affords redress for any error. Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448.

We therefore affirm the judgment.

(53 W. Va. 550)

# DAY v. NATIONAL MUT. BLDG. & LOAN ASS'N OF NEW YORK.

(Supreme Court of Appeals of West Virginia.  
June 6, 1903.)

## EQUITY—INCONSISTENT CAUSES OF ACTION—JOINDER—MULTIFARIOUSNESS—DISTRIBUTION OF ASSETS.

1. Independent, inconsistent, and repugnant causes of action, sufficient in themselves separately, cannot be joined together in the same bill in chancery.

2. If a borrower of a building association files a bill for the purpose of having his stock in such association treated as illegal and void, and the loan made him as usurious, and to have his obligations to such association canceled and annulled, and at the same time asks that he be treated as a shareholder, with the privilege of calling upon the officers and managers of the association to account for the mismanagement of the association under its by-laws, and having its business finally wound up and its property distributed, such bill is multifarious, for misjoinder of separate and distinct causes of suit, inconsistent in their nature, and will be dismissed.

3. One who occupies the position of being a mere debtor of a building association cannot maintain a bill to wind up its affairs and distribute its assets.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County; El. S. Doolittle, Judge.

Bill by Robert L. Day against the National Mutual Building & Loan Association of New York. Decree for plaintiff, and defendant appeals. Reversed.

Harvey & Hutchinson, for appellant. Vinson & Thompson and Jefferson Bryant, for appellee.

DENT, J. The National Building & Loan Association of New York appeals from decrees of the circuit court of Cabell county overruling its demurrer to the bill, and appointing a receiver to take charge of and manage its property and business, at the instance of Robert L. Day. Day filed his bill in chancery against the said association, containing, among other things, the following allegations: First. That the plaintiff subscribed for 17 shares of stock of the association, which was a mere money lender, and borrowed from it \$1,700, being the par value of such stock, advanced, and executed two several deeds of trust to secure the same; that, in accordance with the by-laws of such association, he had paid in at various times \$1,720, which he claims should be credited on such loan, and, if there is any balance, he is ready and willing to pay the same, when properly ascertained; that the association claims a balance of \$1,461.46; that the whole transaction is usurious, and, for various reasons set forth in the bill, is illegal, and his subscription to the stock was procured by false representations—and asks that he be treated as a mere borrower, the usury expunged from his indebtedness, the true balance be ascertained and determined, his deeds canceled, and the association enjoined from making sale of his property. Second. As a stockholder of the association, he alleges that the business of the association is being corruptly mismanaged by the officers and directors thereof in their own private interests, to the injury of the stockholders, and that the association has been rendered insolvent thereby, and has ceased to do and perform its legitimate functions, but is carried on solely for the benefit of the officers, managers, and their friends, in total disregard of the interest of the shareholders

and the borrowers, and prays that a receiver be appointed to take charge of the affairs of the association and manage them in the interests of the shareholders. The defendant demurred to the bill. The demurrer was overruled, and on motion of the plaintiff the court appointed a temporary receiver. The defendant filed its answer and exhibits, and the court at the hearing made such receivership permanent.

The first question that presents itself is as to whether such a bill is maintainable. Can a person repudiate his subscription of shares to an alleged building association, and ask that it be treated as a money lender, and he as a borrower, because of misrepresentation, fraud, and usury, and in the same breath claim to be a shareholder, charge fraudulent mismanagement on the part of the officers and managers, even to insolvency, and have a receiver appointed to take charge of and manage the business of the association in the interests of the shareholders? Equity will not entertain a bill containing such inconsistent allegations, and so repugnant to each other. If the plaintiff is a borrower and the defendant a money lender, and plaintiff's subscription to the stock is void because obtained upon false representations, then the plaintiff cannot be treated as a shareholder, and be permitted to ask for a receiver to take charge of and wind up the affairs of the defendant. A bill is fatally defective for multifariousness and misjoinder when it unites two separate, distinct, and repugnant causes of action against a defendant, either of which, standing by itself, would be a good cause of action. As a debtor, plaintiff may attack his loan as usurious, and the by-laws of defendant as illegal and void; but, as a shareholder, he must accept such by-laws, and be governed thereby. As a debtor, he can sue the association alone; as a shareholder, he must make the officers and shareholders parties, formal or informal, to such suit. As a debtor, his interests are opposed to those of the shareholders; as a shareholder, his interests conflict with his position as a debtor. The defense of the association as a mere money lender is very different from that it must present when charged by a shareholder with mismanagement. The defenses are incompatible and have no necessary connection with each other. In the case of *Guano Co. v. Heatherly*, 38 W. Va. 410, 18 S. E. 611, this court held: "The bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts on which such relief is prayed must not be inconsistent. The bill must not be multifarious; that is, two distinct grounds of equitable relief, even between the same parties, are not to be joined in one bill." A bill to rescind or annul a contract for fraud or illegality, and to enforce the same and require an accounting thereunder, is fatally defective. 14 *En. Plead. & Prac.* 205; *Wilkinson v. Dobbie*, 12 *Blatchf.* 298, *Fed. Cas. No.* 17,670; *Cherokee*

*Nation v. Southern Kansas Railroad*, 135 U. S. 641, 10 *Sup. Ct.* 965, 34 *L. Ed.* 295; *St. Louis R. Co. v. Terre Haute R. Co.* (C. C.) 33 *Fed.* 440; *Shields v. Barrow*, 17 *How.* 144, 15 *L. Ed.* 158. A bill which prays the rescission of contracts of subscription to corporate stock, and also seeks to call the corporate officers to account to the complainants as stockholders, is multifarious. *Brown v. Bedford City Land Co.*, 91 *Va.* 31, 20 *S. E.* 968. In the latter case it is held that stockholders who come into a court of equity, and seek to have their contracts of subscription rescinded on the ground that they were fraudulently obtained, cannot in the same bill complain of the malfeasance or misfeasance of the corporate directors in the management of the corporate property, and seek relief which rests upon their relation as stockholders of the defendant company. Such relief must be considered a distinct act of affirmance and ratification of the very transaction which they in another part of their bill sought to repudiate. *Yeaton v. Lenox*, 8 *Pet.* 123, 8 *L. Ed.* 889; *Pomeroy's Eq. Jur.* § 268. "A plaintiff cannot in one portion of a bill sue on behalf of himself and all the other members of a company, and by another portion seek to establish a demand against the company." 1 *Daniell's Pl. & Pr.* 242. Antagonistic causes of action cannot be set up in the same bill. *Story's Eq. Pleading*, § 271; *Hazard v. Dillon* (C. C.) 34 *Fed.* 485; *Walker v. Powers*, 104 *U. S.* 245, 26 *L. Ed.* 729; *Stebbins v. St. Anne*, 116 *U. S.* 386, 6 *Sup. Ct.* 418, 29 *L. Ed.* 667; *Hartford Fire Ins. Co. v. Bonner M. Co.* (C. C.) 44 *Fed.* 151, 11 *L. R. A.* 623. The relief sought by plaintiff for himself is antagonistic to, and inconsistent with, the relief sought by him for others, and hence the two matters are incompatible. The same rule holds good in suits to impeach wills. *Dower v. Church*, 21 *W. Va.* 23; *Couch v. Eastman*, 27 *W. Va.* 796, 55 *Am. Rep.* 346; *Kerr v. Lunsford*, 31 *W. Va.* 659, 8 *S. E.* 493, 2 *L. R. A.* 668.

The bill in this case is plainly multifarious. When the case was formerly determined, an effort was made to hold that the plaintiff was purely a debtor to the association, and not entitled to file a bill to settle the affairs of the association, and that that portion thereof was mere surplusage, and should be disregarded, and the bill entertained; following *Morgan v. Morgan*, 42 *W. Va.* 542, 26 *S. E.* 294; *Gay v. Skeen*, 36 *W. Va.* 582, 15 *S. E.* 64. This was done under the doctrine that when a shareholder became a borrower to the full par value of his stock, and surrendered his stock to the association, he was no longer a shareholder, nor entitled to share in its profits and losses. *Thornton & Blackledge on Building Associations*, § 387; *Endlich on Building Associations*, § 517; *Bowker v. Mill River Loan Fund Association*, 7 *Allen*, 100; *Overby v. Fayetteville Building & Loan Association*, 81 *N. C.* 56; *Association v. Gilbert*, 23 *Grat.* 787; *White v. Mechanics' Building*



Fund Association, 22 Gr. 233. This doctrine is really foreign to the purpose of building associations, and tends to destroy their character as such. For, so long as a borrower is interested in the earnings of the association, and entitled to a pro rata distribution thereof as a credit on his stock or dues, he must be rated as a member. An examination of the defendant's by-laws filed with the bill shows that plaintiff's stock was only pledged as collateral security for his loan, and it was not to be deemed canceled until "the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares." Hence the plaintiff, until the shares pledged by him were finally canceled, was interested, as a shareholder, in the business of such association, and entitled, on proper showing, to file a bill to have the affairs of the association wound up and settled under the direction of a court of equity. *Thornton & Blackledge, B. & L. Ass'ns*, 393; 7 *Thomp. Corp.* §§ 8772, 8773; *Lister v. Log Cabin Ass'n*, 38 Md. 115; *Ede, Bulld. Ass'ns*, 128; 5 *Am. & Eng. Dec. in Equity*, 123; *Young v. Building Ass'n*, 48 W. Va. 520, 38 S. E. 670; *Edelin v. Pascoe*, 22 Gr. 326; *Cason v. Seldner*, 77 Va. 293; *Code*, c. 53, § 58. Such being the law, the court cannot avoid the effect of the bill being multifarious. The plaintiff sets out two wholly distinct and repugnant causes of action, in one of which he claims that the defendant is an illegal corporation, doing business illegally, with by-laws invalid, and asks that his subscription be treated as null and void, and his debt as usurious. In the other he claims to be a shareholder, subject to the by-laws and entitled to their benefit, with the right to call the association's officers and managers to account thereunder. Which one of these causes of action he will prosecute, it is for him to decide. Equity will not decide, nor will it permit him to set them both up in the same bill.

The decrees will therefore be reversed, the receiver be discharged, the demurrer sustained, and the bill dismissed, without prejudice to any proper suit the plaintiff may be advised to bring touching either or any of the causes of action set forth in his bill.

(66 S. C. 194)

STATE ex rel. SOUTHERN RY. v. EARLE  
et al.

(Supreme Court of South Carolina. April 22, 1903.)

INJUNCTION—ENFORCEMENT OF ORDINANCE—PLEADINGS—MAYOR'S COURT—PRESUMPTIONS—UNREASONABLENESS OF ORDINANCE—APPEAL—JURISDICTION.

1. Where a petition to restrain the authorities of a city from enforcing an ordinance alleged that the city had attempted to pass the ordinance at a certain time, and the return of the respondent admitted the allegations, the intent of the language of the petition was evidently to allege the invalidity of the ordinance because in violation of the Constitution, and the

admission of respondent is not susceptible of the construction that the ordinance was not promulgated as provided by law.

2. On conviction in a mayor's court, it will be presumed that all the requirements of law have been complied with.

3. A party affected by an ordinance is entitled to show that it is so unreasonable as to amount to a confiscation of property under the guise of regulation.

4. Where an appeal has been taken from an intermediate order, and the jurisdiction of the Supreme Court has attached, the circuit court cannot hear the case on the merits.

Appeal from Common Pleas Circuit Court of Richland County; Aldrich, Judge.

Proceeding for prohibition by the Southern Railway Company against F. S. Earle, mayor of the city of Columbia, and Owen Daly, chief of police of said city. From circuit order overruling demurrer, refusing motion for reference, and decree on merits, petitioner appeals. Reversed.

B. L. Abney and B. M. Thomson, for appellant. Allen J. Green, for respondents.

#### Statement of Facts.

GARY, A. J. There are three sets of exceptions in these two cases: (1) Those assigning error on the part of his honor the circuit judge in overruling the demurrer to the rule to show cause; (2) those complaining of error in refusing an order of reference in order that the petitioner might have the opportunity of showing that the ordinance hereinafter mentioned was unreasonable, and therefore deprived the petitioner of its property without due process of law, in contravention of section 1 of the fourteenth amendment to the Constitution of the United States; (3) those alleging error in the final judgment dismissing the petition.

The following is the order refusing the reference:

"This is a proceeding in prohibition to restrain the mayor and chief of police of the city of Columbia from enforcing an ordinance of said city entitled 'An ordinance to amend section 347a of the Revised Ordinances of the City of Columbia, ratified the 26th day of May, 1896.' Said ordinance, according to the allegations of the petition herein, was ordained and passed, or attempted to be ordained and passed, on February 26, 1901, so that said section of the Revised Ordinances, as amended, shall read: 'Section 347a. In order to provide for the safety of the public at places where the tracks of the steam railroad companies cross the streets of the city of Columbia, it shall be the duty of said companies to station both day and night at such crossings as in the judgment of the city council the public safety may require, to be designated by the city council, a flagman, whose duty it shall be to show a red flag whenever a train may be approaching or crossing such streets; and it shall also be the duty of said companies to provide and maintain at such crossings a good and sufficient light, to burn from thirty minutes aft-

er sunset until one hour before sunrise. Any person or corporation violating any of the foregoing provisions shall be punishable upon conviction before the mayor, or alderman acting as mayor, by a fine not exceeding forty (\$40.00) dollars.'

"Thereafter the intersections of a number of streets were designated by the city council, and the petitioner herein, through its proper officers, was notified to place flagmen and lights, as required by the ordinance. In January, 1902, the said ordinance was enforced, or attempted to be enforced, by fining an agent of petitioner for violating the same. On January 9, 1902, his honor Judge Ernest Gary issued a rule against the respondents to show cause before him, at chambers, in Columbia, S. C., 'why the writ of prohibition prayed for in the petition in the above-stated proceeding should not issue in accordance with the prayer thereof,' and restrained respondents, 'until the further order of this court, from further prosecuting the proceedings against the said Southern Railway Company, or its officers and agents, on account of the matters and things alleged in said petition.' The respondents have made return to the rule to show cause and answered the petition herein.

'Petitioner contends: (1) That the city had no power, express, implied, or incidental, to pass the ordinance in question. (2) That the Legislature was without power to confer the right to pass such an ordinance, because it would contravene article 1, § 5, of the Constitution of South Carolina, as well as section 1 of the 14th amendment to the Constitution of the United States, in that it is a taking of property without due process of law, and denies the equal protection of the laws. (3) That it appears upon the face of the ordinance itself, and from the facts before the Court: (a) That this ordinance is unreasonable, unjust, oppressive, and a burden upon the petitioner, and therefore void; (b) that it is in contravention of the sections and articles of the Constitution above referred to, in that it attempts to impose upon the railroad company the whole expense of providing good and sufficient lights where the railroad track crosses any streets in the city of Columbia, as well as requires flagmen at road crossings night and day, the entire expense of which to fall upon the railroad company; (c) that the ordinance has never been duly promulgated, as is required by the charter of said city (14 St. at Large, p. 569, § 10; Revised Ordinances City of Columbia, p. 176).

"The proceeding now comes before me upon the petition and return. As preliminary to the hearing, petitioner moves the court for an order of reference to the master, directing him to take and report the testimony upon the issues of fact raised in the pleadings. This motion of reference is predicated upon the claim of petitioner that it has the legal right to show by testimony that 'this or-

dinance' (the one in question) 'is unreasonable, unjust, oppressive, and a burden upon the petitioner, and therefore void.' In my opinion, petitioner has no such legal right. The ordinance in question, upon its face, purports 'to provide for the safety of the public at places where the tracks of the steam railroad companies cross the streets of the city of Columbia.' It therefore falls under and within the police power. The ordinance may be illegal, because either without authority of law, or because it is unconstitutional; but, if the ordinance is legal, courts 'cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.' *Darlington v. Ward*, 48 S. C. 583, 26 S. E. 806, 38 L. R. A. 326. 'This court, of course, has nothing to do with the policy of the ordinance. It may be very unjust, oppressive, and partial, or it may be one of those wise measures of preservation which experience has rendered necessary to circumvent the cunning of those who look more to private gain than the interest of society.' *City Council v. Ahrens*, 4 Strob. 256. The latest authority upon this subject is the case of *Darlington v. Ward*, supra, where the subject is discussed and the authorities reviewed. I shall not consider the subject further.

"Whether the ordinance in question is void, because illegal, for the reasons stated, can and will be determined without taking testimony as to the reasonableness, etc., of the ordinance. The respondents, when the proceeding came up before me, discussed all of the issues presented by the pleadings, and demanded that the petition herein be dismissed and the rule discharged. The court must refuse such demands, and for two, among other, reasons: First. The petitioner only argued the motion to refer, and did not discuss all of the issues raised. There was, of course, reference to these issues; but they were not fully presented, and naturally so, as the motion to refer was preliminary to the argument upon the merits.

"There is an issue of fact, upon which some record evidence is needed, to be passed upon. I refer to the allegations and contention of the petitioner 'that the ordinance' in question, 'has never been duly promulgated, as is required by the charter of the city,' etc. In paragraph 10 of the petition it is alleged that the city council, 'claiming and assuming authority to act under the charter of said city, and the laws of the state relating thereto, did attempt to ordain and pass the following ordinance,' and the ordinance above stated is then set out in full; but there are no words purporting to show that said ordinance was made and ratified under the seal of the city, signed by the mayor, or attested by the clerk. Whether or not the ordinance was duly and legally ordained will appear upon the records, or the original ordinance. The production of such original, or the proper evidence of the same, should be an easy matter, involving little time and trouble, and a

reference to take such testimony should not be necessary. If, however, I am mistaken in this respect, and it is necessary, petitioner may renew his motion for a reference to take such testimony or proof.

"Wherefore it is ordered that the motion of petitioner for an order of reference herein to take testimony be, and hereby is, refused."

The order is dated 23d July, 1902.

On the 26th day of July, 1902, the petitioner served notice of appeal from said order, and thereafter on 28th July, 1902, perfected its appeal by filing with the clerk of this court the return required by the rules. On the 1st of August, 1902, Chief Justice POPE granted an order staying proceedings until the appeal should be disposed of by the Supreme Court. On the 12th of August, 1902, Chief Justice POPE modified his previous order by ordering "that so much thereof as prevents Judge Aldrich from continuing the hearing and rendering his decision upon the merits be rescinded, and the said judge be, and is, authorized to proceed to hear and dispose of the same in the same manner as if said order had not been granted." Thereafter Judge Aldrich heard the case upon the merits and dismissed the petition.

#### Opinion.

The first ground of the demurrer to the return to the rule to show cause was that "it does not show that the ordinances set forth in the petition have been duly and regularly ordained and passed by the said city council and promulgated as required by the charter of said city of Columbia." The tenth paragraph of the petition is as follows:

"(10) That on the 26th day of February, 1901, the city council of the city of Columbia, claiming and assuming authority to act under the charters of said city, and the laws of the state relating thereto, did attempt to ordain and pass the following ordinance: 'An ordinance to amend section 347a of the Revised Ordinances of the City of Columbia, ratified the 26th day of May, 1896. Be it ordained by the mayor and aldermen of the city of Columbia, in council assembled, and by the authority of the same, Section 1 That section 347a of the Revised Ordinances of the city of Columbia, ratified the 26th day of May, 1896, be, and the same is hereby, amended by striking out after the word "station" the words "during the daytime," and inserting in lieu thereof the words "both day and night," so that the section as amended shall read.' " Then follows a copy of the ordinance set out in the order of Judge Aldrich.

In the return the respondent admits the allegations contained in paragraph 10 of the petition. It will be observed that paragraph 10 does not allege that the ordinance was not promulgated in the manner required by law. The reasonable interpretation of its language is that it intended to allege the invalidity of the ordinance because it was in violation of

the Constitution, which provides that a person shall not be deprived of property without due process of law. The admission of the respondent is not susceptible of the construction placed upon it by the petitioner. There are several other reasons that could be assigned in support of this conclusion, but we deem them unnecessary.

The second ground of the demurrer was as follows: "(2) Although it is admitted that the agent of the Southern Railway Company was tried before the mayor's court as alleged in paragraph 15 of the petition, the return does not show that the said city of Columbia has ever complied with the said ordinance set forth in the petition by designating at what crossings, in the judgment of the city council, the public safety required a flagman to be stationed, and good and sufficient lights to be also provided and maintained by said railroad company." It is presumed from the judgment of conviction before the mayor's court that there was a compliance with all the requirements of law until the contrary is made to appear. Furthermore, the allegations of the petition show that the city designated the crossings mentioned in the ordinance.

The next question that will be considered is whether the circuit judge, in refusing the order of reference, erred in ruling that the petitioner did not have the legal right to show by testimony that the ordinance is "unreasonable, unjust, oppressive, and a burden upon the petitioner." The ruling of the circuit judge is unquestionably free from error, unless, as a federal question, a different principle prevails in cases arising under the Constitution of the United States. When there is conflict in cases involving a federal question between the decisions of a state court and the United States Supreme Court, it is the duty of the state court to follow the decisions of the United States Supreme Court. *Construction Co. v. Township*, 49 S. C. 535, 27 S. E. 570. In 21 Enc. of Law, 985 et seq., it is said: "It is well established as a general rule that ordinances, in order to be valid and binding, must be reasonable and not arbitrary or oppressive, and ordinances which do not conform to this requirement will be declared void." Also: "In determining whether an ordinance is reasonable, regard must be had to the surrounding circumstances, and the character of the place where it is to be put in operation must also be considered. Thus, where the power of regulation given to municipalities by the Constitution is alike conferred upon cities, towns, and counties, an ordinance passed pursuant thereto may be reasonable when confined to the limits of a city or town, while it would be entirely unreasonable when put in operation in all parts of a large county, thinly populated in many of its parts." Again: "The reasonableness of an ordinance is a question of law for the court to decide upon a consideration of all the established facts and circumstances of

the case; but a controversy as to the facts of the case must be determined by a jury." These principles are recognized and followed by the Supreme Court of the United States. In *Turpin v. Lemon*, 23 Sup. Ct. 20, 47 L. Ed. —, the court quotes with approval the following definition of due process of law found in *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569: "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observances of those general rules established in our system of jurisprudence for the security of private rights." The case of *Henderson v. Henderson*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823, shows that, in order to bring a case within the scope of the fourteenth amendment to the Constitution of the United States, it should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that the legislation, by its necessary operation, is really spoliation under the guise of the law. In *Smythe v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the court uses this language: "In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or of the public. This, as has been often observed, is a 'government of law, and not a government of men,' and it must never be forgotten that under such government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held." The court then proceeds to show that it was competent to enter upon an inquiry as to the reasonableness and justice of the law therein mentioned. In *Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, the court says: "There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a

question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." These authorities demonstrate that the petitioner had the right to show by testimony that the ordinance was so unreasonable in its operation as really to be spoliation or confiscation of its property under the guise of legal forms, and that the ruling of the circuit judge was erroneous.

The question whether the circuit judge had jurisdiction to hear the case upon the merits after the Supreme Court had acquired jurisdiction by the filing of the return with the clerk of the court does not necessarily arise, as the circuit court could not hear the case on the merits until the plaintiff had the opportunity of introducing testimony to show that the ordinance was unreasonable. The cases of *Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766; *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711; *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530; *State v. Ry. Co.*, 45 S. C. 470, 23 S. E. 383; and *Alston v. Limehouse*, 61 S. C. 1, 39 S. E. 192—show that, as a general rule, he did not have jurisdiction after the case had been removed to the Supreme Court.

The question as to the power of a single Justice to grant permission to the circuit court to hear the case upon the merits after the Supreme Court had acquired jurisdiction need not be considered, as we have shown that the judgment must be reversed for the reasons hereinbefore stated.

The judgment of the circuit court must be set aside, but without prejudice to the rights of the parties to a new trial, and such is the judgment of this court. It is also the judgment of this court that the order of the circuit court, in both cases, refusing the order of reference, be reversed, with leave to the petitioner to renew its motion.

(54 S. C. 259)

#### HUGHES v. SCHOOL DIST. NO. 37.

(Supreme Court of South Carolina. May 15, 1903.)

#### COURTS—JURISDICTION—SCHOOLS—EMPLOYMENT OF TEACHER—BREACH OF CONTRACT—NONSUIT—EVIDENCE.

1. The circuit court has jurisdiction of an action by a teacher against a school district for damages for breach of contract to teach school.
2. Complaint in an action by a teacher for breach of contract to teach a school need not state that she held a certificate at the time of the contract.
3. It was not error to refuse a nonsuit where there was any material evidence supporting plaintiff's claim.
4. The doctrine that in an action for breach of contract for services amount earned contract time should be deducted from liability of the master, does not apply where earnings were after the expiration of contract time.
5. In an action for breach of contract

ployment of plaintiff as a teacher it will be presumed that the trustees of a public school only employed teachers having certificates from examining board.

6. In an action for breach of contract to employ a teacher for a public school, evidence as to her conduct during a previous term is irrelevant.

7. A request to charge, in order to be reviewed, must be embodied in the exceptions.

Appeal from Common Pleas Circuit Court of Lancaster County; Watts, Judge.

Action by Jennie C. Hughes against School District No. 37. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the complaint:

"(1) That the defendant is a body politic and corporate, duly organized under the laws of this state, under the corporate name of 'School District No. 37 of Lancaster County, State of South Carolina,' and as such authorized and empowered to make the contract hereinafter set forth.

"(2) That on or about the — day of March, 1900, the said defendant, by and through the trustees of said school district, thereunto duly authorized, contracted and agreed with this plaintiff to teach a certain free common school in said district, known as the 'Bruce School,' for a term of five school months, or for as many months as the public funds for said school would justify, commencing on the 22d day of October, 1900, and continuing thereafter, and contracted and agreed to pay the plaintiff for her services in teaching the said school \$30 per month, to be due and payable at the expiration of each school month.

"(3) That said contract was such as the said defendant was authorized by law to make, and that there was and is in the hands of the treasurer of the said county a sum of money as a school fund for said district more than sufficient to satisfy and discharge the amount due under said contract as herein set forth.

"(4) That on or about the 22d day of October, 1900, this plaintiff entered upon the performance of the said contract in the said school building furnished by said defendant under said contract in the said school district in the said county, and continued in the performance of the said contract until prevented from continuing and concluding the performance of the said contract as herein set forth.

"(5) That at the expiration of about two months from the above-stated date, after plaintiff had fully and faithfully performed her contract to teach the said school during such time of two months (being part of the said five months for which she contracted to teach as aforesaid), the said Bruce school building was, by consent and connivance of the trustees of the said school district, dismantled, and rendered entirely unfit for use as a place for teaching the same under the contract aforesaid; that the plaintiff immediately reported the facts aforesaid to the

school trustees of the said school district, and demanded of them that said school building should forthwith be put in such condition as would enable her to complete the teaching of said school during the remainder of the term of her said contract; that said trustees failed and refused so to do, although the said school district had funds and property there available for said purpose; that this plaintiff intended and was ready and willing to complete the performance of her contract for the remainder of said term aforesaid, and did perform her part of the said contract to teach the said school during the said entire term, save only in so far as she was prevented by the acts and defaults of the defendant as aforesaid.

"(6) That the term for which plaintiff contracted to teach the said school as aforesaid has long since expired; that plaintiff has fully performed all the conditions of said contract on her part, and has demanded payment from said defendant for her said services under the said contract, but that defendant has failed and refused, and still fails and refuses, to pay the said plaintiff any part of the said sum of \$150 due to this plaintiff for her said services under the said contract, except only that said defendant has paid to plaintiff the sum of \$30 in settlement for plaintiff's services during the first month aforesaid, leaving still due by said defendant to this plaintiff upon the said contract a balance of \$120, which said defendant has refused and still refuses to pay.

"(7) That there is now in the hands of the treasurer of the said county, and properly applicable to the payment of the said amount due this plaintiff, a sum of money belonging to said school district more than sufficient to pay the said amount due to this plaintiff and the costs of this action.

"(8) That the trustees of said school district are Simon Cauthen, Preston Horton, and Simon Bruce, and the said trustees have thrown every obstruction to the progress of the school, even dismantling the schoolroom as aforesaid, and carrying off the furniture, and have utterly refused to give the plaintiff an order on the county treasurer for the payment of the money due her, and she is now without remedy, except by bringing this action in this court, to enforce payment of her claim.

"(9) Wherefore plaintiff prays judgment against the said defendant for the said sum of \$120, and for the costs and disbursements of this action, and prays that a decree may be therefore made by this court for the payment of the same out of the funds aforesaid; and that such other and further relief may be awarded to this plaintiff as may be just."

The circuit judge, after stating the allegations of the complaint in his charge, continues as follows:

"The defendants come in and deny the allegations of the complaint; that is, they deny she was employed by the trustees.

They claim one employed her, the other had nothing to do with it, and the third trustee was not a trustee by reason of the fact that he didn't live in that school district; and they allege that, even if she was employed, that her contract was canceled for due and sufficient consideration by the trustees of the school, and she took an appeal from that to the county board, and the county board affirmed the action of the school trustees in canceling this agreement; and she then gave notice of appeal to the state board, and abandoned the appeal; and the trustees, defendants, contend that she was never employed, and, secondly, if she was employed, the contract was canceled, and canceled legally, and that they are in no manner liable to pay for four months' wages. They have put in a further defense that these trustees couldn't contract for any money coming into the school district except for that fiscal school year, and that there is another school in that district, and the trustees had the right to apportion the money between these two schools; and, even if she is entitled to recover at all, she would be entitled to recover only the amount of money in the hands of the treasurer appropriated and apportioned to this school. Those are substantially the issues in this case. You have heard the testimony in this case, and you are the judges of that; you are the sole judges. I charge you, as matter of law, that the trustees of a school have to employ the teacher. That is part of their duty; and they can employ who they please, and contract with them to teach as long as the school fund for that year holds out belonging to that school. The school trustees have a right to apportion to the different schools in their school district the public funds belonging to that school district during the fiscal year—the financial year—that they are trustees. They have a right to apportion to these schools within the district a certain amount of funds, and they have a right to employ the teacher to teach the school as long as the funds apportioned to one of those schools holds out. They are charged with the duty and power of employing a teacher. Whoever the trustees appoint they have a right to enter into a contract with, and whoever they enter into a contract with has a right to teach school. Trustees have a right to discharge whoever they employ for good and sufficient reasons. Now, I charge you that if there were three trustees in that school district, and one (Mr. Williams) wasn't a resident, I charge you that, inasmuch as they allege that Williams was not a resident and taxpayer in that school district, it is incumbent upon them to show by the preponderance of the testimony or weight of the testimony that he was not a trustee, because, if you believe that the county board appointed him a trustee, and that he was a taxpayer and resident and qualified elector, he was a legal trustee. I

charge you further that, even if Williams was not a resident and taxpayer of that district, if he was appointed by the county board, and no complaint was made, and he was allowed to hold himself out and acted as such, and the patrons of that school district didn't make any complaint and have him removed by the county board, to all intents and purposes he was a trustee, to the extent of being allowed to make a contract along with the others. The board of trustees have a right to make a contract. They can call a meeting, or they can get together and agree on it. It is not necessary, as I take it, that they should actually designate the time and place. They can discuss the matter on their farms, and, if two agree, and they elect a teacher, that is sufficient, as I take it, in the eye of the law. I charge you, as matter of law, if the majority of these trustees employed the plaintiff in the case to teach the school for five months, she was entitled to teach that school; and if they canceled that agreement, unless they did it on sufficient grounds, she would be entitled to recover the wages or pay that they agreed to give her for her services for the five months; if she was willing and ready to carry out her part of the contract, and was prevented by the trustees from being allowed to do it upon any arbitrary or capricious grounds. If, however, there was not enough money for that fiscal year apportioned for that school to pay her five months' wages, if you think she is entitled to recover, she is entitled to recover only to the extent of the fund apportioned for that fiscal year. I charge you, as matter of law, that no trustees have a right to hire a teacher in advance, and pledge the funds coming into school district for a future year. The law presumes that the money apportioned for a year is to be expended in that year, and the trustees have a right to contract for the services of teachers to the extent of the funds coming into their hands in that year. But they can't create a debt, and thereby make away with the funds coming in a future year. If you think this lady was employed to teach the school, and the school trustees arbitrarily and capriciously discharged her without any fault on her part—without any reason, or anything of the sort—she would be entitled to recover, as I have told you. If, however, after they employed her, if the school trustees for any good and sufficient reasons removed her, I charge you that was a matter within their discretion. The government of the schools is left to them, and after he or she entered upon the discharge of their duties, and if anything turns up, there is good and sufficient reason why they should not be allowed to teach the school, the school trustees having a right of removal; and if they remove her or him her remedy or his remedy is by appeal to the county board, and if the county board sustains the action of the school trust-

tees the party aggrieved has a right to appeal to the state board of education, and if they sustain the county board that ends it. Now, understand, where a party is employed by the trustees to teach a school, the school trustees have no right to arbitrarily and capriciously annul and cancel that contract, but they have a right to do it upon good and sufficient grounds; and, if complaint is made to the school trustees that the school teacher is not doing her duty, and they investigate and find good and sufficient grounds to cancel the contract, they have a right to do it; and the remedy is by appeal to the county board, and from there to the state board, if they want to go that far. So, in this case, it is for you to determine whether there was a contract here; and if there was a contract, and the trustees removed this plaintiff without good and sufficient reasons, then she is entitled to recover. If there was a contract, and they removed her for good and sufficient reasons, then I charge you as matter of law she has not a right to recover.

"The plaintiff and defendant have both requested me to charge you propositions which I will read. Plaintiff's propositions are as follows: '(7) That if the jury should find, on the evidence, that at the time plaintiff claims her contract to teach the school was made, Simon Bruce and John S. Williams had been recognized as trustees of said school district by the school board, and up to that time had been employing the teacher, and as such managing the school of said district, then, as a matter of law, they must both be regarded as trustees until they resigned or were regularly removed by the school board.' I charge you that.

"The defendants request me to charge the following propositions of law:

"(1) That a legally constituted board of trustees for any public school district in this state, except special and graded districts created by special acts, must be chosen by the county board from the qualified electors and taxpayers residing in said district; and that no contract made by an acting board of school trustees, not so constituted, can bind said district.' I refuse to charge you that, because I have already given you my idea of the law on that line. \* \* \*

"(3) That individual school trustees in any such district have no authority to employ teachers. The whole board must be present to bind the district, unless such contract be fully approved and confirmed by a legally appointed board when legally in session.' I refuse to charge you that in that language. I charge you that one member of a board could not employ a teacher, but a majority might agree on one, and have a right to employ her. \* \* \*

"(7) That if a teacher is discharged for good and sufficient reasons by a board of public school trustees, the district in which he contracted to teach is liable to such teacher

only for his stipulated wages for the time taught therein.' I refuse to charge you that. If they employ a person—if they employ a person for a certain number of months, and discharge them without any good and sufficient reason, the person that they employ is entitled to collect for the full time.

"(8) I refuse to charge you the eighth proposition.

"Now, gentlemen, the form of your verdict will be, 'We find for the plaintiff so many dollars,' or, 'We find for the defendant.' Take the record."

The following is the defendant's eighth request: "(8) That, if a teacher is illegally discharged by a board of school trustees, the district in which his services were rendered is liable to him only for the wages he would have earned if he had taught the full term allowed by law to the school assigned him, less the sum he did earn or could have earned in like employment during the balance of said term."

The defendant appealed on the following exceptions:

"(1) Because the circuit judge erred in overruling defendant's oral demurrer to the jurisdiction of the court; whereas it is submitted he should have held that the court was without jurisdiction of the subject-matter of the action, it not appearing from the complaint that the plaintiff had exhausted her right of appeal to the county and state boards of education before the commencement of this action, as contemplated by the statute law of this state; and that, therefore, he should have dismissed the complaint.

"(2) Because the circuit judge erred in overruling defendant's oral demurrer, and in holding the same sufficient; whereas it is submitted he should have held the complaint fatally defective, in that it contained no allegations: (a) That the plaintiff had and held a certificate of qualification from the state board or county board of education, and was, therefore, duly qualified to teach in the public schools in the state; and (b) that plaintiff had exhausted her right of appeal to the county and state boards of education before the commencement of this action; and (c) that plaintiff had made an effort to secure, or had failed to secure, other like employment during the balance of her alleged contract, and the amount of her earnings, if she obtained employment. And therefore his honor should have dismissed the complaint.

"(3) Because his honor erred in holding that it made no difference where plaintiff's patronage came from—whether from the defendant district or from any other adjoining district; whereas it is submitted that under the school law of the state the patronage from the district in which the teacher is employed is alone to be considered by the trustees in the maintenance of the public schools, and therefore the court erred in refusing to allow defendant to introduce testimony tending to show that the plaintiff's patronage

was almost entirely from other adjoining school districts.

"(4) Because his honor erred in allowing the plaintiff, over the objection of the defendant, to testify in reply that she had not been cruel to the daughter of the witness Johnson during the previous term; whereas, such testimony was not in reply, the court having previously refused to allow the said Johnson to testify as to plaintiff's treatment of his daughter during that previous term.

"(5) Because his honor erred in refusing to allow the defendant to prove by the plaintiff in her cross-examination the amount of wages earned by plaintiff while teaching in Chesterfield county, and in holding that what she earned in Chesterfield had no bearing on the case at bar; whereas it is submitted he should have allowed this testimony, since plaintiff's measure of damages, if she was entitled to any, was the difference between what she would have earned had she been allowed to teach out the term of her alleged contract, less what she earned or might have earned in like employment during the months of her discharge.

"(6) Because his honor erred in not granting defendant's motion for a nonsuit, and in holding that there had been some evidence adduced by plaintiff that J. S. Williams was a legally appointed member of the board of trustees of the defendant district; whereas it is submitted he should have granted the motion, there being absolutely no testimony that the said J. S. Williams had ever been appointed a trustee of the defendant district by the county board of education, and it having been established by the cross-examination of plaintiff and her witnesses, that the said J. S. Williams was not a resident of the said district, as required by the Constitution and the school law of this state.

"(7) Because his honor erred in refusing to allow the defendant to introduce any testimony tending to show the peculiarities of temperament, the unfairness, and the cruelty of the plaintiff, as shown in the management of the Bruce School during the previous term; whereas it is submitted such testimony would have been both relevant and competent, as tending to show a sufficient reason on the part of the parents in the district for not patronizing the plaintiff in the fall of 1900, in justification of the action of the board of trustees in discharging plaintiff; and in justification of the action of county board in recommending her discharge.

"(8) Because his honor the presiding judge erred in refusing to charge the jury defendant's first request to charge as submitted.

"(9) Because his honor the presiding judge erred in refusing to charge the jury defendant's third request to charge as submitted.

"(10) Because his honor the presiding judge erred in refusing to charge the jury defendant's seventh request to charge as submitted.

"(11) Because his honor the presiding judge

erred in refusing to charge the jury defendant's eighth request to charge as submitted.

"(12) Because the verdict of the jury was contrary to law, and not warranted by the evidence adduced, there being no competent evidence that plaintiff had and held a certificate of qualification, as required by law, from either the county board or state board of education; and there being absolutely no evidence that J. S. Williams, who, as plaintiff says, employed her to teach the Bruce School, was appointed a trustee of the defendant district by the county board; and it appearing, on the other hand, from the testimony of all the witnesses, that the said J. S. Williams was not a 'qualified elector residing' in the defendant district.

"(13) Because his honor the presiding judge charged the jury, in speaking of the duties and powers of trustees, as follows: 'They can employ who they please, and contract with them to teach as long as the school fund for that year holds out belonging to that school;' whereas it is submitted such is not the school law of this state, for under the law trustees are prohibited from employing any teacher who does not hold and present to the board a certificate of qualification (in force) from the county or state board of education.

"(14) Because his honor the presiding judge charged the jury as follows: 'Whoever the trustees appoint they have a right to enter into a contract with, and whoever they enter into a contract with has a right to teach school;' whereas it is submitted that under the law of this state a teacher who does not hold a certificate of qualification (in force) from the county board or state board of education has no right to teach a public school, and a contract made with her by a board of trustees cannot bind the district.

"(15) Because his honor the presiding judge charged the jury as follows: 'And if they canceled that agreement, unless they did it on sufficient grounds, she would be entitled to recover the wages or pay that they agreed to give her for her services for the five months;' whereas it is submitted a plaintiff could in no event recover more than the wages promised her, less the amount of wages she earned, or could have earned, in Chesterfield county or elsewhere, during the balance of the term of her alleged contract.

"(16) Because his honor erred in charging the jury plaintiff's seventh request to charge as submitted; whereas it is submitted no recognition by the county board of the acts of persons, and no acts of persons themselves (who have never been regularly appointed trustees by the county board, and who are not 'qualified electors residing in the district'), can give to such persons authority to make a contract like the one in question to bind the district, in opposition to the plain and positive provisions of the Constitution and the statute law of this state."



Green & Hines, for appellant. Ernest Moore and R. E. & R. B. Allison, for respondent.

POPE, C. J. Plaintiff brought her action to recover from the defendant \$120, under a contract with a majority of the board of trustees of School District No. 37 of Lancaster county, in this state, by which she was employed to teach the Bruce School, in said School District No. 37, for five months, beginning on 22d October, 1900, at the price of \$30 per month. The trial was had before his honor Judge Watts and a jury. A verdict of \$90 was rendered in favor of the plaintiff. After entry of judgment on such verdict, the defendant appealed to this court, alleging that the circuit judge erred, first, in overruling the demurrer of the defendant; second, in overruling defendant's motion for a nonsuit; and, third, for alleged errors of law in the charge of the circuit judge. The report of the case will set forth the complaint.

1. We cannot find any error in the refusal to sustain the demurrer. The allegations are sufficient to sustain a cause of action as set out in the complaint. Certainly the court of common pleas has jurisdiction of the case set out in the complaint. Nor do we think the circuit judge erred in sustaining the proposition that the complaint did set out a cause of action. We do not think it was incumbent upon the plaintiff to plead that she possessed a certificate as a teacher. It would be assumed that the board of trustees for the school district in question, when they made a contract with the plaintiff to teach a school, complied with the law. Further, when she was paid her salary for one month, it was not only required that the board of trustees signed the warrant therefor, but also that the county superintendent indorse the same by his approval. All these facts are amongst the facts alleged in the complaint. These exceptions are overruled.

2. We have examined the testimony to see if there was any material evidence to take the cause to the jury. We find there was; hence the circuit judge was not in error in refusing the motion for a nonsuit.

The fifth and fifteenth exceptions complain of error in excluding testimony of plaintiff on cross-examination as to the amount she earned teaching school in Chesterfield county from the 25th day of February to the 26th day of April, 1901, and in charging the jury that plaintiff would be entitled to recover whatever salary the district trustees agreed to pay her for the stipulated term, without qualifying the charge with a statement that her earnings during the term should be deducted. These exceptions, in our opinion, do not present grounds sufficient to warrant reversal under the undisputed facts in this case. The undisputed facts show that the plaintiff's earnings in Chesterfield were not during the term for which she was employed. The complaint alleged that the term of

employment commenced on the 22d day of October, 1900, and was to continue thereafter for a term of five school months, or for as many months as the public funds of said school would justify. (*Italics ours.*) A school month is 4 weeks, or 20 teaching days. The testimony of the plaintiff was that there were  $4\frac{1}{2}$  school months from the 22d day of October, 1900, to February 25, 1901, when she began to teach in Chesterfield. This would be true if no allowance is to be made for the usual Christmas week holiday; but with such allowance there was time between the dates named for a term of 17 weeks, or  $4\frac{1}{4}$  months. To prove the exact term of employment according to the allegations of the complaint, plaintiff introduced evidence as to the school funds belonging to the school for that scholastic year, and showed by the county treasurer that the funds were \$103.31, plus dispensary funds, \$29.24, less \$65, leaving \$127.55, of which the plaintiff had received \$30 for one month's salary, leaving less than \$100 of funds applicable. Mr. J. S. Bruce, one of the trustees, testified that plaintiff was employed to teach school "for four or five months, owing to the amount of money there was to run the school." The plaintiff sued for \$120, as for four months at \$30 per month, having been paid for one month of the term; but the jury, under the testimony, found for the plaintiff only \$90, thereby determining that the term of employment was four school months, from October 22, 1900. It is, therefore, manifest that plaintiff's earnings after the 25th of February, 1901, had nothing whatever to do with the case, and that the trial judge committed no error in excluding evidence thereof, and in failing to qualify his charge in the respect complained of, even if there had been a request for such qualification; and there was no such request.

The thirteenth and fourteenth exceptions assign error in charging generally that the trustees could contract with whom they pleased to teach as long as the school funds for that year belonging to that school district hold out. There was no error in this charge, viewed in the concrete, with reference to the case made by the evidence. The error imputed is a technical one, viewing the charge as an abstract proposition, and without reference to the particular case. The statute requires school trustees to employ teachers from those having certificates from the county board of examiners. But there was not a particle of evidence that plaintiff had no such certificate. On the contrary, the presumption was that she had such certificate from the fact of employment by officers presumed to do their duty. Besides, the only evidence on the subject was that plaintiff had such certificate, as appears by reference to folios 60 and 95 of the "case." Under the case made the judge could have properly charged the jury that the school trustees had the right to employ plaintiff, and, if such charge could have been made, surely it was not prejudicial

to defendant to charge that the trustees could contract with whomsoever they pleased, a general statement involving the right to contract with the plaintiff.

Recurring to the first exception, relating to the jurisdiction of the court, appellant's interesting argument upon this point is as follows: "Our position is that under the free school law of this state (chapter 24, tit. 9, pt. 1, Civ. Code 1902, and article 11 of the Constitution of 1895), plaintiff had furnished to her an opportunity and a remedy for her alleged grievance, to submit her alleged claim to a tribunal or tribunals other than the circuit court,—tribunals with all the power of that court to summon witnesses, to take testimony, and to render a judgment that would have bound defendant district, and given plaintiff the relief sought by her, if she were entitled to it; that until she exhausted this, her plain remedy, in the manner required by law, and that fact had been made to appear upon the face of her complaint, the circuit court should take no jurisdiction either of the person of the defendant or of the subject matter of the action. Under section 2, art. 11, of the Constitution of this state, the state board of education is given 'such powers and duties as may be determined by law.' Under section 3 of the same article the General Assembly is given the power to define the '*qualifications, powers and duties*' of the county board of education and of the board of school trustees. (Italics ours.) Section 1203 of the Code constitutes the county board 'a tribunal for determining *any matter* of local controversy or *administration* of the school laws, with power to summon witnesses and take testimony, if necessary, and when they have made a decision, it shall be *binding* upon the parties to the controversy' (italics ours), provided no appeal be taken to the state board in the manner therein provided. Sections 1206 and 1211 and 1218 give the county board the supervision of the actions and doings of the board of trustees. So construed in *State ex rel. Bryson v. Daniel*, 52 S. C. 201, 29 S. E. 633. Under section 1183 of the Code the state board is given the power 'to review on appeal all decisions of the county board of education, \* \* \* and in so reviewing to pass upon all '*questions of law*', as well as the facts of the case. \* \* \* And the decision of the state board shall be *final* upon the matter at issue.' (Italics ours.) *State ex rel. Bryson v. Daniel*, supra. If, as a matter of fact, plaintiff had appealed from the action of the board of trustees in discharging her and refusing to pay her to the county board, and from the latter to the state board, and that appeal were pending before the last-named board at the time of the commencement of this action in the circuit court, the court certainly would not assume jurisdiction in the matter. So that when the complaint in this action failed to show upon its face that the plaintiff had exhausted the powers of the Constitution and

statutory quasi inferior court—a court constituted for the express purpose of adjudicating her rights in the premises—the circuit court could not and should not have assumed jurisdiction of the person of the defendant and of the subject-matter of the action, and therefore defendant's first ground of demurrer should have been sustained, and the complaint dismissed, for want of jurisdiction." The case before us, however, is not a "matter of local controversy in reference to the construction or administration of school laws," and does not come within the rules stated in *State v. Hiers*, 51 S. C. 388, 29 S. E. 89, and *State v. Daniel*, 52 S. C. 201, 29 S. E. 633. This case is for damages for breach of contract. Section 1205, Code 1902, provides that organized school districts "may sue and be sued and be capable of contracting and being contracted with to the extent of their school fund." And by section 15, art. 5, Const., courts of common pleas have jurisdiction "in all civil cases." We have thus overruled the first and second exceptions.

The third is immaterial in this controversy, and is, therefore, an abstract proposition.

We overrule the fourth exception, for it would make no difference to the plaintiff's case what may have occurred prior to the contract sued on. If it had any force before the contract to teach was made, it had none after the contract was made; and thus, for the same reason, we overrule the seventh exception.

We have already overruled the sixth exception.

The eighth, ninth, tenth, and eleventh exceptions cannot be considered, because they do not set out in terms the requests which were refused.

The twelfth exception cannot be sustained under the testimony in this cause, and, further, because two exceptions are attempted to be blended in one.

The sixteenth exception must be declined to be entertained for the reason that, when a request to charge is made the basis for an exception, such request to charge must be embodied in the exception.

The charge of the circuit judge and the exceptions must be embodied in the report of this appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(66 S. C. 229)

DE HAY, County Superintendent, v. COMMISSIONERS OF BERKELEY COUNTY.

(Supreme Court of South Carolina. May 11, 1903.)

CONSTITUTIONAL LAW—LOCAL ACTS—AMENDMENT—SALARIES OF COUNTY COMMISSIONERS.

1. The Legislature cannot, by a local act passed after the Constitution of 1895, amend a local and special act passed before the Constitution, when both relate to a subject prohibited by Const. art. 3, § 34, providing that

the Assembly shall not enact local or special acts for certain specified objects.

2. Act 1898 (22 St. at Large, p. 878) and Act 1899 (23 St. at Large, p. 169), amending Act 1895 (21 St. at Large, p. 984), providing a salary for county school commissioners for Berkeley county, are void; they being special acts relating to subjects prohibited by Const. 1895, art. 3, § 34.

Pope, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Berkeley County; Klugh, Judge.

Claim by A. H. De Hay, county superintendent of education, against the county commissioners of Berkeley county. From an order reversing the action of the commissioners, they appeal. Affirmed.

The order of circuit court reversing action of commissioners is as follows:

"By an act of the General Assembly, entitled 'An act to amend section 1 of an act entitled "An act to regulate the fees and duties of the county officers of Berkeley County," approved January 5, 1895 (21 St. at Large, p. 984), it was provided that 'the county officers of Berkeley county shall receive \* \* \* annual salaries as follows, to wit: \* \* \* The school commissioner, four hundred dollars.' This act was amended in 1898 (22 St. at Large, p. 878) by reducing the salary of the school commissioner to \$300, and in 1899 (23 St. at Large, p. 169) again by striking out the words 'school commissioner,' and inserting in lieu thereof the words 'county superintendent of education,' still retaining the provision fixing the salary at \$300. By an act entitled 'An act relating to fees and salaries of the county officers of the several counties of this state,' approved February 19, 1900 (23 St. at Large, p. 293), it was provided that as to Berkeley county 'the officers shall receive annual salaries as follows: \* \* \* County superintendent of education, three hundred dollars.' On February 2, 1901, the appellant presented his account to the county commissioners of Berkeley county, 'For salary month January, C. S. E., \$25.' This account was duly approved and paid. On March 4, 1901, the appellant again presented his account, 'To services as superintendent of education, \$25,' and this account was also duly approved and paid. On April 1, 1901, the appellant presented to the same authorities his account 'for quarter ending March 31, 1901, for salary as county superintendent of education, \$50.' This account was rejected by the said county commissioners on the ground, stated broadly, that the salary of the superintendent of education for Berkeley county is \$25 per month, as fixed by law. There is nothing in the position taken by the board of county commissioners that the appellant is estopped, by having received payment of the two preceding accounts of \$25 each, to now claim more than \$25 per month as his salary. It may be assumed that his contract on taking the office of county superintendent of education was to perform its duties for the compensation fixed by law.

Every act on the subject declares that the compensation shall be an annual salary, and no provision is made for payment by the month or otherwise. The fact that the appellant has received a certain sum per month may imply some arrangement to the effect that he is to be paid that much of his annual salary each month, but it cannot establish an agreement on his part to serve for less or different compensation than that allowed and fixed by law. In order to establish that such an agreement as that last mentioned would operate as an estoppel against the appellant, there must be an express contract, or one by necessary implication from the circumstances of the case, neither of which is shown by this record.

"We come, then, to the real question raised by this appeal, to wit: What is the salary fixed by law for the county superintendent of education of Berkeley county? The county commissioners claim that it is \$25 per month, or what, for the purposes of this question, is the same thing, \$300 per annum. The appellant herein contends that it is \$400 a year, and in so doing attacks the validity of the three acts above cited, of 1898, 1899, and 1900, which fix the salary at \$300, on the ground that they are in conflict with the provisions of section 34, art. 3, of the Constitution. The constitutional provisions thus invoked which are applicable to this case are as follows: 'The General Assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: \* \* \* (10) To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary service required. (11) In all other cases, where a general law can be made applicable, no special law shall be enacted.' In reference to the act of 1900, before cited, it is sufficient to say that it has already been twice adjudged null and void, because in conflict with the constitutional provisions above recited. *Dean v. Spartanburg County*, 59 S. C. 110, 37 S. E. 226; *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5. We proceed, therefore, to the consideration of the acts of 1898 and 1899, in connection with these inhibitions of the Constitution. The provisions of these two acts are, so far as they affect the question at issue, practically identical. The act of 1898 fixed the salary of the school commissioner of Berkeley county at \$300, and the act of 1899 merely changed the name 'school commissioner' into 'county superintendent of education,' so as to conform to the change or designation of the office theretofore made by statute. Both acts purpose to amend the act of 1894, first above cited. This last act fixed the salary of the school commissioner of Berkeley county at \$400, and, having been enacted prior to the ratification of the present state Constitution of

1895, remained of force until altered or repealed by subsequent legislation.

"In the case of Carolina Grocery Company v. Burnet, County Treasurer, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687, it is declared (at page 211, 61 S. C., page 384, 39 S. E., and 58 L. R. A. 687) that 'it may be regarded as settled that local or special statutes upon any of the ten enumerated subjects [of section 34] above will be declared void, and that the express prohibition of special legislation on said subjects shall not be practically nullified or evaded under any form or guise of legislation.' The same case recognized the distinction made in the Constitution between 'local or special laws,' which are expressly prohibited, and 'special provision in general laws,' which it is provided that nothing contained in said section 34 or article 3 shall prohibit the General Assembly from enacting; and it is held that a statute which may fairly be construed to be a special provision in a general law, though enacted subsequent to the passage of such general law, and amendatory thereof only by implication, is an exercise of legislative power not prohibited by said section of the Constitution. Conversely, it would seem that a local or special statute on one of the inhibited subjects, even though in the guise of an amendment to an antecedent statute, if the latter be itself a local or special statute, cannot be sustained, for it is a special provision on a prohibited subject in a special law. In this view the amendatory acts of 1898 and 1899, hereinbefore set forth, must be held to be in violation of the constitutional provisions above cited, and therefore null and void. It follows that the act of 1894, fixing the salary of the school commissioner, now county superintendent of education, of Berkeley county, at \$400 per annum, is the statute now of force.

"It is therefore ordered and adjudged that the exceptions of the appellant be and the same are hereby sustained, the decision of the county commissioners appealed from be and the same is hereby reversed, and the claim thereby disallowed be and the same hereby is allowed and adjudged to the appellant, and the cause be remanded to the said county commissioners, with instructions which are hereby given to them to approve and pay the said claim of the appellant, and that the appellant have leave to take such steps as may be necessary or he may be advised to enforce this judgment."

From this decree the county commissioners appeal on the following exceptions:

"First. Because his honor, Judge Klugh, erred in considering other testimony, not before the county commissioners.

"Second. Because his honor, Judge Klugh, erred in holding that the acts of 1898 and 1899 were unconstitutional, null, and void.

"Third. Because his honor, Judge Klugh, erred in holding that the respondent was en-

titled to a salary of \$400, under the act of 1894.

"Fourth. Because his honor, Judge Klugh, erred in holding that the salary of the respondent could be fixed under the act of 1894.

"Fifth. Because his honor, Judge Klugh, erred in not dismissing the appeal."

Dennis & Dennis and Burke & Erckmann, for appellants. R. W. Haynes and Simon Hyde, for respondent.

POPE, C. J. The question raised in this appeal is: What was the salary of the county superintendent of education for Berkeley county, in this state, in the year 1901? The appellants insist that it is the sum of \$400 per annum. The basis upon which the respondent rests his case is that the act passed by the General Assembly of this state, approved on the 5th January, 1895 (21 St. at Large, p. 985), gave to the officer known as the "school commissioner" of Berkeley county an annual salary of \$400; that the Constitution of the state, ordained by the people of this state in the year 1895, did not make the office of the school commissioner a constitutional office, but by the third section of article 11 of such Constitution devolved upon the General Assembly of this state the power and the duty of making "provision for the election or appointment of all the necessary school officers, and shall define their qualifications, powers, duties, compensation and terms of office"; that the General Assembly of this state, by the thirteenth section of an act approved on the 9th day of March, 1896 (22 St. at Large, p. 156), changed the name of "county school commissioner of education" to "county superintendent of education," and by the fifteenth section of said act provided "that the salary of the county superintendent of education of each county shall be the same as that now fixed or hereafter to be fixed by law for the school commissioner thereof"; that therefore the salary fixed by the act approved 5th January, 1895, hereinbefore cited, to wit, \$400 per annum, was the salary of the county superintendent of education for Berkeley county; and that the acts of the General Assembly of this state, passed and approved in the year 1898 (22 St. at Large, p. 874), in the year 1899 (23 St. at Large, p. 170), and in the year 1900 (23 St. at Large, p. 294), which said acts purported to change the said salary of \$400 to \$300 per annum, were each unconstitutional, null, and void. On the other hand, the appellant contends that the acts of 1898, 1899, and 1900 were not unconstitutional, so far as they amended the act of 5th January, 1895, by changing the salary of the county superintendent, was concerned. Upon the issues then made up, the parties went before his honor, Judge Klugh, who held that A. H. De Hay, the respondent here, was entitled to be paid an annual salary of \$400, and not simply \$300, and the cir-

cuit judge so ordered. The appellants seek to reverse this judgment of the circuit court. At first I was inclined to think that the circuit judge had committed no error, but upon a more mature reflection I am convinced that his judgment should be reversed, and these are the reflections which have led me to this conclusion. Let the circuit decree and the exceptions thereto be reported.

It is admitted on all hands that the act, approved 5th January, 1895 (see 21 St. at Large, p. 984), which fixed the annual salary of the county commissioner of education of Berkeley county at \$400, was constitutional when passed. Its force and effect as law, after the adoption of the Constitution of this state in the year 1895, was secured by the means of at least two provisions of said Constitution, namely, in article 11, which is devoted to education, it is provided:

"Sec. 5. \* \* \* The present division of the counties into school districts and the provisions of law now governing the same shall remain until changed by the General Assembly."

This section of article 11 of the Constitution was considered by this court in the case of *Martin v. School District*, 57 S. C. 130, 35 S. E. 517. This section 5 of article 11 shows conclusively that the framers of the Constitution of the year 1895 intended that there should be no hiatus in the laws of this commonwealth in regard to the matter of education in all its ramifications. Hence this act, approved in 1895, was made law after the Constitution of 1895 was adopted. But we think there is another provision of the Constitution of 1895 which continued this act of 5th January, 1895, as subsisting law after the Constitution was adopted, namely, sections 10 and 11 of article 17:

"Sec. 10. All laws now in force in this state and not repugnant to this Constitution shall remain and be enforced until altered and repealed by the General Assembly or shall expire by their own limitation.

"Sec. 11. That no inconvenience may arise from the change in the Constitution of this state, and in order to carry this Constitution into complete operation, it is hereby declared: First. That all laws in force in this state at the time of the adoption of this Constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the General Assembly or expire of their own limitation. \* \* \*

As before remarked, the laws of the state which had been enacted by the General Assembly at any time prior to the adoption of the new Constitution on 31st December, 1895, which this Constitution retained as of full force, must not be inconsistent with the provisions of the same and constitutional when enacted. As before remarked, it is admitted on all hands that this act of 5th January, 1895, was consistent with the Constitution of 1868; but, now, was it con-

sistent with the Constitution of 1895? An examination of article 11 of the Constitution of 1895, governing the whole subject of education, will develop the fact that the only officers in the department of education in this state created by our present Constitution is that of state superintendent of education, and the members of the state board of education, and the further fact that to the General Assembly is confided the duty of fixing the rate of compensation for the state superintendent of education and other officers connected with schools or their management and control. Not only so, but under this article of the Constitution to the General Assembly is confided the duty of passing laws regulating schools. Thus it is made manifest that there is nothing in the act of 5th January, 1895, inconsistent with the Constitution of 1895. When the General Assembly, by its act approved 9th March, 1896, provided that county commissioners of education should no longer exist as such, but county superintendents of education should take their places, and further provided that the county superintendent of education in this state should be paid such salaries as are now fixed by law, or hereafter may be fixed by law, for the school commissioners, therefore it seems clear to my mind that the act approved 5th January, 1895, regulated the salary of the county superintendent of education for Berkeley county. So far I am in accord with the circuit judge. But just here we differ.

Was it in the power of the General Assembly to alter, amend, or repeal the act of 5th January, 1895? Unquestionably, under the general power of legislation, the General Assembly could amend or repeal this act; but the framers of the Constitution had declared the provision of the act of 5th January, 1895, as of binding force after the 31st December, 1895, the date of the going into effect of the Constitution of 1895, provided, however, that the General Assembly may alter, amend, or repeal the same. Here we have presented an act of 1895, of full force after the adoption of the Constitution of 1895, but with full power in the General Assembly of this state to alter, amend, and repeal the same. How must such be amended? I answer, by a general act or a special act, as the General Assembly may in its wisdom see proper. But just here it is asserted that the General Assembly is prohibited by certain sections of the Constitution from amending the act of 5th January, 1895, except by a general act, governing all the counties in this state. I cannot admit such a proposition. But let me patiently unfold these constitutional impediments, so that we may reach a conclusion satisfactory to every one. Article 3, § 34, reads as follows:

"Sec. 34. The General Assembly of this state shall not enact local or special laws concerning any of the following subjects or any of the following purposes, to wit: \* \* \* (10) To fix the amount or manner

of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary service required. (11) In all other cases, where a general law can be made applicable, no special law shall be enacted."

To my mind, it is plain that the foregoing provisions of the Constitution relate to the enactment of original, and not amendatory, acts. For if the provisions of subdivision 10 relate to all the original laws, as well as amendments to laws already existing at the adoption of the Constitution of 1895, then, of course, the General Assembly must act by laws in compliance with this requirement, unless, first, there are other provisions of that Constitution which permit a different course in special cases; and, second, a special law can be enacted in all those instances where a general law cannot be made applicable. Section 10. As before pointed out, the Constitution of 1895, in article 11, § 3, provides:

"The General Assembly shall make provision for the election or appointment of all other necessary school officers, and shall define their qualifications, powers, duties, compensation and terms of office."

Here the Constitution has made the General Assembly to determine what officers in the matter of education shall be created, and also what compensation shall be paid to them. Immediately after the adoption of the Constitution, to wit, on the 9th March, 1896, county school commissioners are superseded by county superintendents of education, and then, in the year 1898, an act is passed by the General Assembly changing the compensation of the county superintendent of education for Berkeley county from \$400 per year to \$300, referring in the title of the act to the fact that it is amendatory to the act of 5th January, 1895. Can this exercise of power by the General Assembly be supported under the power of the Constitution to the General Assembly by article 11, relating to education? But this is not all. The Constitution of 1895, in article 17, § 10, expressly provides that all legislation now existing, not inconsistent with this Constitution, shall remain and be enforced until altered or repealed by the General Assembly; and so, likewise, are the provisions of section 11. Again, why may not the General Assembly, in amending the act of 5th January, 1895, have determined that the amendatory act of the year 1898 alone could amend the act of 1895, and therefore have used the special act referred to in subdivision 11 of section 34 of article 3?

This court, in its recent decision of *Fraser v. James*, 65 S. C. 87, 43 S. E. 292, where it was held that the Constitution imposed upon the General Assembly the duty of creating a new county when the specified conditions existed, say: "It was necessarily incumbent upon the General Assembly to determine for itself whether such conditions existed as pre-

liminary to the performance of the duty imposed upon the General Assembly by the Constitution." So I may infer that the General Assembly determined for itself that it could not amend the act of 5th January, 1895, by a general act, and hence resorted to a special act. For myself, I cannot see how a general act could be made so as to amend the act of 5th January, 1895. The convention which formulated the Constitution wisely foresaw these difficulties, and more wisely provided for them.

It is suggested that the decision of this court in the case of *Dean v. County of Spartanburg*, 59 S. C. 110, 37 S. E. 226, supports the judgment of the circuit court; but upon an examination it will be seen that it was an original act, and not one amendatory of a preceding act, which this court passed on in that case. 22 St. at Large, p. 226. And it will be found upon examination that so are the cases of *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5, and also *Carolina Grocery Company v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687; and thus there is no conflict with these cases.

I think the judgment of this court should be that the judgment of the circuit court be reversed, and that the proceedings be recommitted to the circuit court, with directions that an order be formulated dismissing the appeal of A. H. De Hay, as county superintendent of education for Berkeley county, from the order of the county commissioners of Berkeley county, refusing payment of his bill for \$50 as salary unpaid to the 1st day of April, 1901.

GARY, A. J. This is a proceeding commenced on the 1st of April, 1901, by the presentation of a claim to the county commissioners of Berkeley county for the salary of the plaintiff as county superintendent of education. Payment was refused, whereupon the plaintiff appealed to the circuit court, which reversed the decision of the defendants, who have appealed to this court. The main question involved is whether the legislature could, by a local and special act passed after the adoption of the Constitution of 1895, amend a local and special act passed before the Constitution went into effect, when both acts relate to one of the prohibited subjects embraced in article 3, § 34, of the Constitution. We agree with Mr. Chief Justice POPE, that the act of 5th January, 1895, fixing the annual salary of the school commissioners of Berkeley at \$400, was constitutional when enacted, that it was not inconsistent with the Constitution of 1895, and its provisions were of force at the time of this proceeding, unless it was altered or repealed by the acts of 1898, 1899, or 1900 (more particularly described in the opinion hereinbefore mentioned), which provided that the salary should be \$300, instead of \$400. We also concur in his opinion that the name of "school commissioner" was changed by the act of

1896 to that of "county superintendent of education."

It is contended by the respondent that the acts of 1898, 1899, and 1900 could not have the effect of amending the act in existence before the adoption of the Constitution, by reason of the fact that they are repugnant to article 3, § 34, of the Constitution, which is as follows:

"The General Assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit: (1) To change the names of persons or places. (2) To lay out, open, alter or work roads or highways. (3) To incorporate cities, towns or villages, or change, amend or extend the charters thereof. (4) To incorporate educational or religious, charitable, social, manufacturing or banking institutions not under the control of the state, or to amend or extend the charters thereof. (5) To incorporate school districts. (6) To authorize the adoption or legitimation of children. (7) To provide for the protection of game. (8) To summon and empanel grand or petit juries. (9) To provide for the age at which citizens shall be subject to road or other public duty. (10) To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary service required. (11) In all other cases where a general law can be made applicable, no special law shall be enacted. (12) The General Assembly shall forthwith enact general laws concerning said subjects for said purposes which shall be uniform in their operations: Provided, that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws."

Mr. Chief Justice POPE, however, as we understand, differentiates this case from the cases of *Dean v. Spartanburg County*, 59 S. C. 110, 37 S. E. 226, *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5, and *Carolina Grocery Company v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687, for the following reasons: (1) Because the act of 1898 is an amendatory, and not an original, act; (2) because the act of 1898 was authorized by section 3, art. 11, of the Constitution, and therefore it was not affected by section 34, art. 3, of the Constitution; and (3) because the General Assembly had the right to determine whether it was advisable to enact a general or a special law.

We will first consider whether the act of 1898 can be construed to be constitutional, on the ground that it is an amendatory, and not an original, act. In the case of *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687, Mr. Justice Jones uses this language: "It may be regarded as settled that local or special statutes upon any of the ten enumerated subjects above will be declared void, and that the express prohibi-

tion of special legislation on said subjects shall not be practically nullified or evaded under any form or guise of legislation. *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561; *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226; *Nance v. Anderson Co.*, 60 S. C. 501, 39 S. E. 5." In *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800, the court, after citing certain cases, says: "These cases, cited from many on the subject, are sufficient to show that, in determining whether a law is general or special, courts will look, not to its form or phraseology merely, but to its substance and necessary operation." In *Com. v. Patton*, 88 Pa. 258, an act general in form, but so worded that it could apply to only one county in the state, was before the court. It characterized this attempted evasion as "classification run mad." In *State v. Pugh*, 43 Ohio St. 98, 1 N. E. 439, the court says (at page 113, 43 Ohio St., and page 448, 1 N. E.): "It is not the form the statute is made to assume, but its operation and effect, which is to determine its constitutionality." The foregoing cases are cited in *Edmonds v. Herbrandson* (N. D.) 50 N. W. 970, 14 L. R. A. 725. If, therefore, the force and effect of an act (whether it be original or amendatory) would be to destroy the provisions of the Constitution as to special legislation, it should undoubtedly be declared unconstitutional. If this court should lay down the rule that the Legislature has a right to pass a special act, amending another special act, passed before the Constitution of 1895, relating to one of the subjects prohibited by section 34, art. 3, of the Constitution, the provisions of said section would be practically destroyed, as we will demonstrate. If this rule should be sanctioned, the Legislature would have the power, not only to strike out every word in the body of the original act and insert others in the place thereof, but would likewise have the power to change the title of the original act. It would, in short, have the power to enact an entirely new and different law, if it complied with the constitutional requirements that it related to but one subject, and that was expressed in the title. In *Cushing's Law and Practice of Legislative Assemblies* (section 1302) it is said: "The term 'amendment' is used to denote any alteration which may be proposed or adopted, with a view to render a motion conformable to the sense or will of the house. According to the etymology of the word, it might be supposed that nothing could be considered as an amendment which did not relate to and purport to improve the original proposition. But this would be far from conveying an adequate idea of what is meant by the term 'amendment.' A proposition may be amended, in parliamentary phraseology, not only by an alteration which carries out and effects the purpose of the mover, but also by one which entirely destroys that purpose, or which even makes the proposition express a sense the very reverse of that intended by the mover;

and in like manner a motion which proposes one kind of proceeding may be turned into a motion for another of a wholly different kind by means of an amendment, so that, in point of fact, an amendment is equally effectual, and is often used, to defeat a proposition, as well as to promote the object which the mover of that proposition had in view. The reason is that, in altering or amending a proposition, the form of the words only, and not the sense or meaning of it, is regarded; any of the words moved may be left out; any other words may be inserted or added; and any word may be substituted in the place of other words contained in the motion." The following statement of the rule is to be found in Jefferson's Manual, 210: "Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what it was intended by the movers, so that they vote against it themselves. 2 Hats. 79; 4, 82, 84. *A new bill may be engrained by way of amendment on the words, 'Be it enacted,' etc.* 1 Grey, 190, 192." (Italics ours.)

We will next consider whether the act of 1898 was authorized by section 3, art. 11, of the Constitution. That section is as follows: "The General Assembly shall make provision for the election or appointment of all other necessary school officers, and shall define their necessary qualifications, powers, duties, compensation and terms of office." We think the error into which Mr. Chief Justice POPE has fallen is in construing this section alone, instead of in connection with section 34, art. 3, of the Constitution. In this way force and effect will be given to all the foregoing provisions. We are free to say we see no inconsistency between them.

We will lastly discuss the right of the General Assembly to determine whether it was advisable to enact a general or special law. The rule of construction is different for determining whether a special act is obnoxious to the provisions of the Constitution that, where a general law can be made applicable, no special law shall be enacted, and for determining whether such act is unconstitutional, on the ground that it concerns one of the prohibited subjects mentioned in the Constitution. One involves a legislative, the other a judicial, question.

The following authorities show that whether a general law can be made applicable, is a question to be decided by the Legislature: 15 Ency. of Law, 978, which says: "The Constitutions of many states provide that no special or local law shall be passed when a general law can be made applicable. Under such provisions, it is a question for the Legislature exclusively whether a general law can or cannot be made applicable in a certain case"—citing numerous authorities in the note on that page. Guthrie Nat. Bk. v. City of Guthrie, 19 Sup. Ct. 513, 43 L. Ed. 796, in which the court uses this language: "It is

claimed that it violates the act of Congress, approved July 30, 1886 (24 Stat. 170, c. 818), prohibiting the passage of local or special laws in the territories. That act, among other things, provides that, where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial Legislatures thereof; and it also provides that the territorial Legislatures shall not pass local or special laws in any of the cases therein enumerated, among which is a law to regulate the practice in courts of justice. Both of these provisions are said to have been violated in the passage of the act in question. Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial Legislature is a matter which we think rests in the judgment of the Legislature itself. State v. Hitchcock, 1 Kan. 184, 81 Am. Dec. 503. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the Legislature." State v. Kolsem (Ind.) 29 N. E. 595, 14 L. R. A. 566: The opinion in this case is entitled to great consideration, because it was written by that eminent judge and distinguished Chief Justice, Elliott. The court says: "If the enactment of such a law as the one before us is forbidden, it must be by virtue of section 23 of article 4 of the Constitution, for the subject embraced in the act is not included in the enumeration found in the preceding section. But section 23, as has been again and again decided, does not prohibit the enactment of special laws where general ones cannot be made applicable. It has also been repeatedly held that whether a general law can be made applicable to a particular subject is exclusively a legislative question, and it necessarily results that, if the question is legislative, the whole matter, with all its incidents, must be determined by the Legislature. \* \* \* If the question is legislative, then it is indisputably true that it is excluded absolutely and entirely from the dominion of the judiciary. It is inconceivable that the question can be dissected into fragments, and one part assigned to one department of government and another part to a different department. Under our system of government, the departments are distinct and independent. There is no such thing as a power partly judicial and partly legislative. \* \* \* As the question whether a general law can be made applicable is exclusively legislative, the incidents of the main question are necessarily and entirely legislative. Where the principal subject belongs, there the incidents belong. Means, methods, and the like belong to the department that is invested with power over the general subject.



It is for that department to make choice of modes and means, and, as the Supreme Court of the United States has said, 'It is master of its own discretion.'"

The cases, however, which decide that this is a legislative question, nevertheless recognize and approve the doctrine that the question is judicial when the legislation concerns one of the prohibited subjects mentioned in the Constitution. In the case of *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 881, 58 L. R. A. 687, Mr. Justice Jones says: "Such question was treated as a judicial one in *State v. Higgins*, 51 S. C. 54, 28 S. E. 15, 38 L. R. A. 561; and in *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226, whether compensation to county officers was graded in proportion to population and necessary service, under subdivision 10 above, was treated as a judicial question." To the foregoing cases should be added *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5. We do not regard the question as longer open in this state, after the decisions just mentioned. The reason of the difference in the rule is that in one case the Constitution clearly defines the limitation upon legislative action, while in the other the subject is confided to the discretion of the Legislature. There is no rule of law by which the courts can determine whether a necessity exists for the passage of a general law on the subject, but the courts can determine whether a special act concerns any of the prohibited subjects mentioned in the Constitution. If the court should undertake to decide whether a general law could be enacted, it would only substitute its ideas of expediency for those of the Legislature upon a question peculiarly appropriate for the consideration of the legislative department of the government.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, J. I concur in the view that the judgment of the circuit court should be affirmed. I also concur in this opinion of Mr. Justice GARY, except in so far as he states that the applicability of a general law is solely a question for the Legislature. The test of the constitutionality of an act, adopted after the Constitution of 1895 and amendatory of a valid act, is whether the original act, with the proper amendments, could be enacted under article 3, § 34, of the Constitution.

(66 S. C. 219)

#### STATE v. HAMMOND.

(Supreme Court of South Carolina. May 11, 1903.)

#### CONSTITUTIONAL LAW—SPECIAL LEGISLATION —QUESTION FOR COURT.

1. Rev. St. § 1275, prohibiting the cutting or felling of trees in running streams of certain counties, as amended by Act Feb. 19, 1900 (23 St. at Large, p. 448), making it a misdemeanor to fail to remove a dam out of a running stream

in certain counties, is unconstitutional, as special legislation, in violation of Const. 1895, art. 3, § 34.

2. The question whether an act is special legislation is for the court.

Appeal from General Sessions Circuit Court of Anderson County; Gage, Judge.

Two indictments against W. Q. Hammond; one charging failure to clean out a stream, and the other failure to remove a dam. From judgment of sessions court, reversing judgment of magistrate dismissing prosecutions, the state appeals. Affirmed.

Solicitor Boggs and B. F. Martin, for the State. Tribble & Prince and Bonham & Watkins, for respondent.

JONES, J. The defendant was arrested under a warrant charging him with violating section 1275, Rev. St. 1893, as amended by act of 1900 (23 St. at Large, p. 448), by maintaining a rock dam on a running stream in the county of Anderson after 48 hours from notice to remove the same. A motion was made before the magistrate, C. P. Kay, Esq., to dismiss the proceedings upon the ground that said act is unconstitutional, as in violation of article 3, § 34, of the Constitution, prohibiting local or special legislation. The magistrate dismissed the proceedings upon the ground stated. Upon appeal by defendant, the circuit court dismissed the prosecution, holding that said act is unconstitutional as special legislation. From this judgment the state now appeals.

The question, then, is whether said act is in violation of article 3, § 34, of the Constitution. We are of the opinion that the act is unconstitutional. Section 1275, Rev. St. 1893, reads as follows: "The cutting or felling trees into or across any of the running streams of said counties [Anderson, Beaufort, Chester, Greenville, Oconee, Union, Fairfield, Laurens, Newberry, Abbeville, Pickens, Spartanburg and York] shall be deemed a misdemeanor, and any person so convicted shall be punished by a fine of not less than five or more than twenty-five dollars, or imprisonment for not less than ten or more than thirty days, at the discretion of the court." As this act was in force previous to the Constitution of 1895, and the provisions of the Constitution not being retroactive do not affect it, the act in the foregoing form would not be obnoxious as local or special legislation. *State v. Tucker*, 54 S. C. 251, 32 S. E. 361. But the General Assembly, on the 19th February, 1900, adopted an act purporting to be an act amending the foregoing section, so as to make it read as follows (23 St. at Large, p. 448): "The cutting or felling trees across or into any of the running streams of said counties [obstructing the same by throwing any timber or other materials therein, or erecting any dam across any such stream whereby the fall in such stream

§ 2. See Constitutional Law, vol. 10, Cent. Dig. § 130.

is lessened and the flow of water and sand is obstructed, or the land along said stream above such obstruction is damaged, or the health of the community is endangered, or having erected any such obstructions and refusing to remove the same within eight and forty hours after notice by any one to do so], shall be deemed a misdemeanor, and any person so convicted shall be punished by a fine of not less than five nor more than twenty-five dollars, or imprisonment for not less than ten nor more than thirty days, at the discretion of the court [provided that nothing contained in this section shall apply to the construction of milldams, or dams for the purpose of generating power for any purpose]. The parts within the brackets placed by the writer of this opinion are those added to section 1275 by the amendment. By an act approved February 27, 1899 (23 St. at Large, p. 102), Cherokee county was included. Section 1275, as thus amended, now appears as section 182 of the Criminal Code of 1902, wherein the county of Beaufort is omitted. Is the legislation in question local or general?

As shown in *Dean v. Spartanburg County*, 59 S. C. 114, 37 S. E. 226, and approved in subsequent cases, "in order that a law may be general, it must be of force in every county in the state." With respect to territory, a law is general when it applies to the whole state, and local when it applies to only a part of the state. With respect to persons and things, a law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to such class. In the case of *State v. Berkeley*, 64 S. C. 194, 41 S. E. 961, this court held the act (23 St. at Large, p. 320) providing for drawing jurors in counties containing 40,000 inhabitants or more was a general law, notwithstanding there was one county, Charleston, in which the conditions of the statute immediately existed, inasmuch as the law was intended to operate throughout the state in all counties then falling or thereafter to fall within the designated class of counties, or to all counties alike wherein the statutory conditions existed or should thereafter exist. For example, a law protecting oyster beds by penalties is not local or special, but is general, even though there be few localities within the state where oyster beds exist, because the law operates throughout the whole state wherever and whenever the conditions named in the statute may exist. Tested by these rules, the statute in question is local, because it is not intended to be operative throughout the state wherever the conditions named exist or may exist, but is expressly limited to certain counties. Now, does this legislation fall within the principle stated in *Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687, and can it be sustained as an amendment to a valid act? We think not. The legislation sustained in *Grocery Co. v. Burnet*

was an act amendatory of a general act, the amendment containing a special provision in reference to the county government of Charleston county, and was upheld as falling within the proviso to article 3, § 34: "That nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." The general act, with the amendatory matter incorporated in it, was such as the General Assembly had the power to enact under said proviso. The test in such cases is whether the act as amended is such as the Legislature could enact under article 3, § 34, of the Constitution. In the present case, both the original act and the amendatory act are local. But, as the subject of legislation is not one of the ten enumerated and prohibited subjects of special or local legislation, the question finally is whether the act under consideration can be sustained under subdivision 11 of said section and article which provides: "In all other cases, where a general law can be made applicable, no special law shall be enacted."

As it was not mentioned or questioned in argument, we do not decide, but assume, that the word "special," as used in this clause, would properly characterize legislation of the kind in question. But who is to finally determine whether a general law can be made applicable, the Legislature, or the judiciary? In the cases of *State v. Higgins*, 51 S. C. 511, 28 S. E. 15, 38 L. R. A. 651, *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226, *Nance v. Anderson Co.*, 60 S. C. 501, 39 S. E. 5, and *State v. Queen*, 62 S. C. 247, 40 S. E. 553, where the legislation related to some one of the ten prohibited subjects of special or local legislation, the question was treated as a judicial one; and in the case of *Grocery Co. v. Burnet*, 61 S. C. 210, 39 S. E. 381, 58 L. R. A. 687, wherein the legislation considered was not one of the ten prohibited subjects of special or local legislation, this court said: "If the act of January 12, 1899 (23 St. at Large, p. 1), and amending acts, be construed as special acts, there is much authority for the view that, under a provision like subdivision 11, it belongs to the legislative, and not the judicial, department to determine whether a general law can be made applicable. *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *State v. Boone Co.*, 50 Mo. 317, 11 Am. Rep. 415; *Indianapolis v. Navin* (Ind. Sup.) 47 N. E. 529, 41 L. R. A. 337; *Guthrie Nat. Bk. v. City of Guthrie*, 173 U. S. 528, 19 Sup. Ct. 515, 43 L. Ed. 796; 15 Am. & Eng. Ency. Law, 978, and cases cited. We incline, however, to the view that in this state it must be held a judicial question to determine when a general law can be made applicable, since under article 1, § 29, of the Constitution, it is ordained that the provisions of the Constitution shall be construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by

its own terms. Such question was treated as a judicial one in *State v. Higgins*, 51 S. C. 54, 28 S. E. 15, 38 L. R. A. 651, and in *Dean v. Spartanburg Co.*, 59 S. C. 110, 37 S. E. 226. Whether compensation to county officers was graded in proportion to population and necessary service, under subdivision 10 above, was treated as a judicial question. As it is clearly manifest that a general law as to the number who shall compose and the method of appointing the county board of commissioners could be made applicable, if the act of January 12, 1899, *supra*, and amending acts, are to be construed as special acts, they must fall under the inhibition of subdivision 11 of section 34, article 3, of the Constitution, unless some other portion of the Constitution will support them."

While these expressions of the court were made with reference to legislation on a subject not embraced within the ten prohibited subjects of special or local legislation, yet, inasmuch as the act under consideration in *Burnet's Case* was construed by the court not to be a special or local act, but a mere amendment to a general law, and falling within the power to pass "special provisions in general laws," as declared in the proviso to subdivision 12 of said section, it may be said that the views expressed in the foregoing extract are not binding as authority. We will, therefore, further consider the question. The view that the applicability of a general law is a legislative, and not a judicial, question, is strongly presented by Chief Justice Elliott, speaking for a bare majority of the court, in the case of *State v. Kolsem* (Ind. Sup.) 14 L. R. A. 566, where the cases *pro* and *con* are cited in the notes to said case. The argument rests practically on the view that the Legislature must necessarily exercise discretion in determining whether a general law is or can be made applicable, and that, such discretion having been committed to the Legislature, its action is final and not reviewable by the courts. This view, however plausible, ignores the idea that the object of article 3, § 34, was to place a limitation upon the power of the Legislature. The evil sought to be remedied was the great and growing evil of special and local legislation. To remedy this evil, such legislation was absolutely prohibited, as to certain enumerated subjects, and conditionally prohibited as to all other subjects. In considering the effect of a constitutional limitation, it must be borne in mind that the legislative will is unlimited, unless there is in the Constitution some express or necessarily implied restriction. If the intention is not to limit the power of the Legislature, all that is necessary is for the Constitution to be silent. It must be assumed that the framers of the Constitution knew this. What, then, was the purpose of the clause under consideration? Was it to limit or restrict legislative power, or was it intended as a mere rule of caution, or as a mere matter of moral persua-

sion? The fact that it was placed at all in the Constitution, and in such prohibitive terms, shows that it was intended as a restriction upon legislative power, and the express declaration in article 1, § 29, "that the provisions of the Constitution shall be construed to be mandatory and prohibitory and not merely directory, except where expressly made directory or permissive by its own terms," forbids a construction which would reduce the provision to a mere matter of legislative discretion. If the provision is a limitation upon legislative power, then, under our form of government, the power must lie somewhere to enforce such limitation, and there can be but one answer to the question as to where lies the power—in the judicial department.

In determining whether a general law can be made applicable, the judiciary should indulge every presumption in favor of the legislative act; and so it should be presumed that the Legislature, by the special or local enactment, thereby declared its view that the general law could not be made applicable. This conclusion, however, being to some extent at least a question of law, would no more bind the judicial department in enforcing a constitutional limitation than the legislative determination that a statute is constitutional, which is presumptively involved in the passage of every statute. In the case of *Fraser v. James*, 65 S. C. 83, 43 S. E. 292, sustaining the act creating Lee county, approved February 25, 1902 (23 St. at Large, p. 1194), against an attack, that it violated article 7, § 5, of the Constitution, as to the formation of new counties, which provided that "no old county shall be cut within eight miles of its court house building," this court held in these words: "The Constitution imposed upon the Legislature the duty of creating a new county when the specified conditions existed. No other tribunal having power to determine the existence of the condition under consideration, it was necessarily incumbent upon the Legislature to determine for itself whether such conditions existed as preliminary to the performance of the duty imposed upon the Legislature by the Constitution in reference to the formation of new counties. The act to establish Lee county . . . recites that all conditions required by the Constitution and laws of the state for the formation of new counties have been complied with. That determination of the existence of such facts or conditions cannot be assailed in any court by evidence aliunde impeaching the correctness of the same. The Legislature had the power to determine such facts, and no fraud or deceit is imputable to a legislative body. It is not intended to recede at all from the rule stated, that whenever the Legislature has power to determine the existence of certain facts essential to the performance of some duty imposed by the Constitution, courts will not permit evidence aliunde assailing such conclusions of fact, with a view

to overthrow the legislation based thereon. But the applicability of a general law is not simply a question of fact, it involves matter of law; and it is not intended by this court now to assert that, when the Legislature has said that a general law cannot be made applicable, such conclusion may be controverted by any evidence outside of what appears upon the face of the statute, and upon such matters as to which a court must take judicial cognizance. Courts will take judicial notice of the division of the state into counties, their names, their locations with respect to each other, their population as shown by the United States census, the prominent geographical features of the county, the principal water courses and their nature and location, matters of common knowledge and experience in respect to science, and the ordinary operation of the forces of nature. It should be further stated that the court should not declare a statute unconstitutional unless the invalidity is manifest beyond a reasonable doubt."

With these principles in mind, we proceed to examine the statute to see whether it violates the Constitution. The counties to which the section relates constitute a section of the state lying north of the counties of Edgefield, Greenwood, Saluda, Lexington, and Richland, and west of the counties of Kershaw and Lancaster; and at the time of the alleged offense, the county of Beaufort, lying in the extreme southern portion of the state, was included in the statute; all other counties in the state being excluded from the operation of the statute. The conduct which is made a crime in these counties is the erection of any dam across any running stream in said counties, whereby the fall in such stream is lessened, and the flow of water and sand is obstructed, or the land along said stream above such obstruction is damaged, or the health of the community in endangered, or having erected any such obstruction and refusing to remove the same within 48 hours after notice to remove. What possible reason can be assigned for making it a misdemeanor to so obstruct a running stream in Abbeville, while it would not be a misdemeanor to obstruct a running stream in the adjoining county of Greenwood? Why should running streams in Lancaster be so obstructed with impunity, while it is a crime to do a similar act in York or Chester? A dam across a running stream in any part of the state would necessarily obstruct the flow of water and sand in said stream, and would ordinarily cause some damage to lands subject to the backwater, and would as likely endanger the health of the community in one county as well as in another. In every county the same kind of injury or danger would necessarily or ordinarily result from such obstructions, even though it be admitted that the degree of the injury or danger may not be the same. The nature of the conduct sought to be made punishable as crime is not

such as to make it punishable in one part of the state and not in another. We speak of crimes against the state, and not mere municipal offenses. If it be said that conditions in the included counties are peculiar, and seem to call for penal legislation of the kind mentioned, still a general law could be made applicable to the whole state, so as to operate wherever such conditions exist, and whenever similar or like conduct takes place. No one would think for a moment that it would be competent for the Legislature to make the burning of a tobacco warehouse or barn punishable as arson, when committed in Darlington or Sumter or Florence, because the conditions in those counties make such legislation desirable, and then provide no punishment for like acts, should they occur in other counties in this state, even though the conditions there are such as to render such burning very improbable. With the conviction that a general law would be made applicable to the subject under consideration, it is our duty to declare the said statute unconstitutional, under article 3, § 34, of the Constitution.

The judgment of the circuit court is affirmed.

POPE, C. J., concurs in the result, as the decision in *De Hay v. Commissioners of Berkeley County*, 44 S. E. 790, is controlling.

GARY, A. J., concurs in the result. See opinion in *De Hay v. Commissioners of Berkeley County*.

(118 Ga. 185)

STEINHAUSER v. SAVANNAH, F. & W. RY. CO.

(Supreme Court of Georgia. June 3, 1903.)  
INJURY TO EMPLOYE—NONSUIT—ACTION FOR NEGLIGENCE.

1. While, in a suit against a railway company for damages alleged to have been sustained by the plaintiff in the employment of the company, in consequence of the negligence of the defendant, a nonsuit should be granted when the evidence for the plaintiff plainly shows negligence on his part, yet if, under the evidence, the question of the plaintiff's negligence is doubtful, it should be determined by the jury, and the grant of a nonsuit is erroneous. *Central Railroad v. Freeman*, 66 Ga. 170; *Cook v. Western & Atlantic Railroad*, 69 Ga. 619; *Redding v. East Tennessee Railroad*, 74 Ga. 385.

2. The plaintiff having shown negligence on the part of the defendant, and it being doubtful, under the evidence, whether or not he was also negligent, the court erred in granting a nonsuit. (Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Ellis Steinhauer against the Savannah, Florida & Western Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 1001, 1089.

Toomer & Reynolds and Alexander & Hitch, for plaintiff in error. W. L. Clay, Shelby Myrick, and W. G. Charlton, for defendant in error.

PER CURIAM. Judgment reversed.

(118 Ga. 31)

**COHEN v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**MURDER—EVIDENCE—INSTRUCTIONS.**

1. Not only the evidence, but the statement of the accused as well, demanded a finding that, without any provocation of which the law takes cognizance as calculated to excite an uncontrollable passion, he wantonly killed the person for the murder of whom he was tried. The requests to charge which were presented in his behalf, but which the court declined to submit to the jury, were, in so far as the same were legal and pertinent, fully covered by the general charge given, which is not open to any of the criticisms made upon it; and no reason appears why the conviction of the accused should not be allowed to stand.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Abe Cohen was convicted of murder, and brings error. Affirmed.

Abe Cohen, pro se. W. W. Osborne, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 47)

**SHEPPARD v. WALKER et al.**

(Supreme Court of Georgia. May 30, 1903.)

**CERTIORARI—NOTICE OF HEARING.**

1. Written notice of the sanction of the writ of certiorari and of the time and place of hearing must be given to the opposite party in interest. Notice to the members of the court which rendered the judgment complained of will not suffice.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Henderson Sheppard was convicted by E. D. Walker and others in road commissioners' court, and brings certiorari. On judgment dismissing the same, petitioner brings error. Affirmed.

Hendricks & Harrison, for plaintiff in error. Wm. D. Bule, for defendants in error.

FISH, J. Sheppard was convicted in a road commissioners' court, composed of E. D. Walker, J. B. Williams, and W. B. Wilks, commissioners. He sued out a writ of certiorari. His petition for the writ alleged that the case was one wherein the county, "through said commissioners, were plaintiffs, and your petitioner defendant, the same being an action by said road commissioners against your petitioner as a defaulter for refusing to work the road." The written notice

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of the sanction of the writ and the time and place of hearing was directed to E. D. Walker, J. B. Williams, and W. B. Wilks, but Walker only was served with the same. All the commissioners answered the writ. When the certiorari came on to be heard, on motion of "counsel for the defendant in certiorari" the same was dismissed upon the ground that "a majority of the road commissioners' court had not been served" with the notice of the sanction of the writ and the time and place of the hearing. To this ruling Sheppard excepted. The Civil Code requires that the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, etc. Section 4644. The commissioners composed the court which tried and convicted Sheppard, and were in no sense the opposite party in interest. Service of the notice upon all of them would not have been a compliance with the statute. There was no service of the notice upon the opposite party in interest, and the court, therefore, properly dismissed the certiorari, though the ground of the motion to dismiss was not well taken. We are not called upon to decide who is the opposite party in interest in a case of this character, but, if it be the state, the Solicitor General should be served with the notice, as the Constitution makes it his duty to represent the state in all cases in the superior courts of his circuit. Civ. Code, § 5862. If the road overseer is the opposite party in interest, he should be served with the notice.

Judgment affirmed by five Justices.

(117 Ga. 1005)

**SINGER MFG. CO. v. McNEAL PAINT & GLASS CO.**

(Supreme Court of Georgia. June 3, 1903.)

**CERTIORARI—JUDGMENTS OF JUSTICE—WHEN LIES.**

1. The writ of certiorari does not lie from a decision of a justice of the peace in a case pending in the justice's court until after the final determination of the case in which the decision was made, even though the decision would, had it been rendered as claimed by the plaintiff in certiorari, have been a final disposition of the case.

2. In so far as the decision in *Starnes v. Tanner*, 73 Ga. 144, conflicts with the above headnote, it is, upon a review thereof, overruled.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the McNeal Paint & Glass Company against G. W. Foote. Judgment for plaintiff, and summons of garnishment on the Singer Manufacturing Company. Judgment against the garnishee, and he brings error. Reversed.

S. C. Crane, for plaintiff in error. S. D. Johnson, for defendant in error.

¶ 1. See *Certiorari*, vol. 9, Cent. Dig. § 31; *Justices of the Peace*, vol. 31, Cent. Dig. § 765.

**FISH, J.** The McNeal Paint & Glass Company, having obtained a judgment against G. W. Foote at the June term, 1898, of the justice's court of the 1,234th district, G. M., procured a summons of garnishment to be issued by a magistrate of the 1,028th district, G. M., which summons was served upon the Singer Manufacturing Company, and was returnable to the May term of the magistrate's court of the last-named district. The garnishee failing to answer, plaintiff's attorney asked the magistrate to render a judgment by default against the garnishee in plaintiff's favor. This the magistrate declined to do upon the ground that from the affidavit and bond to obtain the garnishment it appeared that the plaintiff had obtained a judgment against Foote at the November term, 1899, of the justice's court of the 1,234th district, and that information had come to the magistrate that from an examination of the docket of the justice of that district no such judgment had been rendered at that term of the court. At the July term, 1901, of the justice's court of the 1,028th district, where the garnishment proceedings were still pending, plaintiff's attorney moved to amend the affidavit and bond for garnishment by inserting therein the correct date of the judgment against Foote. The magistrate allowed the amendment "with the understanding that it could not be retroactive, but that a new summons must be served on the garnishee after amendment." After such amendment the plaintiff's attorney "refused to have new summons served, and demanded default judgment" against the Singer Manufacturing Company. The magistrate refused to render such a judgment, and it does not appear that anything more was done in the garnishment proceedings. The plaintiff, by certiorari, carried the case to the superior court, alleging error upon the refusal of the magistrate to render such judgment. In the superior court the certiorari was sustained, and his honor rendered a final judgment in favor of the plaintiff against the garnishee for the amount of the plaintiff's judgment against Foote. The case is here upon a bill of exceptions sued out by the garnishee, assigning error upon this judgment.

We think it clear that the writ of certiorari was prematurely sued out, because the garnishment proceeding was still pending in the magistrate's court after his refusal to render a judgment in favor of the plaintiff against the garnishee. If the mere refusal of the magistrate to enter up a judgment by default against the garnishee can be at all treated as a decision of the court, it was certainly not a final determination of the case in which such decision was made, for the case still remained pending in the court. The mere fact that, had the judgment for which the plaintiff moved been rendered, it would have been a final disposition of the case, did not entitle the plaintiff to sue out the writ of certiorari. This is evident from

the provision of Civ. Code, § 4842, that "all writs of certiorari shall be applied for within thirty days after the final determination of the case in which the error is alleged to have been committed." Hence the principle applicable to bills of exception that, if a judgment duly invoked is refused, and it would, if rendered, have been a final disposition of the case, the party who invoked it is entitled to sue out a writ of error, without waiting for the final determination of the case in the trial court, has no application in a certiorari case. This was expressly decided in *Everidge v. Berrys*, 98 Ga. 760, 20 S. E. 644. The present case was argued at the last term of the court, and subsequently, upon a motion therefor, a rehearing was granted, which was had at the present term, with leave to review the decision rendered in *Starnes v. Tanner*, 78 Ga. 144. Upon a review of that case, it is, in so far as the question under consideration is concerned, overruled, as we are of opinion that the decision there rendered is in direct conflict with the above-quoted section of the Civil Code. As the case was still pending in the magistrate's court, the judge of the superior court had no jurisdiction of it, and therefore he erred in rendering the judgment complained of. The judgment is reversed, with direction that the judge of the superior court dismiss the certiorari.

Judgment reversed, with direction, by five Justices.

(118 Ga. 73)

#### PROTHRO v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—APPEAL—REVIEW.

1. The finding of the jury that the accused was guilty of the offense of gaming was fully supported by the evidence upon which the state relied for a conviction, and accordingly this court cannot undertake to say that their verdict was contrary to law, and should for that reason have been set aside by the trial court.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Phil Prothro was convicted of gaming, and brings error. Affirmed.

W. H. Beck, J. J. Flynt, and T. E. Patterson, for plaintiff in error. J. D. Boyd, for the State.

**SIMMONS, C. J.** Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 83)

#### BROWN v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—REVIEW ON APPEAL.

1. The evidence warranted the judgment of conviction, and there was no abuse of discretion in overruling the motion for a new trial, which was based solely upon the grounds that

the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Whitfield Brown was convicted of crime, and brings error. Affirmed.

R. D. Feagin, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 66)

#### WATSON et al. v. STATE.

(Supreme Court of Georgia. May 30, 1906.)

#### CRIMINAL LAW—REVIEW—CIRCUMSTANTIAL EVIDENCE—CONTINUANCE.

1. A new trial will be granted in a criminal case on the ground that the verdict is contrary to the evidence, when the evidence is circumstantial and does not exclude every other reasonable hypothesis save that of the guilt of the accused.

2. Where the prosecuting officer admits the truth of facts to which it is claimed absent witnesses would testify, it is not error to overrule a motion for a continuance based on the absence of such witnesses.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; B. D. Evans, Judge.

Dave Watson and Dement Watson were convicted of cattle stealing, and bring error. Affirmed as to Dement Watson, and reversed as to Dave Watson.

H. P. Howard and Jas. A. Thomas, for plaintiffs in error. J. E. Pottle, Sol. Gen., for the State.

COBB, J. Dave Watson and Dement Watson were jointly indicted and convicted of the offense of cattle stealing. They except to the overruling of their motion for a new trial.

1. The indictment charged that the accused had stolen a certain red cow, with both ears cropped and a split in the left ear, the property of one Tom Hall. There was evidence from which the jury could find that a cow of the description set forth in the indictment, the property of Tom Hall, had been stolen. The evidence connecting the Watsons with the transaction was not the same as to both. We will consider first the evidence tending to connect Dement Watson with the larceny of the cow. It was shown that he lived in the same neighborhood with Hall, the prosecutor, and within a mile of his house; that, about the time Hall's cow was lost, Dement Watson had been seen driving a red cow along the public road from the direction of where Hall lived; that about 15 or 20 minutes after this the cow he was driving was seen in his stable. The witness testifying

to these circumstances was not, however, able to say whether the cow was marked in any way. It was shown that about this time a beef had been killed within two or three hundred yards of Dement Watson's stable by the side of a branch. "It was away off from the yard" of Dement Watson. All this occurred in the summer. In the fall following, the horns of a cow were found near the place where the butchering took place, and these horns were identified as the horns of the prosecutor's cow. There was evidence that Dement Watson had threatened the prosecutor after the prosecution began, and there was also evidence that he had made threats that he would injure any one who testified against him, as well as evidence that he had authorized a witness to make an offer of settlement if the grand jury did not find any bill. Dement Watson denied strenuously any connection with the transaction, and the state admitted that just about the time this cow was stolen the accused had butchered a red cow which was unmarked, and which was their property. It is to be determined whether the circumstances above referred to are of such a character as to authorize the jury to find that Dement Watson was guilty of the offense charged. It must be admitted that the evidence is not altogether satisfactory, but the circumstances are such that the jury might find that they excluded every other reasonable hypothesis than the guilt of the Dement Watson, and were inconsistent with his innocence. The jury having reached this conclusion, and the trial judge having approved their finding, we do not feel authorized to interfere. In reference to Dave Watson, the case is different. The circumstances relied on to justify his conviction are that he lived in the neighborhood where the larceny was committed; that he was the father of Dement Watson; that he sold several pounds of fresh beef the morning after the cow was missed and the red cow was butchered in the woods near Dement Watson's stable; that he had made threats against any one who should testify against him; and that he had authorized a settlement of the matter in the event the grand jury found no bill. In his statement he admits being connected with the butchering of a cow about the time the prosecutor's cow was lost, but contended that the cow butchered was his property. It will thus be seen that the circumstances against Dave Watson are by no means as strong as those against Dement Watson. We do not think they are sufficient to show the guilt of Dave Watson beyond a reasonable doubt. It may be that, being the older man and the father of Dement Watson, he is really the more guilty of the two; but, so far as the evidence is concerned, his guilt does not appear beyond a reasonable doubt. See, in this connection, *Newman v. State*, 26 Ga. 633; *Orr v. State*, 34 Ga. 342; *Martin v. State*, 38 Ga. 293.

2. Having reached the conclusion that the evidence authorized the verdict as to Dement Watson, it becomes necessary to determine whether any error was committed by the trial judge which required the granting of a new trial as to him. The only error alleged, other than those embraced in the general grounds of the motion, is set forth in the third ground, which is as follows: "The defendant[s] at the trial of said case, and before announcing ready in said case, moved the court to continue said case on account of the absence of two certain witnesses, namely, Delia Hall and Sallie Watson, and showed to the court by the defendant[s] that said witnesses lived in the county of Laurens, had been subpoenaed, and were not absent by his [their] procurement or consent, and he [they] expected to have witnesses at the next term of the court, and the motion was not made for the purpose of delay, and that he [they] expected to prove by the absent witnesses that he had killed at their house a certain red cow about two years old, which was unmarked, that the cow killed by the defendant[s] was the property of the defendant[s], and that the witnesses saw it killed at the time it was killed and had known it to be the defendants' cow, for it had been raised on the place, and witnesses had known it from a calf, and that there were no other witnesses by which they could prove that fact. The Solicitor General in open court admitted that the defendant[s] had butchered the cow described by the movant, that same was unmarked at the time it was butchered by the defendant[s], and that the state did not insist or expect to prove that the cow referred to by the witnesses was the one charged in the indictment, but that the one charged in the indictment was a cow which was marked as described in the indictment at the time it was killed and butchered by the defendant[s]. Upon this admission being made by the Solicitor in open court, the court overruled the motion, and the case proceeded to trial. Movant assigns the overruling of said motion as error." As the Solicitor General admitted the truth of the facts expected to be proven by the absent witnesses, the court did not err in overruling the motion for a continuance. Civ. Code, 1895, § 5130. Under the admission of the Solicitor General, the accused received a greater benefit than he would have received if the witnesses had been present and testified. The fact that the accused had killed a red cow, their own property, just about the time of the larceny, was a fact which went through the entire case under the admission; while, if the witnesses had been present and testified, the accused would simply have had the benefit of testimony which the jury might not have credited. The jury were, under the admission, bound to deal with the case as if the fact that the accused had butchered a red cow of their own about the time of the larceny was established and uncontradicted. This admis-

sion was helpful, and, as will be seen from the discussion above, was entitled to weight, and was no doubt given its due weight by the jury.

Judgment as to Dement Watson affirmed; as to Dave Watson reversed. By five Justices.

(118 Ga. 45)

#### ROBINSON v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### ASSAULT—EVIDENCE.

1. Under no view of the evidence of the statement of the accused, who was charged with the offense of assault with intent to murder, could he properly have been found guilty of the minor offense of assault and battery.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; D. M. Roberts, Judge.

Sink Robinson was convicted of assault and battery, and brings error. Reversed.

J. H. Martin, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

SIMMONS, O. J. The plaintiff in error, Sink Robinson, was brought to trial for the offense of assault with intent to murder, under an indictment charging that he did feloniously "assault, beat, shoot, and wound" with a pistol one Amos Isaac. The jury returned a finding that the accused was guilty of the offense of assault and battery. He made a motion for a new trial, in which he complained that the court erred in charging the jury as to the law governing that offense; there being no evidence before them to authorize a conviction thereof. His motion was overruled, and he duly excepted. We are of the opinion that a new trial should have been granted.

The evidence relied on by the state tended to establish its contention that Robinson, wholly without justification or any provocation whatsoever, shot at Isaac with a pistol, and wounded him in the arm. According to the statement of the accused, which was corroborated by the testimony of a number of witnesses who were introduced in his behalf, he shot in self-defense, with no purpose other than to prevent Isaac, who was armed with a knife and was advancing in a threatening manner, from making upon him a murderous assault. If the testimony of these witnesses was in accord with the truth, the accused was undoubtedly entitled to an acquittal. Under no view of the evidence introduced by the state could he properly have been found guilty of the offense of assault and battery. This being so, it was his right to have the jury pass upon the credibility of the witnesses testifying for and against him, with a view to determining correctly the controlling issue in the case, viz., whether he shot Isaac wholly without justification, or purely in self-defense. The finding of the jury was apparently a mere compromise verdict. That



It was brought about by erroneous instructions given them by the court seems manifest; the court having told them that if they found the accused not guilty of assault with intent to murder, or of the statutory offense of shooting at another without justification, then they should "go a step further, and see whether or not he [was] guilty of an assault, or an assault and battery," and, if satisfied to the exclusion of a reasonable doubt that he was guilty of one or the other of these minor offenses, then they would be authorized to find accordingly. This court, in *Kendrick v. State*, 118 Ga. 759, 39 S. E. 286, held that "when, on the trial of an indictment for assault with intent to murder, alleged to have been committed by shooting with a pistol, the evidence for the state, if credible, unequivocally demanded a general verdict of guilty, and this evidence was met only by a statement of the accused which, if true, established an alibi, a verdict finding the accused guilty of the statutory offense of unlawfully shooting at another was unwarranted; there being, under such circumstances, no evidence whatever upon which to base the same." In pronouncing the decision of the court, Mr. Justice Fish pertinently remarked (page 761, 118 Ga., page 287, 39 S. E.): "Under the testimony and the statement, the issue was clear-cut—guilty of assault with intent to murder, or guilty of nothing. There was no middle ground." The cases cited in support of the ruling then made are also applicable to the case now before us. See, also, *Pugh v. State*, 114 Ga. 16, 39 S. E. 875, and *Sessions v. State*, 115 Ga. 22-23, 41 S. E. 259.

Judgment reversed by five Justices.

(118 Ga. 48)

#### RICE v. STATE

(Supreme Court of Georgia. May 30, 1903.)

##### LARCENY—EVIDENCE—INFANTS.

1. Where personal property is taken and retained by a person incapable of committing a crime, the custody is that of the owner, and one taking it from such irresponsible agent, with intent to convert the same, would be guilty of larceny, as in the case of finding lost property.

2. If one should procure an infant to enter a house and take personal property therefrom, he would be guilty of larceny from the house, or burglary, as the case might be.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Nettie Rice was convicted of larceny, and brings error. Affirmed.

McDonald, Quincey & Grantham, for plaintiff in error. J. F. De Lacey, Sol. Gen., and L. Kennedy, for the State.

LAMAR, J. While the grounds of the certiorari were not verified by the county judge, the same questions are raised by the assignment that the verdict was contrary to law.

The defendant was found guilty of larceny from the house, but in her statement claimed that she had received the property from her eight year old son. He, on being allowed to testify, said that the prosecutrix had given him the articles, telling him at the same time that her husband was going to destroy her, and, if the boy could not remove the goods before his return, she wanted him to burn down the house. Where personal property is taken and retained by an idiot, infant under the age of 10 years, or other person incapable of committing a crime, the custody is still that of the owner, and one taking it from such irresponsible agent with intent to convert the same would be guilty of larceny, as in the case of finding lost goods, *Edwards v. State*, 80 Ga. 129, 4 S. E. 268; *Berry v. State*, 10 Ga. 511 (2); *Allen v. State*, 91 Ala. 19, 8 South. 665, 24 Am. St. Rep. 856; *State v. Learnard*, 41 Vt. 585. The judge charged that, if the defendant received the goods from the infant, she was guilty of larceny, but that, if she instructed, counseled, and procured him to enter the house for the purpose of obtaining the personal effects of the owner, she would be guilty, which, in legal effect, meant that she would be guilty generally of the criminal offense charged. The prosecutrix denied having given the goods to the boy, and, the defendant being found in the recent possession of the stolen property, the jury may well have believed that the preposterous statement of the child did not satisfactorily account for their possession. All the circumstances were sufficient to warrant a verdict of guilty as charged. It is, therefore, unnecessary to consider whether, if the defendant had not counseled, but only knew that the infant had taken the goods from the house, and consented thereto, the ratification would relate back to the original act of removal, so as to make her guilty of larceny from the house, or whether, as the custody was in the owner when the animus furandi arose, her guilt could not extend beyond what she herself had done, nor be enlarged by the fact that she knew that the infant had taken the property out of the house under such circumstances as might constitute larceny from the house, or burglary, in a responsible person.

Judgment affirmed by five Justices.

(118 Ga. 38)

#### FLEMING et al. v. BLOSSER PRINTING CO. et al.

(Supreme Court of Georgia. May 30, 1903.)

##### INTERPLEADER—WHEN GRANTED—APPEAL.

1. If a clear case for interpleader was not made, a court of equity had jurisdiction to prevent a multiplicity of suits, and a consequent waste of the funds in dispute. The remedy at law was not so adequate, full, or complete as equity could afford, and therefore there was no error in overruling the demurrer to the petition.

2. All the questions of law and fact involved

in this case were by agreement submitted to the court for determination. We find no error in any of his rulings on the legal questions involved, and his finding on the facts is fully sustained by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the Blosser Printing Company and others against W. P. Fleming and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

B. J. Dasher, for plaintiffs in error. Lane & Park, Hardeman, Davis, Turner & Jones, and A. L. Dasher, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 32)

#### MADDOX v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### INTOXICATING LIQUORS—ILLEGAL SALE—SUFFICIENCY OF COMPLAINT.

1. An accusation charging that the accused sold "alcoholic, spirituous, malt, and intoxicating liquors, and other drinks to prosecutor unknown, which if drunk to excess will produce intoxication," charges with sufficient certainty a violation of the provisions of the Political Code of 1895, § 1548, the sale of the liquors enumerated in that section being made penal by Pen. Code 1895, § 451, in counties where the sale is prohibited under the operation of the general local option liquor law, of which Pol. Code 1895, § 1548, is a part. Such an accusation is not defective because it fails to specify the particular kind of liquor sold, nor because it charges the sale of intoxicating "and" other liquors in the conjunctive, nor because of the addition of the words "other drinks to prosecutor unknown," etc.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

G. W. Maddox was convicted of selling intoxicating liquors, and brings error. Affirmed.

John R. Cooper, S. B. Baker, and H. P. Howard, for plaintiff in error. G. H. Williams, Sol., for the State.

COBB, J. Maddox was arraigned upon an accusation charging him with having sold "alcoholic, spirituous, malt, and intoxicating liquors, and other drinks to prosecutor unknown, which if drunk to excess will produce intoxication." The accused filed a demurrer to the accusation, upon the grounds that it charges no offense against the laws of the state; that it does not put the accused on notice with sufficient certainty of what kind of malt liquor he is charged with selling, but charges him with selling other drinks, conjunctively, to affiant unknown; that it fails to put the accused on notice of the kind of

liquor he is charged with selling; that it is too vague and uncertain to put the accused on notice of the charge he is called upon to answer. The demurrer was overruled, and the accused excepted.

The accusation was evidently intended to charge a violation of the general local option liquor law contained in the Political Code of 1895, §§ 1541-1550, it being a penal offense to engage in the sale in any county where it is prohibited under the operation of that law. See Pen. Code 1895, § 451. The liquors which cannot be sold in any such county are "alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which if drunk to excess will produce intoxication." Pol. Code 1895, § 1548. As will be observed, the accusation follows substantially the language of the section of the Code, and none of the grounds of the demurrer are, in our opinion, meritorious. It was not necessary to specify in the accusation the particular kind of liquor sold. *Hancock v. State*, 114 Ga. 439, 443, 40 S. E. 317, and cases cited. If an indictment charges in general terms the sale of "spirituous" or "intoxicating" liquors, or uses any other general term employed in the statute, it will be sufficient, and the sale of any liquor coming within the general description may be shown. *Black, Intox. Liquors*, § 467. This being so, the averment of "other drinks to prosecutor unknown, which if drunk to excess will produce intoxication," is immaterial, because it does not enlarge the proof which may be made under the general terms which are mentioned. In other words, under the present accusation, the sale of any intoxicating drink may be shown under the general specification of "intoxicating liquors," and, to prove a sale under the description of "other drinks to prosecutor unknown," etc., it would be necessary for the state to show merely the sale of an intoxicating drink. The addition of these words cannot, therefore, put the accused in any worse position, or be productive of any more uncertainty, than if they had been altogether omitted. Indeed, they are immaterial, and may be treated as surplusage. They neither add to nor take from the other averments in the accusation. See, in this connection, *Black, Intox. Liquors*, § 443.

The accusation "may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." *Eaves v. State*, 118 Ga. 749, 757, 39 S. E. 318, 321, quoting from 1 *Bishop's New Criminal Procedure*, § 436. See, also, the other authorities cited in the *Eaves Case*. Had the accusation charged the sale in the disjunctive, it would have been bad for uncertainty. *Eaves v. State*, 118 Ga. 756, 39 S. E. 318. There was no error in overruling the demurrer.

Judgment affirmed by five Justices.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 321.

(118 Ga. 53)

**OSBURN v. MAYOR, etc., OF CITY OF MARIETTA.**

(Supreme Court of Georgia. May 30, 1903.)

**INTOXICATING LIQUORS—ILLEGAL SALE.**

1. A municipal ordinance prohibiting the having or keeping for illegal sale of any intoxicating, spirituous, vinous, or malt liquors, the having of any place where any of said liquors are stored or kept for illegal sale, or to be distributed, or to be frequented and drunk, and the distributing of any of said liquors or the doing of any other act that tends to increase or produce drunkenness, is not unconstitutional as in conflict with the general domestic wine act of 1877.

2. *Papworth v. State*, 31 S. E. 402, 103 Ga. 36, distinguished.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Bruce Osburn was convicted of selling liquor without a license, and brings error. Affirmed.

J. Z. Foster, for plaintiff in error. J. E. Mozley and D. W. Blair, for defendant in error.

**CANDLER, J.** The accused was tried and convicted in the mayor's court of the city of Marietta, under an ordinance a copy of which is as follows: "No person shall have or keep any intoxicating spirituous, vinous or malt liquors in said city for the purpose of illegal sale. Nor shall any person have any place in said city where any of said liquors are stored or kept for illegal sale, or to be distributed or to be frequented and drunk. Nor shall any person distribute any of said liquors in said city, or do any other act that tends to increase or produce drunkenness. Any person violating any of the provisions of this section shall on conviction be fined not more than fifty dollars." On the trial it was shown that the accused had on several occasions sold whisky at a livery stable in the city of Marietta. His sales were always made at the same place, and the whisky was sold in any quantity desired by the purchaser. In his statement the accused practically admitted having sold whisky to the witness introduced to prove the sales. The case was carried by certiorari to the superior court of Cobb county, and the certiorari was overruled, whereupon the accused excepted.

The main contention in the court below, and in this court, is that the ordinance under which the accused was convicted is invalid as in conflict with the general domestic wine act of 1877. In addition, one or two minor questions were raised as to the form of the affidavit upon which the accusation was based, but it is sufficient to say that in our opinion these questions present no sufficient reason for reversing the judgment of the court below.

By reference to the ordinance which has been attacked, and which we have already set out, it will be seen that the law is aimed solely at the keeping of intoxicating liquors

for "illegal" sale. We see no reason why the city of Marietta may not lawfully prohibit the illegal sale of anything, no matter what restrictions and protections are thrown around it by the general law of the state. Under certain conditions the accused might legally have sold domestic wines, but this ordinance would not have affected him in the slightest in regard to such sales. It does not attempt to impose any penalty upon persons legally selling domestic wines or other liquors. Its only aim is to prevent illegal sales of such wines and liquors. The act approved December 16, 1895 (Acts 1895, p. 91), expressly authorized any town or city in this state "to regulate the sale of domestic wines and to provide for licensing the same." By that act penalties were provided for the violation of its provisions. Plainly, the ordinance now under consideration comes within the scope of that act, and no valid reason has been assigned for holding it unconstitutional. As to this general subject, see *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Paulk v. Sycamore*, 104 Ga. 723, 31 S. E. 200, and cases cited.

It need hardly be added that there is nothing in the decision in this case which conflicts with the ruling of this court in *Papworth v. State*, 103 Ga. 36, 31 S. E. 402, and the subsequent cases which have been based upon that ruling. The writer takes this occasion, however, to record himself as agreeing with the dissenting opinion of Justices Little and Lewis as expressed in the *Papworth Case*, but this is not the time or the occasion to enter into a discussion of the questions there raised.

Judgment affirmed by five Justices.

(118 Ga. 61)

**HATCHETT v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**CRIMINAL LAW—REVIEW.**

1. The indictment was good as against any objection urged against it, and it was not error for the court to overrule the demurrer thereto. (Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

N. P. Hatchett was convicted of crime, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(117 Ga. 1013)

**PARKER v. BROWN HOUSE CO.**

(Supreme Court of Georgia. June 3, 1903.)

**LEASE—CONSTRUCTION—DUTY TO REPAIR—WAIVER.**

1. A stipulation in the lease of a building, "that the expense of keeping said building in repair during the continuance of this lease is to be borne equally between said parties, but before any repairs are made the nature and cost of same are to be submitted by each

party to the other and mutually approved by them," may, so far as it requires the nature and cost of the repairs to be submitted and mutually approved, be waived by the tenant; and such waiver will result from his continuously, during the existence of the lease, requesting repairs to be made, allowing the landlord to have them made without submitting the nature and cost of the same, standing by and seeing them made without raising any objection to the landlord's failure to comply with the stipulation in the lease, and accepting the benefit of the repairs after they are so made.

2. No sufficient reason has been shown for reversing the judgment complained of.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by the Brown House Company against T. C. Parker. Judgment for plaintiff, and defendant brings error. Affirmed.

Guerrey & Hall and W. B. Birch, for plaintiff in error. Hardeman, Davis, Turner & Hall, for defendant in error.

COBB, J. The Brown House Company brought suit against Parker for \$724.60. It was alleged in the petition that the plaintiff had leased its hotel to Allen; that, with the consent of Allen and the plaintiff, Parker had been substituted as lessee; that during the existence of the lease the plaintiff had made repairs on the building amounting to \$1,001.28; that on the expiration of the lease Parker had failed to redeliver to the plaintiff articles of personal property, which, under the lease, were to have been returned, amounting to \$224.60; and that the lease contained the following stipulations: "It is agreed between said parties that after the said company shall place on said building the improvements mentioned in the 4th article of this agreement, that the expense of keeping said building in repair during the continuance of this lease is to be borne equally between said parties. But before any repairs are made the nature and cost of same are to be submitted by each party to the other, and mutually approved by them." It was also alleged in the original petition that the repairs were made "at the especial request of said Parker, and no improvements were made until petitioner was notified by said Parker that the same were necessary, and made with his full concurrence and approval." By amendment the paragraph of the petition from which the above quotation was made was so amplified as to allege as follows: The repairs were made at the express request of Parker, who received them without objection, and without requiring plaintiff to submit to him the nature and cost of the repairs, and without requiring an express approval by him; but he accepted the repairs, and became liable to pay plaintiff at their reasonable value. Plaintiff further says that the request by Parker for the repairs and the acceptance of the same was a departure from the terms of the contract requiring no-

tice and approval, acquiesced in by both parties, whereby the notice and approval was waived by Parker. The bill of particulars attached to the petition contained items of repairs, beginning with an item on November 26, 1893, and continuing with numerous items at different times ranging in amount from less than \$1 to more than \$100, the last item being on May 24, 1900, just a few months before the lease expired. The answer of the defendant denied all the material allegations of the petition in relation to his liability for the repairs, and especially denied that they were made at the request of the defendant, or that he consented to the making of the same in such a manner as to render him liable under the contract to pay for any part of them. The case was tried before the judge without the intervention of a jury, and a judgment was rendered in favor of the plaintiff for \$250.32, it being stated in the judgment that this sum was "just one-fourth of the amount of the general account for general repairs, and just one-half of what plaintiff alleged to be due it by defendant on said account." There was a further finding of \$21.90 interest. The case is here upon a bill of exceptions sued out by Parker.

The bill of exceptions assigns error upon the allowance of the amendment above referred to. There was no error in allowing the amendment. It was simply an amplification of a paragraph in the original petition. The stipulation in the contract in reference to repairs was binding upon both parties, and, in the absence of any change or modification of the contract, the plaintiff would have no right to call upon the defendant for one-half the cost of any repairs which it had made upon the building, when the nature and cost of such repairs were not mutually approved by the parties after the same had been submitted to the defendant. The parties had a right to make this stipulation, and as long as it stood each was governed by it. See, in this connection, *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 936; 6 Cyc. 77, and cases cited in note 88; *Lloyd, Bldg.* (2d Ed.) § 48. There being no law of this state requiring such a stipulation to be in writing, it was within the power of the parties to alter or modify it by parol, and hence it might be waived by either party either expressly or by conduct having this effect. The controlling question in the present case is whether the judge was authorized to find that there had been such a waiver on the part of the defendant of his right to demand that the cost and nature of the repairs be submitted to him before he should be charged with any part thereof, the plaintiff being entitled to charge the defendant with one-half the cost of repairs made after compliance with the provisions of the stipulation in question. The evidence for the plaintiff authorized a finding that from time to time during the continuance of the lease,

as repairs of more or less importance were required, the plaintiff was notified, either by the defendant or his agents in charge of the hotel, that repairs were needed, and that there was in each instance a request that they be made. These repairs, amounting to more than \$1,000 in the aggregate, were 'hose from a trifling character to those of a very important character—from the repair of a sash cord, at an expense of 75 cents, to the blowing out of gas pipes, at a cost of more than \$100. There was not simply a notice that repairs were required, but, according to the evidence, a direct request in each case that they be made immediately, and the judge was authorized to find that they were made as a result of these requests; that the defendant stood by while they were being made, and raised no objection to the failure of the landlord to comply with the written stipulation; and that the defendant accepted the repairs after they were made, and enjoyed the benefit of them. While the evidence did not authorize a finding that there had been any express agreement to alter the terms of the stipulation, under the circumstances above referred to the judge was authorized to find that the defendant had, by his conduct, waived the right to demand that the nature and cost of the repairs be submitted to him for approval before he should be called upon to pay his part of the expense thereof. Requesting the repairs to be made, standing by without objection while they were being made, and accepting and enjoying the benefit of them after they were made, estops him, when sued for his part of the expense, from pleading the failure of the landlord to comply with the stipulation. See, in this connection, *Lloyd, Bldg.* (2d Ed.) § 51. In *Escott v. White*, 10 Bush, 170, suit was brought for extra work by a contractor against one who had employed him to construct a building. The contract stipulated that no work should be considered extra unless ordered in writing and indorsed by the architect; but it was held that, if extra work was done at the instance of the owner, from which benefit was derived, it was to be regarded as an independent contract, for which a recovery could be had. In the opinion Judge Pryor said: "This stipulation in the writing could have been waived or abandoned by parol; and when extra work has been done in a case like this, at the special instance of the owner or his architect, and from which a benefit is derived, the party at whose instance and for whose protection the clause was evidently inserted should not be allowed to say that, 'Although I ordered the work, and am now enjoying the benefits resulting from it, still I am not responsible, because there was no authority in writing directing its execution.'" In *Baum v. Covert*, 62 Miss. 113, there was a written contract for the erection of a building, which detailed minutely the specifications of the work to be done, and stipulated that no extra

work of any kind was to be allowed or paid for unless authorized by an agreement in writing previously made. It was held that, if the owner ordered the contractor to do extra work outside of and additional to that covered by the contract, and this work was done, the owner must pay what it is reasonably worth, if no price was agreed on. In the opinion Chalmers, J., said: "Notwithstanding a previous agreement that there should be no extras or outside work, save upon an express agreement in writing previously made, it was entirely competent for the parties in interest to contract verbally for whatever they mutually thereafter desired. Both parties being *sui juris*, they could nullify their previous agreement at pleasure. This they did whenever the one party ordered and the other agreed to do whatever extra work they should mutually agree upon. They were the parties solely interested, and had the same right to undo verbally that which they had previously put in writing as they originally had to make such writing. 'Consensus facit jus.' And if it be true, as the jury has found, that the one party ordered the additions which the other made, the owners of the building must pay for them, notwithstanding the written stipulations to the contrary. Such stipulations, though written, may be altered or rescinded by parol, and it may be inferred sometimes that this has been done from the acts of the parties. *Rhodes v. Thomas*, 2 Cart. 638; *Smith v. Gugerty*, 4 Barb. 614." See, also, *Truckee Lodge v. Wood*, 14 Nev. 293; *Foster v. McKeown* (Ill.) 61 N. E. 514. The judge was authorized to find from the evidence that the course of dealing between the parties was such that there had been a waiver on the part of the defendant of the stipulation of the contract above referred to. See, in this connection, *Mercier v. Copelan*, 73 Ga. 636; *Grant v. Insurance Company*, 76 Ga. 575; *First National Bank v. Cody*, 93 Ga. 128, 19 S. E. 831 (4).

It is said, though, that the plaintiff ought not to be allowed to recover for these repairs for the reason that no demand for payment was made until after the lease had terminated, and after all the rent had been paid, and after the plaintiff had given to the defendant a check for a small amount for repairs which he had done. While all this is true, there is nothing in the evidence which would have authorized the judge to find that there was any waiver on the part of the plaintiff of its claim for repairs. Nothing was said or done at the time of the acceptance of the rent, or at the time of the payment of the amount for repairs made by the defendant, which could be construed as a waiver in any way of any claim that the plaintiff had against the defendant, unless the mere silence on its part at the time of these transactions constituted such a waiver. While it may be usual, when a tenant offers to pay his landlord rent, for the latter to call the attention of the former to a claim

against him for repairs, he is under no legal obligation to do this, and certainly mere silence will not operate as a waiver of the right to enforce the claim. While the plaintiff could have refused to pay the small amount due the defendant for repairs he had made, and notified him that it would set off the amount against the sum due by him for repairs, it was not legally bound to give the matter this direction. It appears from the defendant's answer that a large amount of repairs was placed upon the building by him; in fact, according to the evidence for the defendant, the expense of these repairs was greater than the claim of the plaintiff for repairs. It was not claimed that these repairs were made at the request of the plaintiff, nor did the defendant claim any compensation for them. These facts were alluded to simply to illustrate the question as to whether there had been a waiver by the defendant of the terms of the contract, the defendant claiming that when he made repairs not in strict accordance with the contract he did not ask compensation, and that, therefore, the plaintiff should not be allowed to receive compensation for repairs unless they were made in strict compliance with the contract. The difference between the two is simply that in the one case there was a waiver and in the other nothing had been done which would constitute a waiver. The judge, in his finding, did not allow anything for the articles which it was claimed were not returned by the defendant at the expiration of the lease, and he allowed only one-half of the claim for repairs. The evidence authorized, though it by no means required, a much larger finding. Of course, the defendant cannot complain that the judgment is for a less sum than the evidence authorized. We see no error requiring a reversal of the judgment.

Judgment affirmed by five Justices.

(117 Ga. 1010)

**MOORE et al. v. SINNOTT et al.**

(Supreme Court of Georgia. June 3, 1903.)

**SPENDTHRIFT TRUST—ALIENATION—EXECUTORY TRUST.**

1. The beneficiary of a valid and subsisting spendthrift trust cannot alienate the trust property so as to affect the rights of the trustee to the possession thereof, and defeat the objects of the trust.

2. Where property is devised to a trustee in trust for the benefit of A. for life, and, after the death of A., then for the benefit of B. for life, the trust is executory during the life of B., although A. is not the subject of a trust under Civ. Code 1895, § 3149.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; E. L. Brinson, Judge.

Action by J. F. Sinnott and others, executors, against G. M. Moore and others. From the judgment, Moore and others bring error. Affirmed.

Frank H. Miller, J. O. C. Black, and M. P. Carroll, for plaintiffs in error. D. G.

Fogarty, E. H. Callaway, W. K. Miller, J. R. Lamar, C. Henry Cohen, and Frank H. Miller, for defendants in error.

**FISH, J.** By the will of Andrew M. Moore, certain property, including that now in dispute, was left to Sinnott and others, as his executors and trustees, in trust for his three sons, Albert H., George M., and Henry G. Each son was to receive the income from one-third of this property, not subject to his debts or to be disposed of by him. Upon the death of any one of the sons, his share was to go to the other two; and, upon the death of one of the latter, the entire income was to go to the survivor. Upon the death of all of the sons, the will made provision that the executors and trustees should hold it for certain charitable uses. This ultimate remainder, for reasons stated in *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415, was invalid, and there was an intestacy as to this, and a resulting trust in favor of the heirs of the testator. Under a bill for direction, filed by the Georgia administrator of the estate, and various answers thereto, it was claimed that the trusts were invalid, and that the sons were entitled to the property in their own right. The case was brought to this court, where it was held that, so far as appeared from anything in the record, the trusts for the sons for life and the cross-remainders were valid, and the trustees were entitled to the possession and control of the property. After the decision of this court, certain amendments to the pleadings were offered. One of these was filed by George M. Moore and by Henry G. Moore; the latter defending for the use of one Staake, his grantee. This amendment alleged that since the adjournment of the April, 1901, term of the court, Staake and the three sons had executed an instrument of release, by which each had remised, released, and forever relinquished his cross-remainder under the will; the intention being to vest in each "an absolute estate, comprising a life estate, cross-remainder for the life of the other, and the residuary estate, leaving" each owning absolutely and in fee simple one undivided one-third interest in the whole of the property involved in this case. George M. Moore also filed an amendment to his answer, in which he alleged that he was not and is not, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of property; that he was an active business man, about 45 years of age, perfectly competent and qualified to take charge of, conduct, and manage his own property. He claimed that the trust for his benefit was invalid, and that he was entitled to receive one-third of the property, or its proceeds, or at least the commuted value of his life estate. Albert H. Moore also filed an answer making similar allegations as to his ability and fitness to take charge of and

manage his property, and praying similar relief. The third son made no answer touching his habits or his fitness to be intrusted with the care and management of property. There was nothing in any of the answers or amendments to show that this third son, Henry G., is not a proper subject of a trust, under Civ. Code 1895, § 3149. It is true that Albert H. Moore's answer did contain an averment that "the conditions and grounds upon which said trust was created never existed, and, if they ever did exist, do not now exist"; but the context shows clearly that this allegation was meant to apply to Albert only, and was not intended to refer to Henry. The trial judge refused to allow these amendments, and ordered the proceeds of the property to be turned over to the executors and trustees under the will, first deducting the expenses of litigation. To these rulings George M. Moore and Albert H. Moore excepted. Numerous points were made in the record and argued here, and counsel for the defendants in error suggested several reasons why the amendments offered below should not have been allowed. As there is no error in refusing an amendment when it and the pleading sought to be amended do not, taken together, state a cause of action or a defense, and as we think this principle applies in the present case, we shall discuss none of the questions raised, except whether, had the amendments been allowed, the sons would have been entitled to any relief thereunder.

1. Henry G. Moore apparently acquiesced in the judgment of the court below, for he is not a party to the bill of exceptions here. But regardless of this, the controlling fact in the case is that the amendments offered failed utterly to allege that the spendthrift trust is not good as to him. That trust must be treated as valid in so far as he is concerned. The item of the will which created the trust expressly provided that the trust property should not be subject to his debts, or to be disposed of by him. This provision against alienation was intended to secure the property against his improvidence and want of capacity to manage it, and will be enforced by the courts so long as the spendthrift trust subsists for his benefit. He therefore had no power to defeat the objects of the trust by releasing all or any part of the property. His portion must be held for his benefit by the trustee, and the instrument by which he sought to alienate a portion of his interest cannot affect the rights of the trustees to hold and manage his share of the property.

2. It must follow that the trust is still executory, and that the trustees are entitled to the possession of the property during the life of Henry G. Moore. They are entitled to control not merely one-third of it, but the whole. Under the cross-remainders in the will, he would be entitled, if he survived his brothers, to the income for his life from their

shares of the estate, and the trustees would hold the property for his benefit under the trust. While the other brothers may not be, individually, subjects of a spendthrift trust, yet if this one is subject, and still lives, with a right to the income from one-third or one-half or all of the property, according as all the brothers, or he and one other, or he only, survive, the trust is certainly executory, so long as he lives, as to all of the property. "Something remains to be done by the trustees," and they are entitled to hold and manage the property. For these reasons, there was no error in the refusal to allow the amendments offered, or in the order of the court that the proceeds of the trust property should be turned over to the executors and trustees under the will.

Judgment affirmed.

LUMPKIN, P. J., absent. LAMAR, J., disqualified. The other Justices concur.

(118 Ga. 29)

### GIBSON v. STATE.

(Supreme Court of Georgia. May 30, 1908.)

#### LEGAL PROCESS—OBSTRUCTION—INDICTMENT—EVIDENCE.

1. There was no error in overruling the demurrers to the indictment.

2. Under section 306 of the Penal Code of 1895, it is a misdemeanor to obstruct an officer in executing any lawful order of court, whether the same has been reduced to writing or not.

3. The verdict was demanded by the evidence. (Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

O. H. Gibson was convicted of obstructing legal process, and brings error. Affirmed.

M. E. O'Neal, W. D. Sheffield, and Hawes & Hawes, for plaintiff in error. W. E. Wooten, Sol. Gen., and R. R. Arnold, for the State.

SIMMONS, C. J. The plaintiff in error was convicted of the offense of obstructing legal process. His motion for a new trial was overruled. The bill of exceptions complains of the judgment overruling this motion, and also of the overruling of his demurrers to the indictment, his right to complain of the last-named judgment having been preserved by exceptions pendente lite.

1. The indictment charged the accused and another with obstructing legal process, for that they did, on a named day, "unlawfully and with force and arms, knowingly and willfully obstruct and oppose H. H. Smallwood, legal constable of said county of Decatur, in his attempt to execute the judgment and order, the same being lawful process, of W. E. Smith, N. P. & ex officio J. P. of the 694th district G. M. said county, rendered and framed by said magistrate at the January term, 1902, of the justice's court in and for said district and county, in the case then and there

tried and determined of James Watson versus B. H. Gibson, same being a possessory warrant proceeding for the recovery of a certain cow, the said magistrate then and there awarding the possession of said cow to said James Watson, and ordering and directing the said Smallwood, L. C., to execute and enforce said judgment by delivering said cow to said Watson, the execution of which said order by the said Smallwood, L. C., was obstructed and opposed by said defendants as aforesaid, contrary to the laws of said state," etc. This indictment was demurred to on the ground that it was insufficient in law, in that (1) it did not set out the manner in which the process was obstructed, and (2) the order or judgment alleged to have been obstructed was not a lawful order and judgment, and was not legal process.

The demurrer was properly overruled. The indictment was more specific in charging the offense than is the Penal Code in defining it. Section 929 of the Penal Code of 1895 provides that an indictment shall be deemed sufficiently technical and correct when it states the offense in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury. This section, however, was not "designed to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial." *Johnson v. State*, 90 Ga. 441, 16 S. E. 92. The indictment in the present case not only contained the terms of the Code definition of the offense, but was otherwise sufficient. It set out the nature of the order which the constable was endeavoring to execute, and charged that the defendant, with force and arms, knowingly and willfully, obstructed and opposed its execution. The specific act or acts by which he obstructed or opposed the officer were not set out, but the allegations were sufficiently definite for a case of this character, where so much of the attendant circumstances was set out, and where there could have been no very material variation in the manner in which the officer was obstructed.

As to the second ground of the demurrer, there can be no doubt. The judgment or order of the court was described, and there was nothing in the indictment to indicate that it was illegal. If, because of a failure to require bond of the plaintiff, or for other reason, the judgment or order was illegal, this was a matter for plea or for proof, and not for demurrer to an indictment which did not show the existence of such defect.

2. The evidence showed that, on the hearing of a "possessory warrant proceeding for the recovery of a certain cow," the magistrate orally announced that he awarded judgment for the plaintiff, and ordered the constable to deliver the cow to the plaintiff upon his giving the proper bond. The defendant (the present plaintiff in error) gave notice of certiorari. When the constable endeavored to

lead the cow away to put her in his lot, the defendant intercepted him, cut the rope by which she was led, and took her away. The judgment of the court was subsequently reduced to writing. Section 306 of the Penal Code of 1895, in regard to obstructing an officer in executing any lawful process or order, is not limited to cases in which the process or order is written. It also covers the obstruction of an officer who is executing a lawful oral order of court, and certainly embraces a case where judgment has been announced in a justice's court and the obstruction occurs before the magistrate has time to reduce his order to writing.

3. The evidence demanded the verdict of guilty, and we will not examine the charge closely to see if there was any error therein. Any such error was, in view of the evidence, immaterial.

Judgment affirmed by five Justices.

(118 Ga. 50)

#### RICE v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—INSTRUCTIONS—EVIDENCE.

1. It is not made to appear that the trial judge erred in his charge to the jury upon their request for additional instructions.

2. The portion of the original charge of which complaint is made is correct in the abstract, and, as no specific objection is made to it in the motion, it will not furnish a ground for a new trial.

3. The verdict was not contrary to law or the evidence, and the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Irwin County: D. M. Roberts, Judge.

George Rice was convicted of crime, and brings error. Affirmed.

McDonald, Quincey & Grantham, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(117 Ga. 390)

#### TYNER v. LEAKE.

(Supreme Court of Georgia. June 1, 1903.)

##### CERTIORARI TO JUSTICE—ANSWER—DISMISSAL.

1. The petition for certiorari presented to the court below contained no legally sufficient assignment of error save one to the effect that the verdict therein complained of was contrary to law and the evidence; and, as the answer of the magistrate in whose court the trial was had neither adopted as correct the brief of evidence incorporated in the petition nor set forth the evidence which was introduced at the trial, and as no steps were taken by the plaintiff in certiorari to have the magistrate's answer perfected, the case was ripe for dismissal when called for a hearing in the superior court.

(Syllabus by the Court.)

Error from Superior Court, Bibb County: W. H. Felton, Jr., Judge.



Action by H. G. Leake, administrator, against G. D. Tyner. Judgment for plaintiff, and defendant brought certiorari. From an order dismissing the writ, defendant brings error. Affirmed.

M. Felton Hatcher and Guerry & Hall, for plaintiff in error. Hardeman, Davis, Turner & Jones, and E. P. Johnston, for defendant in error.

SIMMONS, C. J. It appears from the record in this case that the defendant in error caused a summons of garnishment to be served upon the Southern Railway Company, calling upon it to answer as to its indebtedness, if any, to George D. Tyner; that the garnishment was dissolved by his giving bond and security, as provided for by statute; that the case was tried before a jury in the justice's court from which the summons issued, and that their verdict was adverse to him. It further appears that he sued out a writ of certiorari, but, owing to the fact that his petition did not disclose that he had dissolved the garnishment by giving bond and security, the proceedings were dismissed on motion of the defendant in certiorari, and that he (Tyner) subsequently undertook to renew the suit by presenting to the superior court a second petition for certiorari, which was duly sanctioned.

The complaint presented by the bill of exceptions is that the court below erred in again dismissing the case on motion of counsel for the defendant in certiorari. One of the grounds of this motion was that the petition for certiorari failed to "point out any error with sufficient particularity, \* \* \* or put the court on notice of what issue was made and tried in the justice court." The first assignment of error made in the petition is that counsel for Tyner was not permitted to ask him, while testifying as a witness, a certain question; but no attempt to inform the court as to what facts were thus sought to be elicited is made. This assignment of error is wholly without merit. *Bigby v. Warnock*, 115 Ga. 386, 41 S. E. 622, 57 L. R. A. 754; *Freeman v. Mencken*, 115 Ga. 1017, 42 S. E. 369. Another assignment is that Tyner, while on the stand as a witness, was compelled to answer, over objection of his counsel, a certain question propounded by counsel for the opposite party. What this objection was is not disclosed, nor is the answer of the witness set forth. Such an assignment of error cannot be considered by a reviewing court, as has been repeatedly held.

The petition for certiorari also sets forth the complaint that "the jury erred in finding said verdict holding the said sum in the hands of the garnishee subject to the execution of the said plaintiff, because the answer of the said garnishee showed that the sum so in its hands was for the daily and monthly wages of your petitioner, and the evidence in the case showed that said wages

were not subject to the process of garnishment." The merits of this complaint cannot be determined, since the answer of the magistrate neither adopts as correct the brief of evidence incorporated in the petition nor discloses what evidence was introduced at the trial in his court. On the contrary, the only reference to the evidence made in the answer was as follows: "Respondent also asks that his statement of the evidence given in his answer to the first certiorari be used in this answer, as he cannot more satisfactorily recall said testimony, and he believes the evidence therein stated is true, in substance, as he is generally careful in reciting evidence in his answers." The magistrate did not attach as an exhibit any document purporting to show what was "his statement of the evidence given in his answer to the first certiorari." This being so, his answer to the second writ of certiorari served upon him was, in the respect just indicated, fatally defective, and the plaintiff in certiorari should have taken the proper steps to have the magistrate's answer perfected. "An incomplete answer to a writ of certiorari can be perfected only in the event the party dissatisfied with such answer complies with the requirements of Civ. Code, § 4647, as to specifying in writing the defects therein, and giving to the opposite party due notice of the exceptions taken thereto before the case is called for a hearing in the superior court." *Ford v. Toomer*, 116 Ga. 795, 43 S. E. 45. And to the same effect, see *Stoner v. Magins*, 116 Ga. 797, 43 S. E. 45. No effort whatever appears to have been made by the plaintiff in certiorari to comply with the provisions of the section of the code just cited.

We find in the bill of exceptions what purports to be a copy of the answer which the magistrate made to the first writ of certiorari sued out by Tyner. The bill of exceptions does not, however, furnish any explanation as to how this copy came to be improperly incorporated in it. His honor could not, with propriety, have treated the original document from which this copy was made as constituting a part of the answer which the magistrate made to the second writ of certiorari, for the reason that the identification of this document as that to which he referred would necessarily have to depend entirely upon extrinsic proof, which could not properly be received in the absence of exceptions to the magistrate's answer filed before the case was called in the superior court for a hearing. There is no hint in the bill of exceptions that counsel for the defendant in error agreed that the document just mentioned should be regarded by the judge as forming a part of the answer, nor does it appear that he treated this document as that to which the answer referred. Certainly, without the consent of the defendant in error, the judge had no right to consider this document at all in passing upon the motion to dismiss,

and it is not to be presumed that he did so. "At the hearing of a certiorari in the superior court nothing can be considered by the judge but the petition and the answer" (Glildea v. Hill, 115 Ga. 136, 41 S. E. 492), unless both parties agree that the court may consider facts not appearing in the record (Barnett v. Tant, 115 Ga. 659, 42 S. E. 65), notwithstanding the judge may have private knowledge concerning facts not therein disclosed. See, in this connection, Cramer v. Truitt, 113 Ga. 970, 39 S. E. 459, and the case of Scroggins v. State, 55 Ga. 380, which is cited approvingly and followed.

The motion to dismiss also called into question the right of the plaintiff in certiorari to renew the action in the superior court by presenting within six months after its dismissal in that court a second petition; but, as this petition contained no assignment of error which could be considered, the case should have been dismissed, irrespective of whether the motion did or did not present other grounds upon which a judgment of dismissal could be based.

Judgment affirmed by five Justices.

(118 Ga. 58)

#### CHAPMAN v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—NEW TRIAL—BURGLARY—EVIDENCE.

1. Objection that a sentence imposed in a criminal case is, for any reason, illegal or irregular, cannot be made the ground of a motion for a new trial.

2. The evidence authorized the verdict, and there was no error committed at the trial which required the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Bud Chapman was convicted of burglary, and brings error. Affirmed.

John R. Cooper and W. O. Lane, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, J. Chapman was convicted of the offense of burglary, and assigns error upon the refusal of the court to grant him a new trial.

1. In five grounds of the motion for a new trial, objections are made to the character of the sentence imposed by the court. Objections to a sentence cannot be properly made grounds of a motion for a new trial. If there has been a lawful verdict of conviction rendered in a criminal case, an error committed by the judge in the imposition of the sentence will be no sufficient reason for setting aside the verdict and trying the accused again upon the question of his guilt or innocence. Such being the case, of course the objection should not be set forth in a motion for a new trial, which is the remedy given to

the accused for determining whether any error has been committed prior to the verdict which would require another trial. See *Burgamy v. State*, 114 Ga. 852, 40 S. E. 991 (2), and case cited.

2. The evidence authorized the verdict. The charge of the judge fairly submitted the case to the jury, and no sufficient reason has been shown why a new trial should have been granted.

Judgment affirmed by five Justices.

(118 Ga. 32)

#### ROBINSON v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### ASSAULT WITH INTENT TO RAPE—INDICTMENT.

1. An indictment which charges the accused "with the offense of assault with intent to rape," for that he, on a named date, in a designated county, "then and there unlawfully and with force and arms in and upon [a named female] . . . violently, feloniously, and forcibly did make an assault, with intent her the said [female] then and there forcibly and against her will to feloniously ravish and carnally know," is not demurrable upon the ground that it "does not allege any offense under the laws of Georgia," nor "because it does not allege any overt act that the defendant did, going to show that he intended to commit the crime of rape."

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Cliff Robinson was convicted of crime, and brings error. Affirmed.

John R. Cooper and Oscar Brown, for plaintiff in error. O. H. Brand, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 714)

#### JINKS v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—EXTRAORDINARY MOTION.

1. Newly discovered evidence which is merely cumulative of that of the existence of which the party making a motion for a new trial knew when the case was tried, and which he, apparently, by the exercise of ordinary diligence, might have procured, but did not introduce, is not cause for a new trial, even in an ordinary motion therefor, and certainly can afford no ground upon which to base an extraordinary motion.

2. In a motion for a new trial, a ground which is not verified by the trial judge cannot be considered.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

M. W. Jinks was convicted of crime, and brings error. Affirmed.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2292.

Brown & Cooper, N. L. Hutchins, and N. L. Hutchins, Jr., for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

FISH, J. The plaintiff in error, Jinks, was tried for, and convicted of, the offense of seduction. He made a motion for a new trial, which was overruled, and he brought the case to this court, where the judgment of the lower court was affirmed. *Jinks v. State*, 114 Ga. 430, 40 S. E. 320. Subsequently there was another motion for a new trial, which was made, heard, and refused in vacation, and the case again brought to this court, where it was held that the motion was a mere nullity, and the judge of the superior court erred in taking jurisdiction of the same. *Jinks v. State*, 115 Ga. 243, 41 S. E. 580. Jinks then at a regular term of the trial court made another motion for a new trial, based upon evidence alleged to have been discovered since his original motion for a new trial was finally disposed of. This motion was likewise overruled by the trial judge, and the judgment overruling the same is now before us for review.

1. The first ground of this motion is that the movant has learned since his first motion for a new trial was overruled, and the judgment of the lower court affirmed by the Supreme Court, that he can prove that "the person alleged to have been seduced by him was not a virtuous unmarried female at the time of, and for some time previous to, said alleged seduction." In this ground of the motion it is alleged that he can prove this by proving: (1) By a witness named Mayes, that he had carnal knowledge of the alleged victim of seduction prior to the date of the alleged seduction, and can prove that prior to that time Mayes received from her two letters indicating that she was not a virtuous woman; (2) by three named witnesses, that she, on the night of a day prior to the alleged seduction, at midnight, left a dwelling house in which visitors were assembled, and went to the kitchen with the movant, and remained there with him alone until about daylight, it being dark in the kitchen; (3) by a witness named Dyer, that on a night before the alleged seduction he and the woman alleged to have been seduced left a house in which a party of people were assembled, and went out into the darkness together, some distance from the house, and remained there by themselves for about half an hour, and that Dyer was engaged to be married to her prior to the alleged seduction, and had frequently hugged and kissed her; (4) by three other named witnesses, that a man named Love, before the alleged seduction, was seen by them hugging her, and taking other liberties with her person. Granting that the movant did not know, and could not, by the exercise of ordinary diligence, have known, until after his original motion for a new trial had been finally disposed of, that these witnesses would testify as he now claims and

they now swear they will, still this ground is wholly insufficient to support an extraordinary motion for a new trial. It would not even be sufficient to support an ordinary motion for a new trial in the present case. The mere fact that a person convicted of a crime after his trial discovers that he can prove a fact material to his defense by a certain witness or witnesses, and that he could not, by the exercise of ordinary diligence, have discovered this before his conviction, is not sufficient to authorize the grant of a new trial upon the ground of newly discovered evidence. It is not the discovery of new witnesses, but the discovery of new evidence, the materiality of which is sufficient to probably produce a different result upon another trial of the case, which authorizes the grant of a new trial. "To render alleged newly discovered evidence available as cause for a new trial, it should appear that the evidence itself is newly discovered, not merely that certain named witnesses by whom the facts can be proved were unknown until after the trial." *Burgess v. State*, 93 Ga. 304, 20 S. E. 331. Beginning with *Roberts v. State*, 3 Ga. 310, it has been repeatedly held by this court that newly discovered evidence which is merely cumulative (that is, tending to establish a fact in relation to which there was evidence upon the trial) is not good cause for a new trial. Certainly, then, the discovery of evidence which is simply cumulative of that of the existence of which a party knew when the case was tried, and which he might then have introduced, cannot be a good ground for a new trial. In the latter case the movant for a new trial stands in the attitude of having, upon the trial of the case, voluntarily refrained from proving the fact which he in his motion for a new trial seeks another opportunity to prove. He had witnesses within his reach by which he might have established the fact, but did not introduce them, and yet claims the right to a new trial because, since the rendition of the verdict against him, he has discovered other witnesses by whom he can prove the same fact. Clearly, such a movant is not entitled to a new trial upon such a ground. As we read the record, such is the position which the plaintiff in error occupies in this case. If the disgusting statements of the accused upon the trial of the case as to the conduct and conversation of his alleged victim were true, it ought not to have been a difficult matter for him to have procured evidence showing her abandoned and depraved character and utter want of chastity. Besides, in his statement to the jury, he said that Mayes, Dyer, Love, "and others" had told him that they had had sexual intercourse with her; and yet he offered no witness to prove that she was not a virtuous woman prior to the time that he had carnal knowledge of her person, nor anything whatever in his defense except his own statement. His excuse now for not having in-

roduced Mayes and Dyer as witnesses in his behalf is that they, when brought to court under subpoenas issued at his instance, told his counsel that they knew nothing, and, if placed upon the stand, would do the defendant more harm than good; but he offers no excuse whatever for not having introduced Love and the "others" who had told him that they had had carnal knowledge of the woman in question. So it is evident that the alleged fact which the movant seeks now an opportunity to prove is not a fact newly discovered by him, but, on the contrary, if he is to be believed, it was well known to him at the time of his trial. According to the statement that he made to the jury which convicted him, he knew then as well as he knows now that the woman alleged to have been seduced by him was not virtuous at the time of the alleged seduction, and knew of other witnesses to this fact besides Mayes and Dyer. He may have discovered since his other motion for a new trial was overruled other means by which to prove this fact than those which were available to him at the time of his trial, or at the time his original motion was heard and overruled, but he fails in this present motion to show that he knew of no witnesses by which he could prove this fact until after his first motion was decided against him; and his statement upon his trial, if credible, clearly shows that he then knew of witnesses other than those he now produces by whom he might have shown this fact. So, even if his motion for a new trial were an ordinary one, duly made, he would not be entitled to a judgment in his favor on the ground which we have been considering. Much less is he entitled to such a judgment on a so-called extraordinary motion. Irrespective of what we have said above, this motion, if tested by the standard for extraordinary motions for new trials set up in *Cox v. Hillyer*, 65 Ga. 57, will be found to contain nothing extraordinary. It was there held: "The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character." We apprehend that it is an ordinary occurrence for a witness subpoenaed by the defendant in a seduction case for the purpose of proving that the witness, from his personal experience, knows that the woman involved in the case was not virtuous at the time of the alleged seduction, to seek, by evasive and misleading statements, not made under oath, to avoid the embarrassment and humiliation of being placed upon the stand and publicly interrogated upon the subject, and that it is not extraordinary for

such a witness, if he is a friend of the defendant, to be persuaded, after the latter has been convicted and sentenced to a long term in the penitentiary, to make an affidavit in support of his motion for a new trial.

2. The other ground of this motion, in relation to the alleged newly discovered disqualification of one of the jurors who tried the case, cannot be considered, as it is not duly certified by the trial judge, but, on the contrary, is effectually disposed of by him in a note, which shows that this ground was known to the defendant and his counsel, and, in effect, waived by them, at the hearing of the first motion for a new trial.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 66)

#### MONAHAN et al. v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### KEEPING GAMING HOUSE—INSTRUCTIONS.

1. The fact that the court, upon the trial of one indicted for and convicted of the offense of keeping and maintaining a gaming house, charged the jury that they would be authorized to find the accused guilty if they believed, beyond a reasonable doubt, that he knowingly permitted persons to come together in a room or place occupied by him and play for money or other thing of value, at any game or device for the hazarding of money or other thing of value, was not cause for a new trial, when the evidence demanded a verdict of guilty of the offense charged.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Jack Monahan and others were convicted of keeping a gaming house, and bring error. Affirmed.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen. for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 82)

#### MCLEOD v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### VAGRANCY—EVIDENCE.

1. There was positive testimony that the defendant had no property to support her, was able to work, and wandered and strolled about in idleness; and, while conflicting, the evidence was sufficient to support a conviction for vagrancy. Pen. Code 1895, § 453.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Susie McLeod was convicted of vagrancy, and brings error. Affirmed.

J. R. Williams, for plaintiff in error. J. A. Ansley, Jr., for the State.

LAMAR, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 81)

**SMITH v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**CRIMINAL LAW—ATTENDANCE OF WITNESSES  
—HOMICIDE—DYING DECLARATIONS  
—INSTRUCTIONS.**

1. The Constitution, in guarantying that a defendant shall have compulsory process to compel the attendance of his witnesses, does not guaranty their attendance, nor more than ordinary diligence in serving a subpoena.

2. It was not error to charge that it was for the court, in the first instance, to determine whether the preliminary proof was sufficient to admit the dying declaration, with instruction that this ruling was not conclusive on the jury, who must be satisfied from the evidence that the statement was actually made in the article of death, and when the defendant was conscious of his condition.

3. It was not error, under the proved facts, to charge on the law of mutual combat and voluntary manslaughter.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Henry Smith was convicted of murder, and brings error. Affirmed.

John R. Cooper and Herman Brasch, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LAMAR, J. 1. The defendant had been convicted, and a new trial granted because of the absence of a witness. It appeared on the second trial that the officers had made diligent search in the county of the witness' residence, and were unable to find him; that his family stated that he had fled shortly before the second trial in order to escape arrest under a warrant charging him with a criminal offense; and that his whereabouts were unknown. The discretion of the trial judge in refusing a continuance because of the absence of such witness will not be interfered with. The Constitution provides that a defendant shall have compulsory process to obtain the testimony of his own witnesses, but does not guaranty more than ordinary diligence on the part of the officers, nor that they shall serve a witness who conceals himself. Civ. Code 1895, § 5702; Roberts v. State, 94 Ga. 72, 21 S. E. 132.

2. The judge charged the jury that it was for the court, in the first instance, to determine whether the preliminary proof was sufficient to admit dying declarations, but that this ruling was not binding upon them, and that they must be satisfied that the statement was actually made by the deceased, and that he was in the article of death and conscious of his condition at the time of making such declaration. This was not error. Pen. Code 1895, § 1000; Dumas v. State, 62 Ga. 58.

3. It was not error to charge the law of mutual combat and voluntary manslaughter. From the defendant's statement, it appeared that the deceased had a pistol, cursed the defendant, and, in the assault which followed, the defendant fired and killed his as-

sailant. It was for the jury to determine whether, under all the circumstances, the killing was murder, voluntary manslaughter, or justifiable homicide. Pen. Code 1895, § 65. From the state's evidence, it appeared that the deceased made an assault upon the accused and cursed him, and immediately thereafter the accused followed and shot the deceased from behind. It was not error for the court to submit to the jury the question whether this conduct on the part of the accused was in the heat of passion on account of the previous assault, or the result of malice, showing an abandoned and malignant heart.

4. There was no error in the charges given, the verdict is supported by the evidence, and the judgment refusing the new trial is affirmed by five Justices.

(118 Ga. 82)

**HURST v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**CRIMINAL LAW—REVIEW.**

1. No error of law was committed, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

William Hurst was convicted of crime, and brings error. Affirmed.

Hawkins & Weddington, for plaintiff in error. G. H. Williams, Sol., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 73)

**KNIGHT v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**CRIMINAL LAW—REVIEW.**

1. No error of law was complained of, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Bill Knight was convicted of crime, and brings error. Affirmed.

W. H. Beck, J. J. Flynt, and T. E. Patterson, for plaintiff in error. J. D. Boyd, Sol., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 17)

**GARY v. STATE.**

(Supreme Court of Georgia. May 30, 1903.)

**BEATING CHILD—INSTRUCTIONS—DESCRIPTION OF OFFENSE.**

1. Where one is indicted, under section 708 of the Penal Code of 1895, for cruelly, unreason

ably, and maliciously beating and ill-treating a child, it is error for the judge, in defining the offense to the jury, to omit the element of unreasonableness; and it is also error to refuse a legal request to charge that unreasonableness is an essential element of the crime.

(Syllabus by the Court.)

Error from City Court of Albany; Rich'd Hobbs, Judge.

Lewis Gary was convicted of ill-treating a child, and brings error. Reversed.

J. J. Hofmayer, for plaintiff in error. John D. Pope, Sol., for the State.

**SIMMONS, C. J.** The judge charged the jury that the elements of cruelty and malice were necessary to make out the case against the accused, and that the jury must be satisfied from the evidence "that the child was cruelly and maliciously treated by the defendant." He refused a request to give an instruction, submitted to him in writing before he began his charge, to the effect that each of the elements of cruelty, unreasonableness, and malice entered into the crime, and must be proved by the state. Error was assigned on the charge and on the refusal to charge. The charge, as given, left the jury free to find a verdict of guilty, without regard to the reasonableness of the beating, if cruelty and malice were present. Section 708 of the Penal Code of 1895, under which the accused was indicted, makes it a misdemeanor to "cruelly, unreasonably and maliciously beat or ill-treat any child," and the indictment charged that the accused did "unlawfully, and with force and arms, cruelly, maliciously, and unreasonably beat and ill-treat" a named child. Thus it will be seen that the request to charge followed the language of the Code and of the indictment, while the charge of the court differed from both, in that it omitted "unreasonableness" as an element of the crime. Since the legislative department has seen fit to include it as such an element, we cannot say that its omission was immaterial. It is made an essential element by the Code, and the judge erred in omitting it from his enumeration of such elements, and also in refusing to charge as requested.

Judgment reversed by five Justices.

(118 Ga. 86)

#### RAY v. BYRD.

(Supreme Court of Georgia. May 30, 1903.)

**BAIL TROVER—JUDGMENT FOR DEFENDANT—VERDICT.**

1. Property having been levied on, the plaintiff brought bail trover against the officer, giving bond, under Civ. Code 1895, § 4606, for the forthcoming of the property to answer the judgment in the case. The defendant prevailed in the suit, and elected to take a money verdict. *Held*, that the officer had only a qualified interest in the property, and, where it was worth more than the amount of the *f. fa.*, he was only entitled to recover a verdict for an amount sufficient to satisfy and discharge the execution

under which the levy had been made. *Holmes v. Langston*, 36 S. E. 251, 110 Ga. 864 (2).

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Jr., Judge.

Action by Jack Ray against J. E. Byrd. Judgment for defendant, and plaintiff brings error. Reversed.

R. D. Smith and Mathews & Riley, for plaintiff in error. W. J. Wallace, for defendant in error.

**LAMAR, J.** Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 13)

#### DANIELS v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

**CERTIORARI—EXCEPTIONS TO ANSWER—PETITION—CRIMINAL LAW.**

1. Exceptions to the answer to a writ of certiorari must specify the defects therein.

2. Where the petition for certiorari in a criminal case sets out a statement alleged to have been made by the accused upon his trial in the lower court, and no statement of the accused is contained in the answer, an exception that the answer does not reply specifically to the allegations of the petition, in that it does not set forth such statement, is sufficiently specific to require a fuller response to the petition.

3. The evidence demanded a finding in favor of the traverse to the answer.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Hammond Daniels was convicted of illegally selling liquors, and brings error. Reversed.

W. C. Snodgrass and Roscoe Luke, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

**FISH, J.** Hammond Daniels was convicted in the county court for unlawfully selling malt and intoxicating liquors. He carried the case by certiorari to the superior court, where, to the answer to the writ, he filed the following exceptions: "First, because the testimony of Charles Davis, one of the witnesses in the trial of the case in the court below, is not stated, but merely the judge's deductions therefrom; second, the statement of Hammond Daniels is neither given in full nor in substance; third, because the said judge presiding does not reply to the allegations and assignments of error in said petition for certiorari, that the same may be duly presented to this honorable court; fourth, because said answer does not give to this court a full and complete history of the case as tried by him, that the same may be duly presented to this honorable court." These exceptions were overruled, and the accused excepted to the ruling. The answer was then traversed, and, upon the trial of

the issue so made, the judge found against the traverse. The accused also excepted to this ruling. The certiorari was then heard and overruled, and the plaintiff in certiorari again excepted.

1. The judge of the superior court rightly overruled the first, third, and fourth exceptions to the answer. An examination of the answer shows that it is not subject to the first exception. The third exception is too general and indefinite, in that it does not point out wherein the answer does not reply to the allegations and assignments of error in the petition for certiorari. The fourth exception is also too general and indefinite. It does not point out wherein the answer fails to give a full and complete history of the case. While the answer to the writ of certiorari must reply specifically to the allegations in the petition, exceptions to the answer must not only be in writing, but must specify the defects therein. Civ. Code 1895, §§ 4646, 4647; *Franklin v. Kaufman*, 65 Ga. 260. Apparently, the answer, read in connection with the allegations of the petition for certiorari, is, save as to the defect specified in the second exception, sufficiently full and explicit.

2. The only reference made in the answer to the statement of the accused was that "the statement of the defendant, as against positive statements under oath, was not considered worthy of belief." The petition fully set forth what was claimed to be the statement of the accused. We think that the second exception, to the effect that the answer did not set out any statement of the accused, was sufficiently specific, and should have been sustained, and the judge of the county court ordered to perfect his answer by setting out the statement of the accused. Whatever may have been the opinion of the county judge as to the credit to be given to the statement, the accused had the right to have that question passed upon by the judge of the superior court.

3. One of the grounds of the traverse was as to the testimony of Henry Kelly, upon which the state relied for a conviction. If the testimony of this witness was as set out in the answer, it was amply sufficient to show the commission of the offense by the accused. On the other hand, if his testimony was as set out in the petition for certiorari, which the traverse alleged truthfully and fully set forth his testimony, the conviction was unauthorized. Upon the hearing of the traverse, this witness testified that his testimony upon the trial in the county court was correctly set out in the petition, except in two particulars, which were not very material, and that he did not testify as set forth in the answer. Kelly was the only witness who testified upon the trial of the traverse, and, as his testimony then given was not contradicted, we think the judge erred in finding against the traverse.

Judgment reversed by five Justices.

(118 Ga. 58)

# BECKETT v. MAYOR, ETC., OF CITY OF SAVANNAH.

(Supreme Court of Georgia. May 30, 1903.)

LICENSE—MONEY LENDERS—CONSTITUTIONAL LAW.

1. While an attorney at law who engages in the business of lending money is subject to a lawful municipal tax imposed upon all money lenders, an ordinance which seeks to tax attorneys at law who lend money, without taxing other money lenders, is violative of that provision of the Constitution which requires that "all taxation shall be uniform upon the same class of subjects."

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Isaac Beckett was convicted of violating an ordinance of the city of Savannah, and brings error. Reversed.

W. P. La Roche, for plaintiff in error. Wm. Garrard, and W. W. Osborne, for defendant in error.

SIMMONS, C. J. Error is assigned on the judgment of the judge of the superior court of Chatham county overruling a certiorari to the recorder's court of the city of Savannah. From the record it appears that the plaintiff in error was by the recorder found guilty of a violation of a city ordinance which is as follows: "Attorneys at law who advertise money to lend or in any other way engage in the business of money lending, whether for clients or not, shall pay a tax of \$75.00." One of the contentions of the accused before the recorder and in the superior court was that the ordinance was unconstitutional and invalid, in that it was violative of paragraph 1 of section 2 of article 7 of the Constitution of Georgia, which provides that "all taxation shall be uniform upon the same class of subjects." The right of an attorney at law to practice his profession does not include the right to engage in another and independent business. If an attorney at law engages in the business of lending money, he is as much subject to taxation on such business as are other money lenders who are not attorneys; and it may be competent for the mayor and aldermen of the city of Savannah to treat the advertising of money to lend as an offer to transact the business of money lending, and to impose a tax on those who advertise money to lend, or otherwise engage in the business of money lending. Conceding that this is true, and that the city authorities had this power, the ordinance under discussion is still illegal, for it does not use the power in a lawful manner. That the requirement of our Constitution as to uniformity of taxation upon the same class of subjects refers to such a tax as this, see *Mayor, etc., of Savannah v. Weed*, 84 Ga. 683, 685, 11 S. E. 235, 8 L. R. A. 270. While an attorney at law who engages in a business not a part of his profession may be subject to a tax imposed upon all engaged in such business, he cannot be

taxed on such business merely because he is in attorney, and without taxing all others engaged in that business. A uniform tax might be imposed upon all money lenders, and an attorney at law would be subject thereto, but attorneys who lend money cannot be so taxed when other money lenders are not. This court has repeatedly held that this kind of tax must be uniform upon all business of the same class. *Mutual Reserve Ass'n v. Augusta*, 109 Ga. 78, 35 S. E. 71, and cases cited. Such a tax cannot be imposed upon certain particular persons engaged in a business without taxing others engaged in the same business. An attorney at law cannot be required to pay a tax for lending money, and to take out a license as a prerequisite to engaging in that business, when no similar burdens are imposed upon money lenders who happen not to be attorneys at law. Such a classification of those who advertise money to lend or engage in the business of lending money is not natural, but arbitrary and unreasonable, and cannot be upheld. The ordinance under which the plaintiff in error was convicted was clearly directed at those money lenders who were also attorneys at law, and it did not embrace other lenders of money. The ordinance was unconstitutional and void, and should have been so held by the recorder, and it was error for the judge of the superior court to overrule the certiorari.

Several other questions were raised—among them, that the case should have been dismissed by the recorder because the summons or charge was insufficient, that evidence was illegally admitted, and that there was no evidence to authorize the verdict. With these we do not deal, as the decision above made is controlling and fully disposes of the case.

Judgment reversed by five Justices.

(118 Ga. 42)

#### LAMB v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### HOMICIDE—INSTRUCTIONS—CONFESSIONS—NEW TRIAL.

1. The instructions of the trial court as to confessions and as to dying declarations were warranted by the evidence, and stated correct principles of law.

2. The charge on the subject of reasonable doubt contained no error sufficient to require the grant of a new trial.

3. The evidence did not require a charge on the law of voluntary manslaughter, and no request for such a charge seems to have been made.

4. The court below committed no error in overruling the motion for a new trial on the general grounds.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; B. D. Evans, Judge.

Andrew Lamb was convicted of crime, and brings error. Affirmed.

John R. Cooper, Jas. A. Thomas, and H. P. Howard, for plaintiff in error. Jos. E.

Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 60)

#### PRICE v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### ASSAULT—EVIDENCE.

1. A finding that the accused was guilty of an assault was fully warranted by the evidence, from which it appeared that he entered the house of the prosecutrix, notwithstanding he had been repeatedly told by her not to come there, and began to curse and abuse her; that she thereupon "picked up a bed slat or door bar, and hit him two licks on the leg, when he grabbed up a hoe and tried to hit" her a severe blow; and that he was prevented from thus inflicting upon her a grievous battery only by reason of the fact that another man present interposed, and "caught the lick with a chair." The jury might well have reached the conclusion that, in view of the provisions of section 103 of the Penal Code of 1895, the prosecutrix was justified, because of the opprobrious words and abusive language of the accused, in striking him as she did; it not appearing from the testimony that the weapon with which she struck him was used by her in such manner as to inflict upon him great bodily injury, and he, in his statement to the jury, making no pretense that he acted in self-defense, but relying wholly upon his flat denial that he made any attempt to strike her with the hoe.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Taliaferro, Judge.

J. W. Price was convicted of assault, and brings error. Affirmed.

J. A. Robson, for plaintiff in error. J. E. Hyman, Sol., for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 21)

#### HILL v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### WRIT OF ERROR—DISMISSAL—CRIMINAL LAW—RECEPTION OF VERDICT—ABSENCE OF ACCUSED.

1. Where a bill of exceptions presents for determination several questions, some of which are prematurely brought before this court, but others of which are not, the writ of error will not be dismissed, but those questions which are properly here will be adjudicated.

2. The accused was out on bond, and at the time the jury were ready to deliver their verdict he had voluntarily absented himself from the court. His counsel offered to waive his presence, and asked that the verdict be received and published. The court declined to do this, but passed an order declaring a mistrial. *Held*, that this was error, and, it appearing that the verdict agreed upon by the jury was one of acquittal, direction will be given that the verdict be published as agreed upon, and the accused discharged.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Homer Hill was indicted for misdemeanor. The judge discharged the jury, which had agreed upon his verdict, and forfeited de-



defendant's bond, and he brings error. Reversed.

Starr & Erwin, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

CANDLER, J. The accused was tried in Gordon superior court upon an indictment charging a misdemeanor. After the evidence was all in, and the court had delivered its charge, the jury retired, made up their verdict, signed the same by its foreman, and returned to the courtroom to deliver it in open court. The accused had previously given bond for his appearance in court and to abide the judgment that might be rendered. When the jury returned to the courtroom with the verdict, he was not present, but his counsel offered to waive his presence, and asked that the verdict be received. This the court refused to allow, and passed an order declaring a mistrial, and discharging the jury, to which the accused excepted. The bill of exceptions recites that the court "immediately permitted the Solicitor General to forfeit the bond given by the defendant, \* \* \* to which ruling \* \* \* the defendant excepted, and now assigns the same as error." It also appears that during the same term of court the accused moved the court to set aside the forfeiture and grant an order acquitting him of the offense of which he was charged. This motion recites that the verdict agreed upon by the jury was one finding the accused not guilty. The overruling of this motion is also assigned as error in the bill of exceptions. As part of the record material to a clear understanding of the alleged errors complained of, the plaintiff in error specifies "the verdict of said jury as made on said indictment," and in the record sent to this court appears what purports to be a verdict finding the accused not guilty.

1. When the case was called for argument here, the Solicitor General moved to dismiss the writ of error, on the ground that the questions raised by the bill of exceptions were prematurely brought before this court. If the order of the court forfeiting the bond and the refusal of the motion to set aside that forfeiture were the only question before us, the motion of the Solicitor General would be well taken, for at the next term of the court, on a motion to take a final judgment on the bond, the defendant would have the right to set up the verdict of acquittal as a defense to the action on the bond. The rule nisi forfeiting the bond only called upon the accused and his securities to show cause why a judgment for the amount of the bond should not be rendered against him. Therefore so much of the bill of exceptions as seeks to review the action of the court in ordering the forfeiture of the bond is premature, but the assignment of error upon the order declaring a mistrial and declining to receive the verdict is properly before us at this time, because the receipt of a verdict of acquittal would

have been an end of the case. As this is really the main contention made here, the motion to dismiss the writ of error is overruled.

2. We are satisfied that the court erred in refusing to receive the verdict agreed upon by the jury. The accused was on bond for his appearance to stand his trial and abide the judgment of the court, and upon the reception of the verdict in the event of a conviction the court could have forfeited the bond, and, if the accused was not in court at the next term, a judgment absolute could have been entered thereon. On the argument here it was contended that, to allow the accused in a case like this to absent himself from court at the time of the rendition of the verdict would be to enable him, in case of his conviction, to prevent and postpone the enforcement of the law for as long as six months. This is true, but the same is also true in any case where one accused of crime is out on bond, for, if the accused does not see fit to comply with the terms of his bond and appear in court when his case is called for trial, the most that the court can do is to forfeit the bond and issue a bench warrant for his arrest; and, if he can elude the officers of the law, he can postpone even the trial of his case for six months, and at any time before the case is called for trial at the next term of the court he can pay the accrued costs of the forfeiture, and give a new bond. So, if this reasoning should prevail, the giving of bonds in all criminal cases could, solely in the interest of the punishment of crime, be abrogated. But our law is jealous of the liberty of the citizen, and to that end encourages the giving of bonds in criminal cases to the greatest extent consistent with the preservation of justice. This court has more than once ruled that it is the right of the defendant in a criminal case to be present at all stages of his trial, especially at the rendition of the verdict, and that, if he be in jail, or otherwise in custody, a verdict of guilty, received during his compulsory absence, will be illegal. The right to be present at the rendition of the verdict, however, is a privilege accorded to the accused, and we have yet to learn of a case holding that the right cannot be waived by the accused or his counsel. In the case of *Barton v. State*, 67 Ga. 655, 44 Am. Rep. 743, it was said: "The principle thus ruled is good sense and sound law, because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into court by its order;" citing *Nolan v. State*, 53 Ga. 137, and *Id.*, 55 Ga. 521, 21 Am. Rep. 281. On the other hand, it has been as often ruled that where, at the time of the rendition of the verdict, the accused is voluntarily absent from the courtroom on bond, he cannot complain if the verdict is rendered in his absence. Judge Bleckley, in the *Nolan Case*, *supra*, clearly draws the distinction between the two class-

es of cases. There is, as is there pointed out, a strong reason for the difference, because, if the verdict could not be received during the voluntary absence of the accused, it would be possible for one by his own voluntary act to indefinitely postpone the rendition of a verdict in his case. In the language of Chief Justice Jackson in the Barton Case, supra: "From the charge of the court, from the countenances of the jury, from the course of the argument, from the hints or misgivings of counsel, from information leaking out of the jury room, the defendant might see that the jury would convict him, and absent himself until the verdict was rendered, and thus have its rendition made entirely nugatory by his own act. The forfeiture of the bond is nothing. Appearance at the next term would save his bail, and trivial costs only would be the penalty paid, while the whole case must be tried again, or the defendant discharged altogether. A second trial at the next term could be made at his option to result in the same way at the same trivial costs, and so on ad infinitum." In the case of Robson v. State, 83 Ga. 166, 9 S. E. 610, when the verdict was brought into court, the accused was at large on bond, and was voluntarily absent. His counsel, as did counsel in the case at bar, waived his presence, and consented to the reception of the verdict. It was held: "When one on trial for a felony is at large on bond, and is voluntarily absent when the verdict is returned, the verdict may nevertheless be received and published, especially as his counsel makes an express waiver of the client's right to be present." The rules of law are applied more strictly in felony cases than in misdemeanor cases. As has been observed, the rule that the accused has the right to be present when the verdict for or against him is returned into court is one made for the benefit of the accused. If he voluntarily absents himself from court at that time, waiving the right to be present, he must take the chances of the verdict. If he is found guilty, he cannot complain that he was not present when the verdict was returned; and so, if the verdict is one of acquittal, he should not be denied the privilege of having it received and published according to law.

As will have been observed, this case presents one anomalous feature, which renders extremely difficult a logical disposition of the question presented for determination. Strictly speaking, the verdict is still within the minds of the members of the jury impaneled to try the case, as it was never received by the court, and hence could not properly go on record; and yet we have before us what purports to be a record of the verdict rendered by the jury. We have it, however, from the certificate of the trial judge to the truth of the recitals of fact in the bill of exceptions, and from the alleged record which was by him ordered to be sent to this court, that, had the verdict been received, it would

have resulted in the acquittal of the accused. As has been seen, the refusal to receive the verdict, and the order declaring a mistrial, are held to have been erroneous; and direction is therefore given that the order declaring a mistrial be set aside, and that the verdict, which appears from the record to have been agreed upon by the jury, and fully written out, and duly signed by its foreman, and returned into court, be entered upon the minutes of the court nunc pro tunc, and the accused discharged.

Judgment reversed, with direction, by five Justices.

(118 Ga. 69)

#### MADDOX v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—INSTRUCTION—INTOXICATING LIQUORS.

1. On the trial of a criminal case it is not error prejudicial to the accused for the court to charge the jury that in reconciling conflicts in the evidence they may take into consideration evidence as to the good character of the accused.

2. A beverage is not necessarily an intoxicant. Accordingly, on the trial of one accused of unlawfully selling intoxicating liquors, the use by the trial judge, in his charge to the jury, of the word "beverage," to describe certain drinks that the accused admitted having sold, was not an expression of opinion that the accused was guilty of selling an intoxicant.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

G. W. Maddox was convicted of selling liquors, and brings error. Affirmed.

John R. Cooper, S. B. Baker, and H. P. Howard, for plaintiff in error. G. H. Williams, for the State.

CANDLER, J. The accused was tried and convicted in the city court of Dublin upon an accusation charging him with unlawfully selling alcoholic, spirituous, malt, and intoxicating liquors, and other drinks which if drunk to excess will produce intoxication. He made a motion for a new trial, which was overruled, and he excepted.

1. One ground of the motion complains that the court erred in the following charge to the jury: "In determining where the weight of evidence lies, or in reconciling conflicts in the evidence, if any, you would take into consideration the character of the defendant and see what his character is; and if you believe from the evidence that he has a good character, that you can take into consideration in reconciling the conflict in the evidence, if any conflict; and that fact you will consider throughout the trial of the case." By reference to the copy of the judge's charge appearing in the record, it appears that the extract quoted ends in the midst of a sentence; and immediately following the word

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 1100.

"case," without even the intervention of a comma, appear the words, "In determining whether or not the defendant is guilty." We fail to see how this charge could have been hurtful to the accused. The court instructed the jury that they had the right to consider the character of the accused in determining upon which side of the case the truth lay, but he nowhere charged that proof of good character could only be considered when there was a conflict in the evidence. At the time, he was charging on the subject of the credibility of witnesses, their manner of testifying, and the various rules for weighing testimony, and in this connection, independently of the law as to the general effect of proof of good character of the accused, he charged the jury that, if the accused had proved a good character, they might also take that into consideration in determining where the truth of the case lay. It would seem to us that this charge was, in its tendency, anything but hurtful to the accused. It allowed the jury, in determining which of two witnesses they would believe, one for and the other against the accused, to take into consideration proof of the good character of the accused, and hence it was helpful, rather than hurtful, to him. The accused had offered evidence during the progress of the trial to show that his reputation and character were good; but several witnesses, testifying to his general character, had said that he had the "character of a liquor seller." Whether he deserved it or not, however, these witnesses did not know. It is not complained that elsewhere in the charge the court did not give to the jury the law as to the effect, on this case, of proof of the good character of the accused, or that there was a failure to inform the jury that they might consider any proof offered by the accused as to his good character in determining whether or not he was guilty beyond a reasonable doubt. Evidence having been offered as to the good character of the accused, the court should have given the law on that subject to the jury; but no complaint was made of the court's failure in this respect, nor does it appear that any written request was made to the court to charge on the subject. The sole complaint is that the court told the jury that in determining conflicts between the witnesses for and against the accused they might determine these conflicts in view of the evidence offered by the accused as to his good character. As before stated, the charge complained of was distinctly helpful, rather than hurtful.

2. The following portion of the charge of the court is also assigned as error: "Applying the principles of law to the evidence in the case, if you believe the defendant, in this county and state, sold a beverage which if drunk to excess would produce intoxication, it would be your duty to find him guilty. If you find it would not produce intoxication, it would be unnecessary to go any further, and it would be your duty to acquit the

defendant. If you believe from the evidence that the other kind of beverage which defendant sold was the identical beverage as that sold on this occasion, and that the former was a nonintoxicant, then the defendant should be acquitted. But if you believe this beverage was intoxicating, it would make no difference whether that formerly sold would intoxicate or not, and it would be your duty to find the defendant guilty, and in that event the form of your verdict would be, 'We, the jury, find the defendant guilty.'" The error assigned upon this charge is that it was misleading, was not a clear statement of the case, and that the court presumed that the "lager soda" that the defendant sold "was a beverage, which is a liquor, and the presumption is that it is intoxicating, or might be so considered by the jury." It is claimed, therefore, that in using the expression "beverage" the court intimated to the jury an opinion that the accused had sold liquor, whereas he was not shown to have sold a beverage, but had sold the drink already referred to as "lager soda." A number of witnesses testified that they had bought from the accused bottles containing a drink known as "lager soda," which was intoxicating when drunk in quantities. If these witnesses told the truth, then unquestionably the accused sold such intoxicating liquors as were contemplated by the accusation. The accused introduced one witness, who claimed to have manufactured a drink called "lager soda," and he testified that it contained only about 1½ per cent. of alcohol. The accused contended that this was the drink sold to the various witnesses for the state, and it was upon this phase of the case that the court gave the charge now under consideration. The charge was certainly as favorable to the accused as he could have asked. Reduced to its last analysis, it amounted to a statement that if the jury believed that the drink about which the state's witnesses testified as having been sold them was the same drink as that about which the witnesses for the accused testified, and that it was nonintoxicating, they should acquit the accused; but, on the other hand, if they believed that the drink about which the witnesses for the state testified was an intoxicant, it would be immaterial whether the drink about which the witnesses for the accused testified was intoxicating or not. Webster's International Dictionary defines a "beverage" to be a "liquid for drinking; drink;—usually applied to drink artificially prepared and of an agreeable flavor. \* \* \* Specifically, a name applied to various kinds of drink." For a judge, in charging the jury, to use the word "beverage," is in no sense an expression of opinion that the drink referred to is intoxicating. It is as proper to apply the word "beverage" to a cup of coffee or a glass of lemonade as to a glass of beer or whisky, and from a careful reading of the entire charge we are satisfied that no intelligent jury could have been

misled by the language used by the trial judge.

The foregoing covers all of the motion for a new trial that we consider of sufficient importance to require discussion here. The evidence for the state was ample to authorize the conviction of the accused; there was no error in any of the charges complained of; and this court will not disturb the judgment overruling the motion for a new trial.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 61)

#### PRICE v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—REVIEW.

1. There was no error in excluding evidence, and the evidence introduced authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. K. Tallafarro, Judge.

J. N. Price was convicted of crime, and brings error. Affirmed.

J. A. Robson, for plaintiff in error. J. E. Hyman, Sol., for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 83)

#### WATSON v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—INSTRUCTIONS—NEW TRIAL—CUMULATIVE EVIDENCE.

1. The alleged impeaching evidence was not of such a character as to authorize a reversal of the judgment of the court below for refusing to charge the law in regard to impeachment, in the absence of a written request for such a charge. There was no error in the charge of which complaint is made. The alleged newly discovered evidence was merely cumulative in character. There was sufficient evidence to sustain the conviction of the accused, and the court below did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; B. D. Evans, Judge.

Z. F. Watson was convicted of crime, and brings error. Affirmed.

S. B. Baker and H. P. Howard, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 99)

#### CANNON v. SHAHAN.

(Supreme Court of Georgia. May 30, 1903.)

##### FRAUDULENT CONVEYANCE—EVIDENCE—EXECUTION—CLAIM OF THIRD PERSON.

1. There was no evidence, from the attesting witnesses or otherwise, tending to show that the

deeds were signed after the judgment, or made for the purpose of delaying and defrauding creditors, and the verdict for the claimant was demanded by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Claim case between J. M. Shahan and A. E. Cannon. Judgment for claimant, and defendant brings error. Affirmed.

Cantrell & Ramsaur, Walter M. Jones, and W. C. Martin, for plaintiff in error. Starr & Erwin, for defendant in error.

LAMAR, J. In a claim case the plaintiff in *fi. fa.* assumed the burden. The only proof of possession by the defendant after the judgment was that he had a key to the house levied on, and alleged to have been sold to the claimant, who resided at a distance, and that the defendant kept his buggy in the stable, which was also used by the public generally for that purpose. The claimant showed a sale of the property under deeds dated before the judgment, but not recorded until the date of the levy. There was no attempt to prove, by the witnesses to the deeds, or otherwise, that they were in fact executed after the judgment was rendered, and a verdict for the claimant was demanded by the evidence.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 123)

#### LESTER et al. v. LESTER.

(Supreme Court of Georgia. May 30, 1903.)

##### APPEAL—REVIEW.

1. Both the pleadings and the evidence bring this case clearly within the jurisdiction of a court of equity. The questions of law raised in the record do not present any reason for reversing the judgment of the lower court, and that court did not abuse its discretion in granting the injunction.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by J. F. Lester against W. H. Lester and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Porter, for plaintiffs in error. Mayson, Hill & McGill, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 364)

#### BERRY et al. v. CLARK et al.

(Supreme Court of Georgia. April 8, 1903.)

##### EVIDENCE—CERTIFIED COPY OF MAP—HARMLESS ERROR—INSTRUCTIONS—CONSTRUCTION OF DEED—ERROR IN DECREE—TRESPASS.

1. A properly certified copy of a map of Houston county in the office of the Secretary of

State is admissible in evidence without proof of the correctness or existence of the original.

2. Where by a slip of the tongue the judge designates the act of the scrivener as a mistake of law, instead of a mistake of fact, a new trial will not be granted, unless there is a showing that the objecting party was injured thereby.

3. Where one party claims under a deed which the other party is asking to have reformed for a mistake, it is not an expression of opinion, forbidden by Civ. Code 1895, § 4334, for the judge to construe the deed, and charge the jury as to its effect.

4. A motion for a new trial is not the proper means for correcting an error in a decree alleged to be unwarranted by the verdict and pleadings.

5. There was no complaint that the judge refused any written request of the defendant; the general charge fully submitted the issues; there was no error in the charge as given; and, if the defendant desired more specific instructions, written requests to that effect should have been presented.

6. The evidence was conflicting, but sufficient to sustain the finding of the jury.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by S. M. Clark and others against F. W. Berry and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Mrs. Clark filed a petition to restrain Mrs. Berry from cutting timber on land lot No. 102 in Houston county. Mrs. Berry defended on the ground that the timber being cut was on lot 103, to which she had title. By an amendment she set up that, if the timber was actually on lot 102, she still had the right to cut it, inasmuch as it was on that part of 102 north of Big Indian creek; that in a division of land acquired from their father, J. W. Woolfolk, Sr., she and her brother W. W. Woolfolk had received from Mrs. Clark, their sister, a deed to lot 103, and all that part of 102 which was north of Big Indian creek, known as the "Little West Place"; that the partition deed was prepared in Atlanta, when the plats and deeds containing accurate descriptions were inaccessible, but it was understood between all the parties that Mrs. Berry and her brother should get the land running down to Big Indian creek. She prayed that the deeds should be so reformed as to speak the true intent of the parties at the time the partition was made, and for a decree that she had perfect title to the said land known as the "Little West Place," extending to and bounded by Big Indian creek, by virtue of continuous possession under claim of right, and for general relief. Mrs. Clark denied this contention, and insisted that the conveyance to her of lot 102 expressed the real understanding; that nothing was said about Big Indian creek being the boundary at the time the division was made. Both parties insisted that they had been in possession of the disputed land, by themselves or their tenants, since the execution of the partition deed in 1891. Deeds

and plats were introduced. There was evidence by the surveyors as to what was the true line, and testimony as to what was the understanding of the parties in Atlanta at the time the deed of partition was made, and what were the boundaries of the Little West place. The evidence on these and most other points was very conflicting. The jury found in favor of Mrs. Clark. The defendants filed a motion for new trial, containing 19 grounds, with subassignment, which was overruled, and they excepted.

Ross & Grace and Duncan & Duncan, for plaintiffs in error. A. C. Riley and W. O. Davis, for defendants in error.

LAMAR, J. The motion assigns as error that the court admitted in evidence a tracing purporting to be "a correct copy of the map of Houston county, on file in the office of the Secretary of State," over the objections of defendants that the same was secondary evidence, that there was no proof of its correctness, that it did not appear when or by whom it was made, and that there was no proof that the map on file in the office of the Secretary of State was a true and correct map of Houston county or of the lands in dispute. The copy was correctly certified, and under the ruling in *Polhill v. Brown*, 84 Ga. 342, 10 S. E. 921, was admissible. Civ. Code 1895, §§ 5211, 5212. It was not conclusive. Its weight was for the jury, who could compare it with other evidence in the case.

It is assigned as error that the court told the jury that "defendants alleged that the scrivener had by mistake incorrectly expressed the agreement of the parties in the deed of partition," and stated that "this was a mistake of law." That by a slip of the tongue the judge called the act of the scrivener a mistake of law, instead of a mistake of fact, would not require the grant of a new trial, unless defendants should show wherein they had been harmed by the lapsus linguæ. For the jury were instructed that the result of a mistake of either sort should be a verdict for the defendant. Civ. Code 1895, §§ 3980, 3983.

There was a conflict of the evidence as to the possession of the land in dispute since the execution of the deed of partition. Mrs. Berry claimed that she had been in adverse possession, and had acquired title thereby. If the land was in fact conveyed to her by deed, she did not need to rely on prescription. If, however, the lot was not described in the deed, she could not have been in possession under color of title, and prescription could not have ripened short of 20 years. Civ. Code 1895, § 3588.

The fourth, fifth, sixth, and seventh grounds of the amended motion may be grouped together. The court read portions of the deed of partition, and, in effect, instructed the jury that the instrument put paper title to all of lot 102 in the plaintiff.

¶ 4. See *New Trial*, vol. 37, Cent. Dig. § 35.

It was assigned as error that this was inapplicable and misleading, that it excluded from the consideration of the jury other portions of the deed on which the defendant based her claim of title, that the contract showed that Mrs. Berry had not conveyed to Mrs. Clark that part of the West place in which the timber was situated, and that the judge did not submit to the jury the effect of the intention on the part of the parties to make Big Indian creek the boundary line. We have carefully considered each of these charges, and the attack thereon, but fail to find error therein. The pleadings and evidence required the judge to instruct the jury on this subject. The construction of the deed seems to have been correct. Indeed, defendants' allegations as to mistake and the prayer for reformation impliedly recognize that on its face the deed put title in the petitioner. In the deed of partition the land conveyed to Mrs. Clark was described as the "West place, being lots 109, 102, 67, 101, 68, 60, and 25 [except certain parts of lots 61, 109, 110] being 1,439 acres in the 12th and 13th districts of Houston county. \* \* \* This includes all of the West tract except that this day conveyed to Mrs. Cartwright and W. W. Woolfolk, consisting of 290½ acres." By this same deed of partition, Mrs. Berry was to have "such part of the West place in the 13th district of Houston county, being all of number 103 and 88 acres in the southwest corner of number 66, and 10 acres in the southeast corner of 104." From these descriptions it will be seen that lot 102 was, without qualification, conveyed to Mrs. Clark, and lot 103 to Mrs. Berry. The timber being on one or the other of these two lots, any construction as to what the deed meant with reference to the big or little West place, or as to any other land, would be irrelevant and harmless, whether as to such other land the deed was properly or improperly construed; the judge having charged that Mrs. Berry had conveyed away all of her interest in the West place, whether known as the "Big West Place" or the "Little West Place." The plaintiff earnestly insists that in so doing he expressed an opinion as to what had been proved, and that Civ. Code 1895, § 4334, "requires a new trial, even if the charge was a correct statement of the fact, as shown by the written contract of partition." The purpose of that section was to prevent judges of trial courts from directly or indirectly infringing on the province of juries, but it was never intended to modify the court's power and duty to construe written instruments. Civ. Code 1895, § 3672. There is a difference between referring to testimony, and saying what that testimony has established. The judge is absolutely prohibited from even expressing an opinion as to what has been proved, but he is not cut off from properly dealing with the evidence which has been introduced. He must charge as to the respective theories which have been

raised by the evidence. In construing a written instrument, he must treat it as a paper introduced in evidence. In telling the jury what is its meaning, he must not talk to the winds, or deal with the paper as a mere abstraction. He must apply his construction to what is claimed to be a fact, and must necessarily refer a deed's legal effect to property under consideration, or to some theory raised by the testimony or pleadings. In *Goldsmith v. White*, 68 Ga. 334, it was held: "The construction of a deed is for the court. In construing the description, he is not limited to an exact direction of lines, but may construe the entire description together, including the termini of the lines, so as to reach a consistent and reasonable construction of the grantor's meaning." And in *Holman v. Georgia R. R.*, 67 Ga. 595, the court construed the contract and letters to mean that the plaintiff impliedly waived an indorsement, or authorized the agent to indorse the elevator receipt. See *Benton v. Horsley*, 71 Ga. 619 (2); *Shiels v. Stark*, 14 Ga. 429 (1) and (2); *Thornton v. Zane*, 11 Ga. 461 (19).

The judge charged the jury that, if the land in dispute was a part of lot 103, their verdict must be for the defendant; that, if they found it was part of lot 102, it would be necessary for them to determine whether there had been any mistake by the scrivener in drawing the deed of partition. He then proceeded very fully and fairly to state the contentions of the parties as raised by the pleadings and evidence. If the defendant had desired other and more specific instructions as to the law of mistake, and the effect of possession under the deed in shedding light on the question as to whether there had been a mistake in drawing the partition agreement, proper requests to charge should have been submitted; but, in the absence thereof, we cannot consider a number of assignments in the motion for a new trial that the court erred in failing to charge the jury in a particular manner. Where the charge as given was correct, a new trial cannot be granted because of a failure to charge something additional, even though it might have been appropriate.

There is no complaint that the court refused to give any charge requested in writing by the defendant. There are a number of assignments and subassignments that the court failed to charge on various matters—on the right to relief in equity where the party complaining acts promptly; on the effect of possession; on the effect of the understanding of the parties; on the effect of the understanding of Mrs. Berry, known to Mrs. Clark at the time the partition agreement was made; on the mutual intent of the parties to make Big Indian creek the boundary line; on the burden of proof, and the rule for determining the preponderance of evidence and the credibility of witnesses. We find no error in the charges given. The

court submitted in general terms the issues raised by the pleadings, and, if the defendant desired charges on special points, it was necessary to present written requests to that effect.

The verdict of the jury was "for the plaintiff, and enjoin further trespassing by the defendants." Thereupon the court enjoined further trespassing, decreed that title to the lot in dispute was in Mrs. Clark, and ordered the county surveyor to mark the lines between the plaintiff and the defendant. It is argued that, on a petition for injunction, it was improper to determine the title, and that the decree is broader than the verdict. The answer of the defendant raised the issue of title, and prayed a reformation of the deed, for a decree adjudging that Mrs. Berry owned the land to Big Indian creek, and that the surveyor mark the lines of the property. Even if the decree was not warranted by the verdict, it cannot be corrected by motion for a new trial, which is limited to the consideration of errors occurring during the trial which may have affected the finding of the jury.

The evidence was very conflicting. There was sufficient to sustain the finding of the jury in favor of the plaintiffs. The judge of the superior court was satisfied therewith, and, in view of the uniform rulings of this court in similar instances, we cannot interfere.

Judgment affirmed by five Justices.

(118 Ga. 38)

#### SMITH v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

##### CRIMINAL LAW—EVIDENCE—NEW TRIAL—BRIEF OF EVIDENCE—APPEAL.

1. Where, in a criminal case, there is no proof of the venue, a verdict of guilty is without evidence to support it.

2. The brief of evidence filed with the motion for a new trial and approved by the trial judge must be treated as correct, and this court has no power to amend it, or to order the clerk of the court below to send up the original transcript of the evidence, although it may have been identified by the judge.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Plummer Smith was convicted of selling intoxicating liquor, and brings error. Reversed.

Jas. B. Hicks and Hawkins & Weddington, for plaintiff in error. G. H. Williams, Sol., for the State.

SIMMONS, C. J. In the city court of Dublin, Plummer Smith was convicted of the illegal sale of intoxicating liquors. He moved for a new trial, and the motion was overruled. He excepted.

1. One of the grounds of the motion for

new trial was that the verdict was "contrary to evidence, and without evidence to support it." The brief of evidence filed with the motion for new trial, and approved by the judge, contains no evidence whatever as to venue. The failure to prove the venue was insisted on here in the brief of counsel for the plaintiff in error. The venue is a jurisdictional fact, and without proof of it a conviction is unwarranted; and the lack of evidence of the venue is covered by the exception that the verdict is contrary to evidence, and without evidence to support it. *Futch v. State*, 90 Ga. 472, 16 S. E. 102.

2. This was recognized by counsel for the state, and he sought to cure the defect. He filed a petition in this court, reciting "that by error and mistake the brief of evidence in said case, agreed to by your petitioner \* \* \* and approved by [the presiding judge], is incorrect, because it fails to show that the venue was proven," and praying that the clerk of the court below be required to send up "the original evidence in said case, identified as such by the judge of said court as correct, and that it be made a part of the record in said case in this court." This we cannot do. In the first place, the original transcript of the evidence, though identified by the judge, is no part of the record, and cannot be transmitted as such by the clerk. Again, the law contemplates that this court shall deal with a brief of the evidence in each case, and not with an unabridged report or transcript, and this court has frequently declined to consider the latter even where it had been characterized and approved by the trial judge as a "brief" of the evidence. A bill of exceptions may in certain cases be amended by the record, and a defect in a transcript of the record sent to this court may be cured by ordering the clerk to send up a correct copy of the record below; but, where the transcript sent up is in accord with the record below, this court has no power to amend the record, or to consider a transcript of a paper which is not part of the record of the case. In deciding a motion for new trial, the judge below should pass on the evidence as contained in the brief of evidence; and we cannot, in reviewing his decision, consider matters which were not before him on the hearing of the motion. The brief of evidence purports to contain all of the material evidence, and we can no more consider a statement of additional facts than we can a statement which directly contradicts the statements in the brief. In passing upon the evidence, we must be governed solely by the brief of evidence approved by the trial judge. *Minhinnett v. State*, 106 Ga. 141, 32 S. E. 19; *Clark v. State*, 110 Ga. 911, 36 S. E. 297; *Sigman v. Austin*, 112 Ga. 571, 37 S. E. 894.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 728.

(118 Ga. 112)

**COMMISSIONERS OF ROADS AND REVENUES OF GORDON COUNTY v. BURNS et al.**

(Supreme Court of Georgia. May 30, 1903.)

**ALTERNATIVE ROAD LAW—ADOPTION.**

1. Where the alternative road law, provided for by the act approved December 24, 1896, as amended by the act approved December 19, 1898, has been adopted by popular vote, the recommendation of the grand jury is not necessary to put the law into effect.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by C. L. Burns and others against the commissioners of roads and revenues of Gordon county. Judgment for plaintiffs, and defendants bring error. Affirmed.

Starr & Erwin, for plaintiffs in error. R. J. & J. McCamy, for defendants in error.

LAMAR, J. At an election in December, 1902, held in accordance with the provisions of the act of 1896 (Acts 1896, p. 78, § 1), the people of Gordon county adopted the alternative road law, under the act of 1898 (Acts 1898, p. 110), the eighth section of which provides "that the provisions of this act [1898] shall not become of force in any counties where the provisions of said act of 1896 has been adopted by a vote of the people, until the grand jury of said county or counties shall have recommended and adopted the provisions contained in this act [1898]: provided, that the provisions of this act [1898] shall not go into effect in any county until said county has adopted the said act of 1896." Nothing having been done towards enforcing the law, petitioners applied for writ of mandamus. The commissioners of roads and revenues demurred and answered, claiming that the act of 1896 was absolutely repealed, and that a recommendation of the grand jury was necessary before the statute became operative in Gordon county. At the hearing the judge made the mandamus absolute, and the commissioners excepted.

The alternative road law in Pol. Code, §§ 573-583, was not repealed by the act of 1896 (Acts 1896, p. 78). The act of 1898 (Acts 1898, p. 110), in effect, repealed all of the provisions of the act of 1896, except the first section, providing how the election was to be held, in so far as it related to counties thereafter adopting the alternative road law. Construing the Code and these two acts together (Pol. Code, § 4, par. 8), the legislative intent will very clearly appear.

(a) The alternative road law, under the act of 1891, goes into effect upon the recommendation of the grand jury. Pol. Code, § 583.

(b) The road law under the act of 1896 went into effect on a vote of the people; and where, prior to the act of 1898, it had been adopted, it remained in force in such county unmodified by the act of 1898.

(c) If, however, a county which had already adopted the road law of 1896 desired to avail itself of the new provisions in the act of 1898, it could do so on the recommendation of a grand jury. There having already been an election showing that the people were in favor of a road law different from that provided in Pol. Code, § 526 et seq., it was not deemed necessary by the General Assembly to require a new election merely to adopt the details and methods under the act of 1898. That could be done by the grand jury.

(d) After the act of 1898, its provisions, and those of Pol. Code, §§ 573-583, were the only alternative road laws which could be thereafter put in force in any county—the first, by a recommendation of the grand jury (section 583); the second, by an election held according to the provisions of the first section of the act of 1896. The popular vote was an expression of the will of the people. It was unnecessary to have that vote supplemented by the recommendation of the grand jury. *McGinnis v. Ragsdale*, 116 Ga. 245, 42 S. E. 492.

The judge did right in making the mandamus absolute. Judgment affirmed by five Justices.

(118 Ga. 118)

**AIKEN v. SOUTHERN RY. CO.**

(Supreme Court of Georgia. May 30, 1903.)

**CARRIERS—CONTRACT OF CARRIAGE—PURCHASE OF TICKET.**

1. While a husband may make with a railway company a contract for the safe carriage of his wife, the law will not imply such a contract from the mere purchase of an ordinary ticket by the husband for the wife. In such a case the law raises an implied contract for safe carriage in favor of the wife only.

2. Construing the petition in the present case most strongly against the pleader, it simply alleged that the husband had purchased an ordinary ticket for the wife, and did not set up that there was any other contract than one which would result from the purchase of such a ticket.

(Syllabus by the Court.)

Error from City Court, Polk County; F. A. Irwin, Judge.

Action by F. D. Aiken against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bunn & Trawick, for plaintiff in error. Shumate & Maddox and Fielden & Mundy, for defendant in error.

COBB, J. Aiken, as administrator of King, brought suit against the Southern Railway Company on January 20, 1902, alleging that King was the husband of Eugenia King, and that on the 15th of September, 1897, King, "desiring to go with his wife and other members of his family to Cedartown, Ga., upon a visit, contracted with the said Southern Railway Company, through its ticket agent at Brunswick, Ga., to be carried, to-



gether with his wife, from Brunswick, Ga., to Rockmart, Ga., in said county of Polk, and that his wife and himself should be safely transported by said defendant and landed safely at Rockmart, Ga.; and he purchased from the said defendant, through its said agent at Brunswick, a ticket for himself and a ticket for his wife, and a ticket for the other members of his family, paying for said ticket for his wife, as well as for the others, the usual passenger fare from Brunswick, Ga., to Rockmart, Ga." It was further alleged that, "in consideration of said price paid for said ticket for Mrs. Eugenia King by her husband the defendant undertook and promised to convey her from Brunswick, Ga., to Rockmart, Ga., and to afford her all reasonable and proper opportunities safely to alight from the train." The petition then avers, in substance, that after purchasing the tickets, and making the contract with the defendant, King and his wife and the other members of his family entered the train of the defendant at Brunswick, and surrendered their tickets to the conductor; that they were safely conveyed until they reached the town of Rockmart, when Mrs. King received painful and serious injuries as a result of the negligent jerking of the train while she was attempting to alight therefrom. The petition sets forth in detail the circumstances under which she was injured, and the extent of her injuries. The value of her services are set forth, and also various items of expense which her husband incurred by reason of the accident. A general demurrer to the petition was sustained, and the plaintiff excepted.

Where a person makes a contract with a railway company engaged in the business of a common carrier to be transported from one point to another along its line of road, and he is injured by the negligence of the carrier, he has two remedies—one an action for a breach of the contract, and the other an action on the case for the wrong; and he may elect which of the remedies he will pursue. *Patterson v. Railway Co.*, 94 Ga. 140, 21 S. E. 283. See, also, *Civ. Code* 1895, § 3811. "Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract." *Whitenton Mfg. Co. v. Packet Co.* (C. C.) 21 Fed. 896. When the petition in the present case is construed as a whole, we think it sufficiently appears that the purpose of the pleader was to bring an action on the alleged contract of carriage. So construing it, it is to be determined whether it sets forth a cause of action. Does it sufficiently appear that the railway company entered into a contract with King for the safe transportation of his wife? It is alleged in terms that King contracted with the railway company, but the manner in which the contract was made is

also set forth, and from this it is apparent that King made no other contract than one which would arise from the mere purchase of an ordinary ticket for his wife. The question, therefore, arises whether, when one purchases such a ticket from a railway company for the use of another, and there are no other transactions or negotiations between the purchaser and the company, the contract of carriage is made with the purchaser of the ticket, or with the one who uses the ticket as evidence of a right to passage. While there has been some difference of opinion as to whether a railroad ticket constitutes a contract, by the great weight of authority "the ordinary ticket is not a contract, but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and is intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract." 6 Cyc. 570. See, also, 25 Am. & Eng. Enc. L. (1st Ed.) 1074; 1 Fetter, Carriers, § 275; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *McLain's Cas. Car.* 57, 222, 663, 682. In *Boyd v. Spencer*, 103 Ga. 823, 30 S. E. 841, 68 Am. St. Rep. 146, this language was used: "A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system." See, also, *Southern Railway Company v. Watson*, 110 Ga. 601, 36 S. E. 209. There is nothing alleged in the petition as to the character of the ticket purchased by King for his wife, and it is to be presumed that it was the ordinary ticket indicating the points between which the passenger was to be transported. When one purchases an ordinary ticket from the ticket agent of a railway company, and there is no other communication between the purchaser and the company than the application to the ticket agent for the ticket, the delivery of the ticket, and the payment of the price, the railway company, by the delivery of the ticket under such circumstances, undertakes to safely transport and carry any person who may enter its cars as a passenger having possession of such ticket. In the absence of some express agreement to the contrary, this is the undertaking of the company. If the purchaser himself becomes the passenger, he has a right to rely upon the implied contract of safe transportation. On the other hand, if he does not become the passenger, but delivers the ticket to some one else, either for a valuable consideration or gratuitously, the implied obligation on the part of the railway company to safely transport arises in favor of him who presents

himself as a passenger and tenders the ticket as evidence of his right to passage. In other words, in such a case the contract entered into by the railway company at the time the ticket is delivered is simply a contract safely to transport whoever may present himself as a passenger holding the ticket. We do not mean to hold that a husband might not make an express contract with a railway company for the safe transportation of his wife; but it would seem that, where such a contract was claimed, it would be incumbent upon the person setting it up to show that the agent with whom it was made had authority to do so. What we do mean to hold is that the mere purchase of an ordinary ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the purchaser and the company for the safe transportation of the wife, but the implied contract for safe passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone can an action be maintained for its breach. Of course, we do not mean to hold that where a railroad company has undertaken to safely carry a wife, or child, or servant, the husband, or father, or master may not, in an action of tort, recover any damages he sustained on account of injuries received by the wife, child, or servant in consequence of the negligence of the carrier. The recovery in such a case is for the injury to the husband, father, or master on account of the tort, and not for the breach of any implied contract which the law raises in his favor. The only case called to our attention which seems to be at all in conflict with what is above laid down is the case of Jacksonville Railroad Company v. Mitchell (Fla.) 13 South. 673, 21 L. R. A. 487. In that case it was held that a husband traveling with his wife, where he purchased tickets for himself and his wife, and had his own and her baggage checked to the point of destination, might sue the company in his own name for the loss of the wife's trunk containing her wearing apparel and that of her child. It seems, though, that this decision was put upon the special ownership which the husband had in the property of his wife, which was intrusted to his care; that is, not so much upon the ticket which he had bought for his wife, but upon that which he had purchased for himself. If the case cannot be distinguished upon the ground stated, it seems to us to be manifestly unsound. See, in this connection, 2 Fetter, Carriers, § 644.

Judgment affirmed by five Justices.

(118 Ga. 93)

#### HILL et al. v. LUNDY.

(Supreme Court of Georgia. May 30, 1903.)

##### NEW TRIAL—GROUNDS—EXCEPTIONS.

1. It is not a proper ground of a motion for a new trial that the judge of the superior court, on the trial of an appeal from a county court, refused, on motion, to dismiss the appeal, or to

dismiss the petition of one of the parties thereto. The error, if any, should be made the subject of a direct exception. *Heery v. Burkhalter*, 39 S. E. 406, 113 Ga. 1043, and cases cited.

2. The verdict was supported by the evidence, and it was not erroneous to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action between Anna Lundy and Alf Hill and others. From a judgment of the superior court refusing, on appeal from the county court, to grant a new trial, Hill and others bring error. Affirmed.

Hunt & Merritt, for plaintiffs in error. R. H. Lewis, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 85)

#### GILL v. MAYOR, ETC., OF CITY OF BRUNSWICK.

(Supreme Court of Georgia. May 30, 1903.)

##### MUNICIPAL CORPORATIONS—POLICE OFFICERS—DISMISSAL—TRIAL—CERTIORARI.

1. It was in legislative contemplation that the mayor and aldermen of the city of Brunswick should act in a judicial capacity when exercising the power conferred upon them by the act of November 23, 1900, to dismiss from service all officers and members of the police force of the city who should be guilty of conduct which that act declares shall constitute cause for removal from office. See Acts 1900, p. 240.

(a) A trial conducted in accordance with the terms of a statute of this character is a quasi criminal proceeding, and the writ of certiorari lies to review the rulings and findings of such a corporation court. *Mayor of Macon v. Shaw*, 18 Ga. 172, 185; *Asbell v. Brunswick*, 5 S. E. 500, 80 Ga. 503.

(b) The refusal of the court below to sanction the petition for certiorari in the present case could not properly have been based either on the ground that a writ of certiorari could not legally issue, or upon the ground that there was no merit in any of the complaints which the plaintiff in certiorari set forth in his petition.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action between Louis Gill and the mayor and council of Brunswick. From a judgment, Gill brings error. Reversed.

Earnest Dart, for plaintiff in error. F. E. Twitty, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 100)

#### MAYOR, ETC., OF DALTON v. WILSON.

(Supreme Court of Georgia. May 30, 1903.)

##### MUNICIPAL CORPORATIONS—NUISANCE—FAILURE TO ABATE—PLEADING.

1. A municipal corporation is not liable for the failure or refusal to exercise its charter power

to abate a nuisance maintained by a private individual upon private property, and not of such a character as to amount to an obstruction of a public street or to imperil the safety of travelers thereon; and this is true notwithstanding the nuisance in question may consist of a sewer which the municipal authorities allowed to be constructed by a private individual in part under the streets of the city, that portion of the sewer under the public streets not being itself the cause of any damage either to the public or to any private individual.

2. The petition in the present case, construed most strongly against the pleader, does not set forth a cause of action against the municipality for maintaining a nuisance. It is, at most, a complaint that the municipality consented to the erection of a nuisance by a private individual, and has failed and refused to abate the same.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by W. H. Wilson against the mayor and council of Dalton. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error.  
Shumate & Maddox, for defendant in error.

COBB, J. Wilson brought an action against the mayor and council of the city of Dalton, alleging, in substance, as follows: Petitioner, with his family, consisting of a wife and several children, owns and resides upon a lot in the city of Dalton. There is a ditch within about 20 or 25 yards from the western end of petitioner's lot, and at the time he commenced to live thereon the water in the ditch ran freely and unobstructed along the ditch, and little or no fecal matter gathered therein. For a number of years petitioner and his family were healthy, and free from malarial diseases. Several years after petitioner began to reside on the lot referred to, the Hotel Dalton was built, and "with the advice and consent, and, as petitioner charges and believes, with the co-operation, of the mayor and council of the city of Dalton," a sewer was constructed from the hotel, and emptied into the ditch near his property. By reason of the construction of this sewer, and on account of the further fact that there is not a great deal of fall to the ditch, foul and fecal matter has accumulated in the bottom of the ditch to the depth of several inches, the result of which is to cause continued illness in petitioner's family from malarial diseases, to render it impossible, especially at certain seasons of the year, for petitioner and his family to reside at their home, and to seriously impair the market value of his property. Petitioner made application to the city authorities to abate the nuisance, but they have failed and refused to do so, notwithstanding they have passed upon the question and adjudged the ditch to be a nuisance. The action of the mayor and council in allowing the ditch to remain in its unhealthy and filthy condition, and their refusal to abate the same as a nuisance, is gross negligence on their part, on account of

which action petitioner claims damages, having previously filed his claim therefor with the mayor and council, as the law requires. Certain special demurrers to the petition having been filed, the plaintiff amended, so as to allege that, while the minutes of the council do not show any agreement with the Hotel Dalton in regard to the construction of the sewer, there was in fact an agreement, and the mayor and council consented that the sewer might be built, and thereby, as petitioner charges, became a party to the construction and direction of the construction of the sewer, as well as the place where it was to empty, well knowing at the time where the contents of the sewer would be emptied. It is also alleged that the Hotel Dalton made with the city of Dalton a contract to indemnify it against damages resulting from the construction of the sewer and its becoming a nuisance, this being a recognition on the part of the city that the sewer would become a nuisance. It is not alleged, either in the petition or the amendment, that the sewer was constructed along a public street, though there is an allegation in the amendment that the sewer crossed the streets of the city, and that this was done with the permission and consent of the city authorities. It is also alleged that the charter of the city of Dalton gives the mayor and council absolute authority to abate nuisances, and that their failure to abate a nuisance in a given instance is a ministerial act, for the breach of which the municipality is liable. In addition to the special demurrers above referred to, the defendant demurred generally to the petition, and, its demurrers being overruled, it excepted.

"Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers." Pol. Code, § 748. See, also, *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Collins v. Macon*, 69 Ga. 542; *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173; *Wyatt v. Rome*, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41; *Tarbutton v. Tennille*, 110 Ga. 90, 35 S. E. 282; *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 979, 51 L. R. A. 720; *City Council of Augusta v. Owens*, 111 Ga. 464, 477, 36 S. E. 830; *Same v. Little*, 115 Ga. 124, 41 S. E. 238; *Nicholson v. Detroit (Mich.)* 56 L. R. A. 601; *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; *Barron v. Detroit (Mich.)* 19 L. R. A. 452, and notes; *McDade v. Chester*, 117 Pa. 414, 12 Atl. 421, 2 Am. St. Rep. 681. A municipal corporation is, however, liable "for neglect to perform, or for improper or unskillful performance of their ministerial duties." Pol. Code, § 748. See, also, *Mayor of Savannah v. Spears*, 66 Ga. 304; *Collins v. Macon*, supra; *Smith v. Atlanta*, 75 Ga. 110; *City of Greensboro v. McGibbony*, 93 Ga. 672, 20 S. E. 87. In the case of *Jones v. Wil-*

Hambsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294, Riely, J., in referring to the distinction above stated, uses the following apt and appropriate language: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the state, to enable it the better to govern that portion of its people residing within the municipality; and to this end there is granted to or imposed upon it, by the charter of its creation, powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate and private character there are granted unto it privileges and powers to be exercised for its own private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute, and for an injury resulting from negligence in their exercise or performance the municipality is liable in a civil action for damages, in the same manner as an individual or private corporation. The line of distinction is clearly drawn by the courts and text-writers, and the exemption of the municipality from liability in the one case, and its liability in the other, for an injury resulting from negligence, firmly established." Cases often arise where the courts find it difficult to determine to which class they belong, but the distinction between the two classes is none the less definitely drawn in the law. The conflict in the decisions on the subject is due to the fact that different courts have not reached the same conclusion upon a similar state of facts where the cases are near the line that bounds the two classes. As a general rule, the courts have held that the duty imposed upon municipalities to abate nuisances existing upon private property within their limits is a duty which is judicial in its nature, and that for a failure to perform this duty, or for errors in the performance of it, the municipality is not liable in damages. *Armstrong v. Brunswick*, 79 Mo. 319; *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545. There are also a number of rulings to the effect that where the nuisance is in a public street the failure to abate it is a judicial rather than a ministerial act, and the city is not liable to an action for damages at the instance of one injured on account of the existence of the nuisance in a public street. *Mayor v. Vandegrift*, 1 Marv. 5, 29 Atl. 1047, 25 L. R. A. 538, 65 Am. St. Rep. 256; *Kent v. Cheyenne*, 2 Wyo. 6; *Camp-*

*bell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656. In some cases municipalities have been held liable for permitting, or for failing to abate, a nuisance in a public street. *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435; *Taylor v. Cumberland*, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759. It has been held that where a nuisance is adjacent to a public street, and of such a character that one using the street may be injured thereby, the city is not liable for a failure to abate the same. *Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; *Howe v. New Orleans*, 12 La. Ann. 481. In this state, where the nuisance is in or near a public street, the municipality is liable to one who uses the streets, and thereby suffers special damage from the existence of the nuisance and on account of the failure of the municipality to abate the same. *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486. The doctrine that the municipality will be liable for failing to abate a nuisance in or near a public street grows out of the well-established rule in this state that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that the failure to perform this duty constitutes a breach of a ministerial duty, and renders the municipality liable to one who is injured by the failure. In such a case the municipal corporation is not held liable for a failure to perform the judicial duty of abating a nuisance, but for the failure to keep its streets and sidewalks free from obstructions which are dangerous to the traveler. It has been held in Tennessee that a municipal corporation, having charter power to enact ordinances necessary and proper to preserve the public health and to prevent and remove nuisances, is indictable for permitting a slaughterhouse to be kept upon the private property of a citizen within the town, to the detriment of the public health or comfort. *State v. Shelbyville*, 4 Sneed, 176. An indictment might satisfy the public offense where the nuisance was a public nuisance, and there might be an action for damages against the municipality where the nuisance was maintained by the municipality itself.

But it seems to be well settled that there can be no action for damages where the nuisance is maintained by a private individual upon private property and the maintenance of the nuisance in no way amounts to an obstruction of a public street or in any way imperils the safety of travelers upon the street. In such a case the remedy of the party aggrieved is by an action for damages against the one who maintains the nuisance; or, in the event the party maintaining it is insolvent, or the damages are irreparable, or the nuisance is a continuing one, equity would interfere by injunction to abate the same at the instance of the person aggrieved. *Butler v. Thomasville*, 74 Ga. 570; *Forsyth v. Atlanta*, 45 Ga. 152, 12 Am. Rep. 576.

Upon the subject of the liability of municipal corporations generally, see *Hopkins' Pers. Inj.* § 469 et seq.; 2 *Wood, Nuls.* (3d Ed.) § 748 et seq.; 2 *Dill. Mun. Corp.* (4th Ed.) §§ 949 et seq., 1048 et seq.

The petition in the present case, properly construed, does not set forth a cause of action against the city for maintaining a nuisance. It is not claimed that the allegations are sufficient to make a case where the municipality is in direct control of the property upon which the alleged nuisance exists, or of the ditch or sewer which is alleged to constitute the nuisance. The allegations of the petition are to be construed must strongly against the petitioner, and under these allegations the case is to be dealt with as if the ditch were wholly on private property and owned by private individuals. It is not in terms alleged that the municipality maintains, controls, or operates the alleged nuisance. The petition, at most, alleges merely permissive conduct on the part of the city, and a failure and refusal to abate the alleged nuisance. It has, under its charter, the right to abate a nuisance. If the sewer and ditch are maintained as a nuisance, it is the duty of the city to abate it, but this duty is judicial and not ministerial, and for a failure to exercise this duty, or for errors in attempting to exercise it, the city is not liable to an action of damages. There is no allegation that the sewer or ditch interferes in any way with safe passage along the public streets, and the mere fact that the city consented to the construction of the sewer, and acted in such a way as to recognize that if it became a nuisance the city would be liable to persons injured by it, and the further fact that it adjudged the sewer to be a nuisance, does not render it liable for a failure to abate it. The fact remains that the nuisance is maintained by private individuals on private property, and, so far as the allegations of the petition are concerned, does not interfere with the safe use of the public streets of the city. The judge erred in overruling the demurrer.

Judgment reversed by five Justices.

(118 Ga. 125)

### JACKSON v. STATE

(Supreme Court of Georgia. June 1, 1903.)

#### BLACKMAIL—CHEATING—FALSE PRETENSES.

1. One may be guilty of obtaining money by a false pretense as to his official position and power if the party defrauded relied on such statement.

2. But where one falsely represents himself to be a United States officer, arrests, and threatens to prosecute for a crime unless money is paid to settle the offense, and the person arrested, being in fear of the prosecution, pays the money, but it is not alleged that the prosecutor believed or relied on any statement made, the offense is not cheating and swindling, under Pen. Code 1895, § 670, but blackmail, under Pen. Code 1895, § 116, which makes it a misdemeanor to extort money by accusing or threatening to accuse one of a criminal offense.

(Syllabus by the Court.)

44 S.E.—53

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

Charles Jackson was convicted of cheating and swindling, and brings error. Reversed.

Charles Jackson was indicted for cheating and swindling, "for that the said Charles Jackson \* \* \* did \* \* \* use the following deceitful means and artful practices, by which he defrauded and cheated John Neal out of the sum of eight dollars, to wit: He, the said Charles Jackson, represented himself to said Neal as being a United States detective, and then and there arrested said Neal, charging him with a criminal offense against the United States, and threatened to take said Neal before the United States court to be prosecuted for said criminal offense; said criminal offense being alleged to be that of the sale of liquor without a license; and he, the said Jackson, offering to settle said case without prosecution upon the payment by Neal of the sum of eight dollars; and he, the said Neal, being in fear of said prosecution, paid the sum of seven dollars in money and one dollar in [other property], and agreed to pay the further sum of \$12. Whereas in fact said Jackson was not a United States detective, nor any other United States officer, and had no authority to arrest said Neal nor to settle the alleged offense; by which means said Jackson cheated and defrauded said Neal as aforesaid," etc. To this indictment the defendant demurred, and, the demurrer having been overruled, he excepted *pendente lite*. The trial resulted in a verdict of guilty, and defendant's motion for a new trial was overruled.

J. H. Worrill, for plaintiff in error. S. P. Gilbert, Sol. Gen., and Chas. R. Williams, for the State.

LAMAR, J. The defendant falsely represented himself to be a United States detective, charged the prosecutor with selling liquor without a license, arrested him, and threatened to take him before the United States court to be prosecuted for said offense. He offered to settle the case without prosecution upon payment of \$8, "and the said Neal, being in fear of said prosecution, paid the money." As there was no violence beyond that of the arrest and the threat to prosecute, we are compelled, on authority of *Long v. State*, 12 Ga. 293, and *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, to hold that it was not robbery. There was no seizure of property, so as to bring the case within the provisions of Pen. Code 1895, § 217. Neither was it cheating and swindling, under Pen. Code 1895, § 670. Where one falsely represents that he holds a particular office, or is authorized to receive money, and thereby defrauds another, a crime may be committed under the provisions of the eleventh division of the Penal Code. Those sections relate to cases in which the defrauded person is deceived, beguiled, tricked, but yet,

relying on the false token or the false pretense, voluntarily pays the money for some supposed gain, chance, or value. These sections do not apply to cases of coercion, where the party with full knowledge acts against his will; or even to cases where, in ignorance of the real truth, he does not act on any false statement, but because of some fear, apprehension, or motive other than the deceit. In cases of a prosecution under law as to false pretenses it will generally be found that the defrauded person was to receive a quid pro quo, and willingly parts with his property for what he thought he was getting. The indictment here distinctly shows that the money was extorted; that Neal, being in fear of the prosecution, paid the money. It is not alleged that the defendant pretended that he had the right to settle, or that the other party thought that he had such authority, and the case comes, therefore, squarely within the letter of the act of 1887 (Acts 1887, p. 58, Pen. Code 1895, § 116), in which it is provided that "if, with intent to extort money, any person shall accuse or threaten to accuse another of a crime, he shall be guilty of blackmail." The fact that the defendant falsely represented himself to be an officer may have made the threat of prosecution more effective, but it was none the less extorting the money by means of a threat to accuse and prosecute. *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89, is not authority for the proposition that the facts alleged amount to obtaining money under false pretenses. There the defendant fraudulently represented himself to be an officer, exhibited a false token in the shape of a pretended warrant, and fraudulently claimed that he had authority to settle, all of which the defrauded party believed to be true, and paid the money in reliance thereon. It is more like *McCord v. People*, 48 N. Y. 470. The facts set out in the indictment make a case of extorting money by a threat to prosecute. The failure to aver that the defendant represented that he had a right to settle, or that the prosecutor, from all the circumstances, believed he had such right, takes the case out of the law relating to obtaining money by false representations. While the facts indicate that the offense committed was blackmail, the indictment does not contain the averments necessary in an accusation for that crime.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 50)

#### TAYLOR v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

CERTIORARI—PETITION—VERIFICATION—  
SANCTION BY JUDGE—DISMISSAL.

1. Where one convicted of crime in a county court applies to the superior court for the writ of certiorari, his petition should be verified by an affidavit as to the truth of the averments of

the petition. An affidavit which does not so verify the averments of the petition is insufficient, although it may comply fully with section 765, Pen. Code 1895.

2. Where the judge of the superior court sanctions a petition for certiorari which is not properly verified, and in his answer to the writ the judge of the county court fully supports and corroborates the averments of the petition, it is too late to dismiss the certiorari on the ground that the averments, of the petition are not sufficiently verified.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Dempsey Taylor was convicted of misdemeanor. From a judgment dismissing the writ of certiorari, he brings error. Reversed.

McDonald, Quincey & Grantham, for plaintiff in error. J. F. De Lacy, Sol. Gen., and L. Kennedy, for the State.

SIMMONS, C. J. After conviction of a misdemeanor in the county court of Irwin county, Taylor sued out a writ of certiorari. The petition was sanctioned by the judge of the superior court, but on the hearing the certiorari was dismissed on the ground that the petition had not been properly verified. To the judgment of dismissal Taylor excepted.

1. The affidavit attached to the petition for certiorari was to the effect that petitioner "has not had a fair trial, has been wrongfully and illegally convicted, and, owing to his poverty, he is unable to pay the cost or give the bond and security as required by law, and that his counsel has advised him that he has good cause for certiorari." Section 763 of the Penal Code of 1895 provides that the writ of certiorari shall lie "for the correction of error committed by the judge [of a county court] in his decision and judgment in criminal as in civil cases, and it shall be obtained under the order and sanction of the judge of the superior court of the county, upon the written petition, duly sworn to, of the defendant, stating the complaint, showing sufficient ground of error, and containing a brief of the material evidence." Section 765 provides that "the writ shall not be granted unless the accused shall file his affidavit stating that he has not had a fair trial and has been wrongfully, and illegally convicted, and shall also give bond and security or make affidavit" in forma pauperis. Counsel for the plaintiff in error contended that section 763 should be construed with section 765, and that the latter was intended to set out specifically the affidavit required by the words "duly sworn to" in the former. This, we think, is not true. Certioraries from county courts are regulated by the act of January 19, 1872 (Acts 1871-72, pp. 288-298), now incorporated in the Code. Under that act the rules for certioraries from justices' courts are made to apply to certioraries from county courts in civil cases. One of these rules was and is that "no writ of certiorari shall be granted or issued" unless

there be an affidavit containing, among other things, an averment that the facts stated in the petition, so far as they come within deponent's knowledge, are true, and, so far as they are derived from the information of others, are believed to be true. The act of 1872 then provides "that the right to certiorari from the decision and judgment of the county judge in all criminal cases shall exist as in all civil cases," that certiorari may be had upon proper petition, which shall "give a brief of the material evidence, and be duly sworn to." After providing for the sanction of the writ and the hearing of the case, this part of the act closes with the proviso above set out as section 765 of the Penal Code. The affidavit described in this proviso is, therefore, not intended to fill the requirement in section 763, but is additional thereto. Not only must the accused file the affidavit required in civil cases, but he must also file the affidavit described in this proviso, or file an affidavit filling the requirements of both sections. To relieve him of making the affidavit required by section 763 would be to make the trial judge sanction petitions not verified by oath. The judge has to determine whether the petition makes out a prima facie case, and it is important that the petition presented to him should be true. To subserve this end it is provided that the application or petition shall be accompanied by an affidavit as to the truth of the averments made. This is true of all certioraries from county courts in civil and in criminal cases, and in the latter there must also be the additional affidavit required by section 765. We therefore hold that the petition for certiorari was not properly verified.

2. The judge of the county court had been served with the writ of certiorari, and had filed an answer, which fully supported and corroborated the averments of the petition. The question then arises as to whether the defect in the affidavit was not cured by this answer. If this were a new question, some of us would be inclined to hold that the defect was a jurisdictional one, which could not be cured by anything in the answer. The question is not an open one, however, for this court ruled in *Taylor v. Gay*, 20 Ga. 77, that, where a petition for certiorari was not sufficiently or properly verified, but the answer was in, and showed the statements in the petition to be true, it was too late to dismiss the certiorari because of the insufficiency of the affidavit. That case was one governed by the general law as to the affidavit to be made in certiorari cases, and, as we have seen, that law is still applicable, as regards this requirement in the affidavit, to certioraries from county courts. Nor is that case distinguishable on the ground that petitions for certiorari are now required to be sanctioned by the judge of the superior court. Under the old law such petitions were presented to the judge of the superior court, and, if he deemed the exceptions sufficient,

he issued the writ. This was changed, as to justices' courts, by the act of 1850, by which it was made the duty of the clerk to issue the writ upon presentation to him of a proper petition. This act of 1850 applied "only to the 'justices' courts' of the several districts in the state," and was held not to apply to the case of *Taylor v. Gay*. Under the ruling made in that case, the defect in the affidavit was cured by the answer of the county judge, and it was error to dismiss the certiorari.

It was argued by counsel for the defendant in error that, "even if the petition for certiorari should not have been dismissed for want of proper verification, still the judgment of the lower court ought not to be reversed unless reversible error was committed in the Irwin county court upon the trial of the case there." This argument is not sound, as in such cases the judge of the superior court has large discretionary powers in granting new trials or reducing the punishment. Pen. Code 1895, § 767. In this particular case he has not exercised his discretion, but dismissed it without any consideration on the merits. We must, therefore, reverse the judgment dismissing the certiorari, that the judge may pass upon the case made by the petition and answer.

Judgment reversed by five Justices.

(118 Ga. 131)

## HENDRICKS v. W. G. MIDDLEBROOKS CO.

(Supreme Court of Georgia. June 1, 1903.)

### SLANDER—LIABILITY OF PARTNERSHIP—CONTRACT—CUSTOM AND USAGE—ABUSE OF LEGAL PROCESS.

1. A partnership is not liable to respond in damages to a person aggrieved by reason of slanderous reports concerning him circulated by one only of its members without the knowledge and sanction of his copartners.

2. A party to a contract, who did not know of and contract with reference to a local custom confined to a particular city, is not in a position to successfully assert that this custom became, by implication, a part of the contract into which he entered, whether the other party thereto may or may not have previously given recognition to such custom.

(a) In the present case the nature and operation of the business usage referred to in the plaintiff's petition were not alleged with sufficient particularity and fullness; nor did it contain the essential averment that he contracted with reference to this local custom.

3. That a creditor, ignoring a gratuitous promise to grant indulgence to a debtor to which he was not legally entitled, brings suit against him upon an open account for a balance claimed to be still due thereon, does not, without more, constitute a malicious abuse of legal process; and this is so notwithstanding the creditor may knowingly sue for a greater amount than is, in point of fact, still due upon the account, provided he is not actuated by any malicious design to impair his debtor's credit, or to make any other wrongful and improper use of the process.

(Syllabus by the Court.)

¶ 1. See *Libel and Slander*, vol. 22, Cent. Dig. § 175

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by B. L. Hendricks against the W. G. Middlebrooks Company. From an order sustaining a demurrer to the complaint, plaintiff brings error. Affirmed.

R. D. Feagin and Hall & Wimberly, for plaintiff in error. E. P. Johnston and Harde-man, Davis, Turner & Jones, for defendant in error.

SIMMONS, C. J. An action for damages was brought by B. L. Hendricks against the W. G. Middlebrooks Company, a partnership, and certain individuals, who were members of that firm, the plaintiff alleging in his petition that they had injured him in the sum of \$5,000 by reason of the following facts: "Between August 1, 1901, and February 6, 1902, petitioner [who was the proprietor of the Park Hotel, in the city of Macon] purchased from the said W. G. Middlebrooks Co. groceries to the amount of \$212.51, as set forth by the passbook of petitioner, the entries in said passbook being made by defendants," and it being furnished to him by them on March 3d, 1902. During the period above mentioned he paid on his account \$169.70, "leaving a balance due to defendants of \$42.81, according to the said passbook \* \* \* and according to the itemized statement of the account of petitioner furnished March 3rd by the said defendants." On August 6, 1901, he paid them "in full up to August 1, 1901. After this payment and settlement in full, petitioner made payments upon his subsequent account" with them; and "when petitioner's next bill was presented to him petitioner demanded an itemized statement of the same of defendants, and defendants promised to render same to petitioner at once, but failed to do so. At numerous times after this request petitioner frequently asked an itemized statement of his account from the said defendants, and [they] promised faithfully each time to furnish the same at once, but for some reason unknown to petitioner the defendants failed to do so." In the early part of February, 1902, they sent him "a bill [not itemized] for \$86.94, which amount petitioner did not owe. Petitioner at the time owed defendants, as he has since found out from the passbook and itemized statement furnished by defendants to petitioner on March 3, 1902, the sum of \$42.81, which amount [he] stood ready at all times to pay, and did at all times tender the same to defendants, and offer to settle in full with defendants upon presentation to him of an itemized account. \* \* \* Petitioner believed at the time the said bill was rendered to him that the same was not correct, and so informed the said defendants, and again requested an itemized statement so that the amount of petitioner's indebtedness could be correctly ascertained." They promised to furnish him the statement of account called

for, but again failed to do so. "Upon the continued refusal of defendants to furnish the itemized statement, petitioner finally notified the said defendants that he would stop trading with them unless the said statement was rendered him." On the 26th of February, 1902, "notwithstanding the fact that defendants had promised and agreed to furnish petitioner with the said itemized statement, [they], without warning, and in violation of their promise to petitioner to wait on him for payment until they had rendered him an itemized statement of his account, sued petitioner in the justice court of the 564th Dist. G. M., for \$86.94, when the said defendants well knew that no such sum was due them by petitioner." At the same time "garnishments were served upon petitioner's boarders, at the instance of the said defendants, in connection with the said suit against petitioner, both of which acts of the said defendants, viz., the filing and prosecuting of said suit and garnisheeing petitioner's boarders in connection therewith, \* \* \* was a malicious abuse of legal process." Owing to "the said willful and malicious abuse of legal process on the part of" the defendants, "two of petitioner's boarders, who were paying petitioner the sum of \$25 per month each, left petitioner," to his great injury and damage. On February 27, 1902, "in order to have the said garnishment dismissed, and to prevent his other boarders from leaving him, petitioner paid to the said defendants, under protest, the said amount claimed and sued for, viz., \$86.94; and has since sued the said defendants for \$44.13, the amount of overpayment according to defendants' itemized statement of petitioner's account" and the passbook made out by them, which were furnished to him after the suit was filed, and after he had paid to them, under protest, the amount they claimed was due. The above-mentioned "malicious and abusive use of legal process in the manner aforesaid was calculated to injure, and did injure and damage your petitioner in the business in which he was then engaged, viz., that of proprietor of the said Park Hotel." The defendants, "not content with their willful and malicious abuse of legal process, as above set forth, by their further illegal, willful, and malicious actions in connection with said garnishments and said suit have further injured and damaged" him in his business as follows: One of the defendants, "C. B. Holleman, acting for the said W. G. Middlebrooks Co., and in the scope of the partnership business, went to Geo. P. Clarke & Co., and talked to Geo. P. Clarke and to S. C. Rainey, and told them that he had been forced to sue B. L. Hendricks, and to garnishee his boarders, in order to collect the bill that the said Hendricks owed the said W. G. Middlebrooks Co.; that he had not had a settlement with the said Hendricks in six years, although the said Holleman well knew at the time that the said Hendricks had only been proprietor of



the Park Hotel for a little over three years at that time, and that a settlement in full had been made by the said Hendricks on August 6, 1901, up to August 1, 1901." The report thus published by Holleman, "acting for the said W. G. Middlebrooks Co., was a willful and malicious slander against petitioner in the line of" his business, "added insult to injury, and slandered petitioner and petitioner's business. The said C. B. Holleman well knew that he, acting for the said W. G. Middlebrooks Co., had promised to render" petitioner an itemized statement of his account, and to wait on him for payment until such a statement was furnished. The animus which actuated the said Holleman was further displayed by his going to one Oscar Bradley and telling him, in substance, that he (Holleman) had found it necessary to sue petitioner and institute garnishment proceedings in order to collect a bill he owed the partnership. As a "result of said suit and garnishments sued out, as aforesaid, by said defendants, and as a result of said slanderous reports put into circulation by the said C. B. Holleman, acting for W. G. Middlebrooks Co., petitioner's credit has been impaired, and almost hopelessly ruined, [for] it became extremely difficult, after the aforesaid conduct of the said W. G. Middlebrooks Co., for petitioner to obtain any credit whatever"; all of his "creditors became uneasy, and began coming to him, and began to make inquiries, and to shut off their credit"; and because of this action on their part, "caused by the willful and malicious conduct of the said W. G. Middlebrooks Co., petitioner was forced to surrender his lease of the said Park Hotel, his lease still lacking two years and five months of having expired," to his great injury and damage.

To this petition the defendants demurred on the grounds (1) that it showed "on its face that the petitioner was indebted to the defendants at the time it is alleged they brought suit against him and sued out garnishments" in connection with said suit; and (2) that the plaintiff was not entitled to recover because of the alleged reports circulated by Holleman, especially in view of the fact that at the time he made the statements set forth in the plaintiff's petition the latter was in fact indebted to the partnership.

The plaintiff subsequently offered two amendments to his petition, in one of which he alleged he had been damaged in the sum of \$5.95 by reason of having to pay the costs of the legal proceedings wrongfully instituted against him by the defendants, and in the other of which he alleged that the suit which he brought against them to recover the amount of the overpayment he had made to them under protest had resulted in his favor. This latter amendment also contained the following averments: "It is the custom with the grocers of Macon and with the said W. G. Middlebrooks Co. to furnish an itemized statement of all accounts upon re-

quest of debtor for same. Defendants owed a duty to B. L. Hendricks to furnish him with an itemized statement of his account before they could collect same. They obligated themselves to do so as a condition precedent to receiving payment from the said B. L. Hendricks of any amount that said Hendricks then owed the said W. G. Middlebrooks Co. This violated obligation and disregard of duty on the part of the said defendants towards the said B. L. Hendricks, evidenced by said malicious abuse of legal process, injured and damaged" petitioner as aforesaid.

On the hearing of the case in the trial court, his honor sustained the demurrer filed by the defendants, and to this ruling the plaintiff duly excepted. Before entering upon a discussion of the various contentions upon which his counsel relied in his argument before us, it is proper to observe that the only party named in the bill of exceptions as a defendant in error is the "W. G. Middlebrooks Company," and that there was no effort on the part of the plaintiff, when the case was called in this court, to bring before it any of the other defendants below by securing from them a waiver of service, and asking leave to amend the bill of exceptions by the record, in order that they might be therein named as parties defendant. See, in this connection, *Orr v. Webb*, 112 Ga. 806, 38 S. E. 98, and cases cited. So the only question presented for our determination is whether or not the sustaining of the demurrer was, relatively to the defendant partnership, erroneous.

1. In the recent case of *Martin v. Simkins*, 116 Ga. 254, 42 S. E. 483, this court held that: "Where a member of a partnership has a person arrested and illegally imprisoned on a charge of larceny of partnership effects, and the person so arrested sues the partnership for false imprisonment, the partnership, under Civ. Code 1895, § 2658, is not liable for these acts of an individual partner." The writer, who pronounced the judgment of the court in that case, took occasion to point out the distinction between it and the case of *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, in which it was decided that a partnership was liable in damages to a person who had been subjected to a malicious prosecution "instituted in furtherance of the partnership's interests and by direct authority of its members." As was then remarked, "the real question" presented for determination in the case last referred to "was whether the partnership was liable when all the members joined in the commission of the tort. It was held, and, we think, properly, that in such a case a partnership was liable. The opinion delivered in that case "did not allude to the code section" cited above. "It was scarcely necessary to do so, as the section did not apply to the case. The Code section applies to torts committed by one

partner. In the Page Case the tort was the joint act of all the partners. The epitome, in the Page Case, of the law in other jurisdictions as to torts of one partner, while correct, is not binding on this court, when we have a statute directly to the contrary." It is apparent that the petition filed in the present case was framed upon the idea that the defendant partnership was liable because one of its members, Holleman, circulated slanderous reports concerning the plaintiff. There was no allegation that the other partners had anything to do with the circulation of these false reports. True, the plaintiff undertakes to say that Holleman, in making the slanderous statements complained of, was acting within "the scope of the partnership business"; but this assertion is properly to be regarded as the expression of a bare conclusion of law, and an erroneous one at that.

As to the promises made to the plaintiff with regard to rendering him an itemized statement of his account and waiting on him for payment until such a statement was furnished him, and as to what occurred in connection with the legal proceedings instituted against him, the allegations upon which the plaintiff relied for a recovery are, we think, to be taken as meaning that all of the members of the partnership had knowledge that these promises had been made, but nevertheless give their sanction to the bringing of suit against the plaintiff, and having summons of garnishment served upon his boarders. We shall therefore deal separately with this branch of the case.

2. In the Political Code of 1895 (section 1, par. 4) it is expressly declared that: "The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part of the contract." A mere local custom or business usage which springs up in a particular city is not, therefore, "binding except upon those who have recognized it in their own transactions, and thus adopted it for their own dealings." *Miller v. Moore*, 83 Ga. 685, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329. As to one who has never recognized the existence of such a custom, his assent thereto cannot reasonably be inferred, unless it affirmatively appears that he had knowledge thereof at the time he contracted. *Kelly v. Kauffman Milling Co.*, 92 Ga. 105, 18 S. E. 363; *American Sugar Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383; *Horan v. Strachan*, 80 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471. And it necessarily follows that, unless he did in fact have such knowledge, and actually contracted with reference to such custom, he is not in a position to assert that it became, by implication, a part of a contract into which he and another entered, whether the latter had or had not, in prior dealings with others, given recognition to the custom. *Sugart v. Mays*, 54 Ga. 554. This is

so for the simple reason that to so assert would do violence to the real truth of the matter.

As has been seen, the plaintiff alleged that: "It is the custom with the grocers of Macon and with the said W. G. Middlebrooks Co. to furnish an itemized statement of all accounts upon request of debtor for same." He did not, however, undertake to say that he contracted with reference to this alleged local usage, or that he had any knowledge of the same at the time he bought goods from that firm, or even that this custom was in existence at that time. Furthermore, the plaintiff did not allege, as matter of fact, that under this custom no account could fall due until after an itemized statement thereof was duly furnished to the debtor, or that the operation of this custom was such that the furnishing of an itemized statement of goods purchased was a condition precedent to the right of the creditor to demand and collect the purchase price from the debtor. For aught that is alleged to the contrary, the grocers of Macon simply follow a common practice pursued by merchants generally of furnishing, purely as a matter of grace, and not of right, itemized statements of account to such of their customers as claim not to be posted with regard to the obligations they have assumed, and request information which their creditors are under no legal duty to furnish, often with no other end in view than to secure indulgence to which they are not entitled. Certainly, it cannot be held, as matter of law, that a debtor is under no duty of keeping himself informed as to the kind, quantity, and price of goods he purchases on credit from another, but that the latter is bound to furnish all necessary information in this regard, and has no standing in court unless he has, before making demand for payment, fully complied with this obligation on his part. A custom which imposes upon a merchant any such remarkable obligation as a condition precedent to collecting an account against a customer should be specifically and unequivocally alleged when relied on as constituting one of the essential features of a contract. The allegations set forth in the petition now before us, in so far as they relate to the custom of Macon grocers, fall far short of being sufficiently explicit and comprehensive. Indeed, the petition, as originally framed, contained the unreserved admission that at the time suit was instituted by the defendants against the plaintiff he was due them on open account to the amount of \$42.81; and, though one of the grounds of the defendants' demurrer was based upon this fact, yet the plaintiff did not attempt, by way of amendment, to retract this admission. That he actually owed the defendants that amount at the time they sued him must, therefore, be taken as conceded.

It is pertinent to remark, in this connection, that while the defendants, for the purpose of

demurrer, admitted all the facts set forth in the plaintiff's petition, they by no means accepted as correct any of the mere conclusions he drew therefrom. In the absence of an unequivocal averment that, in point of fact, he knew of and contracted with reference to a local custom which imposed upon Macon grocers the obligation of furnishing to each customer "an itemized statement of his account before they could collect same," the plaintiff's bare assertion that the W. G. Middlebrooks Company "owed a duty to" him to render such a statement before instituting suit amounts to nothing more than the expression of an opinion on his part concerning their legal obligations in the premises. Unless he entered into a contract with them, under the terms of which they were legally bound to furnish him with an itemized statement of his account, he was not entitled thereto, notwithstanding they may have been in the habit of furnishing such statements to other customers whenever called on to do so. See *Haupt v. Insurance Co.*, 110 Ga. 146, 35 S. E. 342, and authorities cited. Possibly, the plaintiff may have meant to aver that, because the defendants had faithfully promised him to furnish the statement requested, and to wait on him for payment until they had done so, their fulfillment of this promise was a condition precedent to receiving payment or bringing suit upon the account. We shall accordingly deal with this phase of the case.

3. If a creditor contracts with his debtor not to enforce his claim within a given time, but nevertheless subsequently brings suit thereon, the debtor is entitled to recover damages for any "actual injury occasioned him thereby, without alleging malice or want of probable cause." *Juchter v. Boehm*, 67 Ga. 534. In such a case the person aggrieved has a right to sue because of the breach of contract. *Porter v. Johnson*, 96 Ga. 147, 23 S. E. 123. But where a creditor, without consideration, promises to grant indulgence to his debtor, a mere failure on the part of the former to live up to his gratuitous undertaking will not give rise to a cause of action. *Marable v. Mayer*, 78 Ga. 710, 3 S. E. 429. Nor can an action to recover damages for the bringing of a suit and the suing out of summons of garnishment in connection therewith be maintained unless malice and want of probable cause be alleged and proved. *Wilcox v. McKenzie*, 75 Ga. 73. "An action for malicious abuse of legal process will lie where legal process has been employed for some object other than that which it was intended by law to effect," and in "such an action it is not necessary to allege want of probable cause. The malicious use of legal process may give rise to an action where no object is contemplated to be gained by it other than its proper effect and execution. In such case it is necessary to show malice and want of probable cause." *Porter v. Johnson*, *supra*. If the petition filed in an action of the nature last referred to simply contains

an averment that the plaintiff suffered damages by reason of being compelled to defend a suit brought against him without cause, his pleadings are fatally defective, in that he fails therein to allege that such suit was brought maliciously as well. *Hyfield v. Bass Furnace Co.*, 89 Ga. 827, 15 S. E. 752.

The action with which we are now dealing sounds in tort, and is in no sense a suit to recover damages for an alleged breach of contract. The plaintiff admits that he was indebted to the defendants in a specified amount at the time they brought suit against him, and no consideration is shown for the promise they made to wait on him for payment until he was furnished an itemized statement of his account. This being so, neither this suit nor the garnishment proceedings in connection therewith can properly be said to have been instituted wholly without cause. The plaintiff makes the charge that "the filing and prosecuting of said suit and garnishing petitioner's boarders in connection therewith \* \* \* was a malicious abuse of legal process," which resulted in great injury and damage to him. However, it is to be noted that he alleges but a single fact in support of this charge, *viz.*, that the defendants well knew at the time they brought suit that he was not indebted to them to the amount of \$86.94, for which sum they asked judgment. Nor is there any pretense on his part that any of the defendants, save Holleman, acted maliciously in the matter with a view to injuring his credit, causing his boarders to leave him, or accomplishing any other wrongful and illegal purpose. So the question at last is: Can the plaintiff be permitted to claim and recover damages, either punitive or actual, simply because the defendants, knowing he owed them but \$42.81 on account, brought suit against him for \$86.94, and declined to dismiss this suit or the garnishment proceedings unless he paid them this latter amount? We think this question should be answered in the negative. Had the plaintiff defended the action, instead of paying their unjust demand "under protest," full opportunity would have been afforded him of showing what amount was actually due and unpaid. It would be to establish a dangerous precedent to hold that the bringing of an action to recover a sum in excess of that which a plaintiff knows is the full amount he is entitled to will, in and of itself alone, and without regard to whether he was actuated by a desire to do more than secure a judgment for more than the defendant was justly due, give rise to an action by the latter for a malicious abuse of legal process. If the plaintiff in error were allowed to maintain his action simply because the defendants knowingly sued him for a greater amount than that which he owed them, then we see no reason why the defendants could not, in turn, sue him on the ground that he sought in the present action to recover \$5,000, when he well knew that he had not suffered dam-

ages in any such amount. It may be well to here repeat what I said in the case of *Porter v. Johnson*, 96 Ga. 148, 23 S. E. 124: "So far as I know, no respectable court in this country has ever held that an action will lie against a person for having brought an action against another, unless he did so with malice and without probable cause. If the law were otherwise, the ending of an action would be merely the beginning of litigation. The defendant, immediately upon the failure of the action, would begin one against the plaintiff, and, if the latter action should fail, the defendant therein would in turn bring another action; and so on *ad infinitum*." Imagine, then, the practical effect of a decision that one having a good cause of action is guilty of an actionable wrong if he in bad faith seeks to recover more than is his just due.

The foregoing discussion covers, we think, all the points relied on by counsel for the plaintiff in error upon the hearing before us. On the whole, we are satisfied that, taking the most favorable view of the case made by his pleadings, the sustaining of the defendants' demurrer was, certainly as to the partnership, entirely proper.

Judgment affirmed.

(118 Ga. 98)

**LE CROIX v. WESTERN & A. R. CO.**  
(Supreme Court of Georgia. May 30, 1903.)

**ACTION AGAINST RAILROAD—VENUE.**

1. The act approved November 12, 1889 (Acts 1889, p. 362), for the lease of the Western & Atlantic Railroad, providing that suits may be brought "in any county through which the road runs," does not give the plaintiff the right to elect in which county suits may be brought. Actions against said company are governed by the provisions of the Civil Code of 1895, § 2334, and, where the injury occurred in Fulton county, a suit therefor could not be brought in Cobb county.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by Hattie Le Croix against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. P. Green and N. A. Morris, for plaintiff in error. Payne & Tye and Clay & Blair, for defendant in error.

**LAMAR, J.** At the time of the adoption of the act for the lease of the Western & Atlantic Railroad (Acts 1889, p. 362), it was not known whether the lessee would be a domestic or foreign corporation, or where the home office of the lessee company would be. In the interest of the public it was provided that suits might be brought "in any county through which the road runs, \* \* \* for any cause of action \* \* \* to which it might become liable." This was not an absolute privilege on the part of a plaintiff to sue

in any county, regardless of the general rule requiring these suits to be brought in the county where the cause of action arose. It was not intended to change the law contained in the Civil Code of 1895, §§ 2334, 1900, or to take that road out of the provisions of any statute on the subject of venue then or thereafter of force, but rather to preserve existing provisions and the right of the state to legislate in the future. The provisions of the last act as to where suits shall be brought did not modify the rule as to when they should be brought in one or another of such counties. In *Sawtell v. W. & A. R. R.*, 61 Ga. 567, the suit was under a former lease act and the constitution of 1868. That ruling could not be followed under the present lease act and the Constitution of 1877, in view of the provisions of the Civil Code of 1895, § 5732, as to special acts changing a general law. Even if it had been valid when enacted, it would have been repealed by the provisions of the act of 1892 (Acts 1892, p. 59). Civ. Code 1895, § 2334. It follows that the plaintiff could not in 1902 sue in Cobb county for a cause of action arising in Fulton county.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 86)

**MCDONNELL v. CENTRAL OF GEORGIA RY. CO.**

(Supreme Court of Georgia. May 30, 1903.)

**INJURY TO SERVANT—DEFECTIVE APPLIANCES—NONSUIT.**

1. Applying the rules laid down in the Civ. Code 1895, §§ 2611, 2612, in reference to suits against masters other than railroad companies, to the facts of the present case, the court erred in granting a nonsuit. The evidence authorized a finding that the defendant was negligent in reference to the machinery furnished upon which the servant was at work at the time of his death, and that the defects in the machinery were of such a character that the defendant ought to have known of them, and have given warning to the servant in respect thereto, as well as a finding that the servant did not know of the defects, and had not equal means with the master of discovering the same, and was not required to make an inspection or examination to discover the defects, and therefore was not lacking in ordinary care in proceeding to work upon the machinery without making an inspection or examination.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by T. M. McDonnell against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Ross & Grace, for plaintiff in error. Lawton & Cunningham, Hall & Wimberly, and J. E. Hall, for defendant in error.

**COBB, J.** The plaintiff brought her action against the defendant company for damages for the homicide of her husband, who was a machinist in its employment. He was killed

by the explosion of the boiler of a locomotive in the shops of the defendant. The locomotive had been in the shops for several days undergoing repairs, and was not in use as a locomotive at the time the boiler exploded, steam having been generated simply for the purpose of aiding in making the necessary repairs. At the conclusion of the evidence for the plaintiff the court granted a nonsuit, and the plaintiff excepted.

It is contended that the plaintiff is not entitled to the benefit of the presumption of negligence authorized by Civ. Code 1895, § 2321, because the homicide was not the result of "the running of the locomotives, or cars, or other machinery," or of the act of "any person in the employment or service" of the company. While there are numerous cases in which it may appear that the court has dealt with the law embraced in this section of the Code as applicable to suits for injuries received by or for the homicide of employes of railroad companies occasioned in the manner stated in the section, there are several rulings to the effect that the provisions of this section are not applicable in any suit for injuries to or the homicide of such employé. *W. & A. R. Co. v. Vandiver*, 85 Ga. 471, 11 S. E. 781; *Georgia R. Co. v. Hicks*, 95 Ga. 302, 305, 22 S. E. 613 (2); *Fla. C. & P. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730; *Port R. & W. C. R. Co. v. Davis*, 103 Ga. 579, 30 S. E. 262; *Augusta So. R. Co. v. McDade*, 105 Ga. 135, 138, 31 S. E. 420 (6); *W. & A. R. Co. v. Jackson*, 113 Ga. 356, 38 S. E. 820; *Atlantic & B. R. Co. v. Reynolds*, 117 Ga. —, 43 S. E. 456.

It is also contended that there is nothing in Civ. Code 1895, § 2297, which declares that, as railroad "companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence," which would authorize a presumption of negligence to arise in favor of the plaintiff, for the reason that the husband of the plaintiff was not killed by the running of trains, and that there was no presumption at common law in favor of passengers except where the injury or death resulted from the running of trains. In other words, the contention is that the case of the plaintiff is not brought within any of the statutory provisions of this state which modify the common law relating to master and servant with respect to suits against railroad companies. It is, of course, admitted that under the law of this state the common-law rule which prohibited one servant from recovering from the master for injuries received as a result of the negligence of a fellow servant is not applicable in any case where the master is a railroad company, whether the injury results from the running of trains or otherwise. *Thompson v. Railroad Co.*, 54 Ga. 509 (1); *Georgia Railroad v. Ivey*, 73 Ga. 499 (1);

*Georgia Railroad Co. v. Brown*, 86 Ga. 320, 12 S. E. 812; *Ga. R. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939 (1); *Ga. R. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (1); *Southern Ry. Co. v. Johnson*, 114 Ga. 329, 40 S. E. 235 (1). It is contended, though, that this modification of the common-law doctrine has no application to the present case, it not being claimed that the homicide of the plaintiff's husband was the result of the negligence of a fellow servant. It is claimed by the defendant that its liability is to be determined in this case solely by the law of master and servant as it existed at common law. For the purposes of this case, this will be conceded to this extent: that is, that the liability of the company is to be determined by the general law of master and servant as it is found in the Code, applicable to cases where the master is other than a railroad company. The duties of a master other than a railroad company are laid down in section 2611, which is as follows: "The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency; he must use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment unknown to the servant, of which the master knows, or ought to know, he must give the servant warning in respect thereto." Section 2612 provides: "A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with the duties imposed by the preceding section, it must appear that the master knew or ought to have known of the incompetency of the other servant, or of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." The section just quoted purports to be a codification of the rules laid down in the cases of *McDonald v. Eagle Manufacturing Company*, 68 Ga. 842, *Georgia Railroad Co. v. Nelms*, 83 Ga. 75, 9 S. E. 1049, 20 Am. St. Rep. 301, and *Davis v. Augusta Factory*, 92 Ga. 713, 18 S. E. 974; and the rules laid down in the last two cases are taken from *Wood's Law of Master and Servant*. Under this section of the Code, in suits for injuries arising from dangers which are unknown to the servant, in order to authorize a recovery by the servant, or in a suit for his homicide, it is necessary that two things should appear: First, that the master knew or ought to have known of the danger to which the servant was exposed; and, second, that the servant did not know of such danger, and had not equal means with the master of knowing it, and by the exercise of ordinary

care could not have known thereof. In other words, as it is sometimes expressed, it is incumbent upon the servant to show, not only "negligence on the part of the master," but also "due care on his own part." *Brush Electric Co. v. Wells*, 103 Ga. 515, 30 S. E. 533 (1); *McDaniel v. Acme Brewing Co.*, 113 Ga. 80, 38 S. E. 404. If the servant shows that the machinery he was furnished to work with or upon was in a defective condition, and that work with or upon such machinery subjected him to danger, he has carried the burden required by law, so far as proving the master negligent is concerned. But this alone will not authorize a recovery, for, if he knew of the danger, and nevertheless continued to work, or if he had equal means with the master of discovering the danger, any injury resulting to him would be the result of his own fault. *W. & A. R. Co. v. Bishop*, 50 Ga. 465, 473; *Johnson v. Railroad Co.*, 55 Ga. 133; *Bell v. W. & A. Railroad*, 70 Ga. 566; *Atlanta & Charlotte Ry. v. Ray*, Id. 674; *Central Railroad v. Haslett*, 74 Ga. 59 (5); *Smalls v. Ry. Co.*, 115 Ga. 137, 41 S. E. 492; *Stewart v. Ry. Co.*, 115 Ga. 624, 41 S. E. 981. When the servant has shown that he did not know of the defects, and did not have equal means with the master of discovering the same, and could not have discovered them by the exercise of ordinary care, he has established a *prima facie* right to recover, if he has also carried the burden of showing negligence on the part of the master in furnishing the machinery. Let these principles be applied to the facts of the present case. The husband of the plaintiff was employed as a machinist in the shops of the defendant. It was his duty to do work of a certain character upon locomotives which were brought into the shops for repairs. It was no part of his duty to inspect the boiler of a locomotive upon which he was placed at work, or to make any examination of the boiler to ascertain its condition before beginning work upon the engine. He had been placed at work upon a locomotive which had been in the shops for several days for the purpose of undergoing repairs, and had left it with the fire banked the evening before the homicide. The last seen of him before the explosion of the boiler he was going through the shops in the direction of the roundhouse where the locomotive was, apparently with the intention of resuming work thereon. His body was found in the debris of the locomotive, and a jury would be authorized to find from the evidence that he had reached the locomotive before the explosion, and was engaged on it in the work required of him, adjusting what is called in the evidence the "pop valve." The evidence authorized a finding that the boiler was in a very defective condition, a large number of staybolts being found broken after the explosion, and in such a condition that these breaks must have existed before the explosion. The evidence disclosed a condition of affairs which would authorize a jury

to find that the boiler was in a dangerous condition, entirely too dangerous for use. The defects in the boiler were shown to be of such a character that an inspection would have disclosed them, and from the evidence it is to be inferred that the character of the defects was such that they must have existed for some time. It is to be inferred that the work in which the plaintiff's husband was probably engaged at the time of his death rendered it usual, proper, and necessary that the engine should be heated, and the boiler filled with steam. While the evidence is voluminous, what is above stated is the substance of the material parts.

Under these circumstances was the plaintiff entitled to have a jury pass on her case? Has she carried the burden which the law imposes upon one suing for the homicide of an employé? There can be no question that there was sufficient evidence to authorize a jury to find negligence on the part of the defendant, so far as the condition of the boiler was concerned. It is unnecessary to determine whether the doctrine of *res ipsa loquitur* applies, but see the following cases: *Illinois Central R. Co. v. Houck*, 72 Ill. 285; *Dunlap v. Steamboat Reliance (C. C.)* 2 Fed. 249; *Robinson v. Railroad Co.*, 20 Blatchf. 338, 9 Fed. 877; *The Reliance*, 4 Woods, 420, 2 Fed. 249; *Illinois Cen. R. Co. v. Phillips*, 49 Ill. 234. As boilers, properly constructed and properly used, do not generally explode, the explosion of a boiler would seem to be evidence of negligence in some one. It may have been that of the boiler maker, or of the one whose duty it was to inspect the boiler before using it, or of the one who was using the machinery to which the boiler was attached. It would seem, therefore, that, while the mere explosion of a boiler would raise a presumption of negligence of some one, it would not, necessarily be evidence of negligence on the part of the owner of the boiler. As we say, however, no decision as to this need be made in this case. There was evidence authorizing a finding that the defendant was negligent in furnishing such a boiler for use by an employé either at work with or upon the machinery with which it was connected. The evidence also authorized a finding that the company ought to have known of the defective condition of the boiler. The plaintiff has, therefore, successfully carried the burden which the law imposed upon her of showing that there was a latent danger to which her husband was exposed, and which the company ought to have known of before placing her husband at work upon the locomotive, and about which it was its duty to warn him. Her right to recover, therefore, is dependent upon whether she has successfully carried the second burden which the law imposes upon her. Does the evidence show that her husband did not know of the condition of the boiler, and did not have equal means with the company of discovering it, and could not

by the exercise of ordinary care have known of it? Want of knowledge on the part of the servant as to the defects in machinery may be shown by circumstances as well as by direct evidence. Of course, in a case like the present, where the servant loses his life, it is impossible in a suit by his widow to show by direct evidence this want of knowledge. If the circumstances are such that it can be reasonably inferred that the servant did not have knowledge, this inference from the facts sufficiently establishes want of knowledge. The evidence shows that the plaintiff's husband was not required, under the terms of his employment, to inspect or examine the boilers of locomotives upon which he was placed at work. If it was not his duty to make an inspection of the boiler, then he was not lacking in diligence if he went to work upon the engine without examining into the condition of the boiler. He had a right to rely upon the obligation which his employer was under to furnish him safe machinery to work with, so far as latent defects were concerned. He was placed at work upon the engine by his employer. He had worked upon it several times before his death. The last seen of him, he was making his way toward the house where the engine was situated, presumably with the intention of resuming work on it; and a jury could find that he was at work on the engine at the time of his death. A jury would be authorized to find that the plaintiff's husband did not know of the defects in the boiler. Not being required to inspect boilers, not having any one at his command to make an inspection, and not being himself an inspector of boilers, he had not equal means with the company of knowing of the defective condition of the boiler. We do not mean to say he would have been under a duty to inspect if he had been a professional inspector of boilers, but the fact that he was not such an inspector is an additional reason why he had not equal means with the master of discovering the defects. The boiler was shown to be in such a defective and dangerous condition that no sensible man would have used it for the purposes for which the plaintiff's husband used it if he had known of its condition; and the mere fact that he went to work upon the engine is itself evidence of want of knowledge on his part as to its condition. This of itself would be sufficient to shift the onus upon the company to show that he did have knowledge. There being evidence authorizing a finding that the company was negligent where it ought to have been diligent, and that the plaintiff's husband was not negligent as to any matter about which the law required him to be diligent, the plaintiff was entitled to have her case submitted to a jury. We do not mean, of course, to hold that the evidence demands a finding in her favor, but, after a thorough review of the evidence, we think it was sufficient to authorize a recov-

ery. If at another trial the evidence is substantially the same as that contained in the present record, the case should be submitted to a jury under proper instructions. On the record now before us we are clear that the court erred in granting a nonsuit.

Judgment reversed by five Justices.

(118 Ga. 128)

### BRICE v. SHEFFIELD.

(Supreme Court of Georgia. June 1, 1903.)

#### DEED—ALTERATION—ADMISSION IN EVIDENCE —DESCRIPTION—PAROL EVIDENCE —CONSTRUCTION.

1. A deed is not inadmissible in evidence because of an alteration which is unimportant and immaterial to the case.

2. A description of land as "ten acres of land, situated in [a certain district], where I now reside," is not too indefinite to be made certain by parol evidence. A deed conveying land so described is not inadmissible in evidence as wanting a sufficient description of the land conveyed, and the latter is sufficiently identified when it is shown that at the time of the execution of the conveyance the grantor was living in the named district upon a certain tract of land which contained just 10 acres.

3. An instrument executed and attested as a deed and duly delivered, which recites that it is "to certify" that the grantor has given the grantee certain land in consideration of his having built her a house, "said land to belong to him at my death," is not testamentary in character, but conveys a present title, with the possession postponed until the death of the grantor.

4. The trial judge erred in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Sarah Sheffield against William Brice. Judgment for plaintiff, and defendant brings error. Reversed.

Minter Wimberly and J. E. Hall, for plaintiff in error. E. P. Johnston and Harde-man, Davis, Turner & Jones, for defendant in error.

SIMMONS, C. J. Complaint for land was brought by Mrs. Sheffield against William Brice. On the trial the judge directed a verdict for the plaintiff for the premises in dispute, but seems to have left to the determination of the jury the amount of the mesne profits to be awarded. The defendant moved for a new trial. The motion was overruled, and the movant excepted. Two grounds are insisted on by counsel for the plaintiff in error: (1) That the court erred in refusing to admit in evidence a certain paper tendered in evidence by the defendant as a deed to him from his mother, who was the common grantor, under whom both parties claimed; and (2) that the court erred in directing a verdict. The paper excluded by the court was as follows:

¶ 1. See *Alteration of Instruments*, vol. 2, *Cent. Dig.* § 208.

"Macon, Georgia, March, 1884.  
"Georgia, Bibb County.

"This is to certify that I have given my son, Wm. Brice, ten acres of land, situated in Rutland district, where I now reside, for in consideration of building me a house, said land to belong to him at my death.

her  
Aletha X Brice.  
mark

"Signed in the presence of us:

"J. A. Jordan.

"W. E. Jenkins, J. P. Bibb Co. Ga.

"I neglected to date this agreement at the time of writing it. It was executed prior to April, 1884, for I resigned as justice of the peace in April, 1884. My recollection the paper was executed in March, 1884. This September 15th, 1892.

"W. E. Jenkins, N. P. Bibb Co. Ga."

This paper was excluded on the grounds that its record was not good notice, because there appeared to be a material alteration in the deed, unexplained, and because the description of the land conveyed was not sufficient to put the plaintiff, a subsequent purchaser, on notice. It was also argued here that the paper was testamentary in character, and postponed not only the possession, but the title, until after the death of the person signing it.

1. We will first consider the so-called alteration. From the note at the bottom of the paper and from the parol evidence it appeared that there was no alteration of the body of the instrument, but that it was executed without date some time about March, 1884, and that in 1892 the attesting officer wrote, "Macon, Georgia, March, 1884," in the upper right-hand corner, and added, below the body of the instrument and the signatures, the certificate as to the time of execution. This, we think, was not a material alteration of the instrument. The paper was duly recorded as a deed in September, 1892, and, if given effect as a deed from the date of its record, was good as against the plaintiff. The date of the execution is wholly unimportant so it was executed and recorded prior to the acquisition of an interest in the land by another.

2. The description of the land conveyed was sufficient, under the facts shown by the parol evidence, to definitely and positively identify the tract referred to. Mrs. Brice at one time had owned a 70-acre tract of land, this being the only land she ever owned in Bibb county. She made a parol gift of 30 acres of this to each of her two sons, retaining for herself a 10-acre tract. The land was divided, each son taking his 30 acres, and the mother retaining and residing upon the 10 acres. The deeds were not made conveying the 30 acres to each of the sons until after the execution of the instrument now under consideration, but the actual division of the land had been made before this instrument was executed. Taken in connection with this

evidence, the paper clearly identified the land conveyed. The caption was "Georgia, Bibb County," and the words "Rutland district," in the body, will be referred to the locality named in the caption. The description of the land as 10 acres "where I now reside" is not so vague as to make identification impossible, and render the instrument inadmissible, for the description was such that it might, by parol evidence, be applied with certainty to some given tract, as in fact it was by the evidence just above recited. At the time this paper was shown to have been executed, the grantor was residing on a definite tract or lot of land which contained 10 acres, and the conveyance of 10 acres of land where she at the time resided could have referred to no other or different land. Neither more than this tract nor less than all of it would answer the description given, and no metes and bounds or further descriptive terms were necessary. The description in the deed, considered in the light of the facts existing at the time of its execution, identified as the land conveyed the tract on which the grantor at that time resided.

3. The defendant testified: "My mother asked me to build a house for her on the ten acres of land on which she lived, agreeing that if I built her the house she would give me a deed to the land, she having the right to live on it during her life. She made the proposition to me to build the house, and that she would give me a deed to the ten acres of land, subject to her use during her life. I built the house as she directed, and she made me this deed after the house was built." Considered as showing the circumstances under which the instrument was executed, this evidence is helpful in determining the character of the instrument. It shows that the paper was not intended as mere evidence of an executory contract to convey the land when the house was completed, for the house had been completed before the instrument was executed. The instrument is not in the form usual to deeds, but the words "This is to certify" are not essentially different from the more usual "This indenture witnesseth," and the words "I have given" are sufficient in Georgia as words of conveyance of land. So, too, in Georgia, the word "heirs," or its equivalent, is not necessary to create an absolute estate; but every conveyance, properly executed, is construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. In *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 373, many of the Georgia cases dealing with habendum clauses of a doubtful nature, where it was difficult to determine whether or not the instrument was testamentary in character, are collected. Under those cases and the decision in *Wynn v. Wynn*, the instrument now under consideration cannot be treated as testamentary, but must be regarded as creating a present title to the land, with a postponement of the pos-



session only. See, also, *West v. Wright*, 115 Ga. 277, 41 S. E. 602. In this case, as in *Wynn v. Wynn*, the instrument was attested in a manner which fully complied with the law as to the attestation of deeds, but which was ineffectual as applied to a will. Then, too, the fact that the instrument was delivered to the grantee is evidence tending to show that it was intended as a deed, rather than as a will. The reservation of the life estate in the grantor is not at all inconsistent with an intention to convey the title in present, with the right of possession postponed until the death of the grantor. Giving effect, as best we can, to the intention of the parties as gathered from the form and language of the instrument, considered in the light of all the surrounding circumstances and the contemporaneous acts of the parties, we must hold that the instrument is not testamentary but is a deed which conveyed the title.

4. For the reasons given, this instrument was admissible in evidence. Had the judge admitted it, the evidence would certainly not have demanded a verdict for the plaintiff, and it would have been error to so direct. The judgment of the court below refusing to grant a new trial was erroneous.

Judgment reversed by five Justices.

(118 Ga. 63)

#### TAYLOR v. CITY OF SANDERSVILLE.

(Supreme Court of Georgia. May 30, 1908.)

#### JUDICIAL NOTICE—MUNICIPAL ORDINANCE—LOITERING ON STREETS—EVIDENCE—CERTIORARI—VERIFICATION.

1. In a proceeding in a municipal court to enforce an ordinance of the municipality, judicial notice will be taken of the existence and substance of the ordinance.

2. A municipal ordinance making it penal for any person "to be found idling, loitering, or loafing upon the streets" of the municipality is not void as an effort to punish for the same acts which are embraced within the state laws against vagrancy.

3. To warrant a conviction under such an ordinance, it is not necessary that the municipality should prove that the accused is without property or means of support.

4. Statements of fact made in a petition for certiorari cannot be considered on the hearing when they are not verified by the answer.

5. Questions not made in the record will not be considered, although they may be argued here.

(Syllabus by the Court.)

Error from Superior Court, Washington County; H. M. Holden, Judge.

Lewis Taylor was convicted of violation of an ordinance of the city of Sandersville, and brings error. Affirmed.

Evans & Evans, for plaintiff in error. Hardwick & Hyman and Fulton Colville, for defendant in error.

SIMMONS, C. J. After conviction before the mayor of the city of Sandersville, Tay-

lor sued out a writ of certiorari. On the hearing before the judge of the superior court, the certiorari was overruled. Taylor excepted. From the petition and the answer of the mayor it appeared that Taylor was convicted of a violation of a municipal ordinance making it penal for any person "to be found idling, loitering, or loafing upon the streets of the city of Sandersville."

1. The petition for certiorari alleged that the conviction was illegal, and contrary to law, because no ordinance making it penal to idle, loiter, or loaf upon the streets of the city was introduced in evidence, or proved to be in existence. This ground is verified by the mayor who, however, states that there is such an ordinance of force, and embodies it in his answer. That a municipal ordinance cannot be judicially noticed by state courts is well settled in this state, as well as by the decisions of the courts of other states. They are treated as are private statutes, and must be alleged and proved as matters of fact. This rule, however, does not in any sense apply to a proceeding in a municipal court to enforce an ordinance of the municipality. In such a proceeding the court will take judicial notice of the existence and substance of the ordinance. Relatively to the municipal court, an ordinance of the municipality stands upon the same footing as do public acts of the Legislature in the courts of the state. They are the laws of the forum—the enactments of the legislative department of the government of which the municipal court is the judicial branch. That this is no new doctrine may be seen by an examination of *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258, and cases cited; *Conboy v. Iowa City*, 2 Iowa, 90; *City Council v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 723, approving *City Council v. Chur*, 2 Bailey, 164; *Information against Oliver*, 21 S. C. 319, 53 Am. Rep. 681; *Wheeling v. Black*, 25 W. Va. 266, 281; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373; note to *Lanfear v. Mestier*, 89 Am. Dec. 668, and cases cited.

2. The petition also alleged that the conviction of the plaintiff in error was illegal, "because under the charge of disorderly conduct your petitioner could not be convicted of vagrancy, because said vagrancy is an offense against the state laws, and the said mayor of said city is without jurisdiction to try the same." In this ground there are some assumptions of facts which cannot be sustained by the record. The answer of the mayor does not verify the statement that Taylor was charged with disorderly conduct, or that he was convicted of vagrancy. On the contrary, it states unequivocally that Taylor "was not tried for vagrancy, but for idling, loitering and loafing on the streets of Sandersville, Georgia," and was found guilty of that offense. It was argued that the ordinance in question is void as an effort by the municipal authorities to punish an act

¶ 1 See Evidence, vol. 20, Cent. Dig. § 42.

which is an offense under the penal statute of the state against vagrancy. To warrant a conviction under section 453 of the Penal Code of 1895, wherein vagrancy is defined, it is necessary (except in case of professional gamblers living in idleness) to show that the accused is without property, or has no means of support. Nor is it essential under that section that the accused be found idling, loitering, or loafing upon the streets, or in any particular place. This municipal ordinance is materially different, for it makes it penal for any one, regardless of his property or means of support, "to be found idling, loitering, or loafing upon the streets of the city." The ordinance is not aimed at the lazy and shiftless, who are apt to require support in some public institution, or else to resort to theft; but at all persons, rich or poor, who loiter or loaf upon the public streets, whose idleness makes them less likely to act in accordance with the best interests of the city, and who, at best, render more difficult the passage of others along the streets. With the policy of the municipal authorities in passing this ordinance we have nothing to do. It is enough for our purposes that it does not seek to impose a punishment for the same acts which are made penal by the laws of the state.

3. It was alleged that the verdict was contrary to evidence, and without evidence to support it. In support of this ground it was argued that the evidence failed to show the financial condition of the plaintiff in error. What we have said above really disposes of this ground. If the ordinance imposes a punishment upon all persons found idling, loitering, or loafing upon the streets, without regard to their property or means of support, it must follow that proof of the financial condition of the accused was not essential to a conviction. The evidence set out in the answer of the mayor warranted the conviction of the accused, and there was no error in refusing to sustain the certiorari on this ground.

4. The petition for certiorari alleges that the conviction was illegal because the accused "was not presented before his trial with a copy of charges and the list of witnesses against him, he not having waived the same." The answer of the mayor states that "upon a verbal demand of [Taylor's] attorney, he was furnished with a copy of charges and the witnesses." Even if there were any merit in this ground as it is stated in the petition, it cannot be considered, as the allegations of facts upon which it is based are not verified by the answer.

5. The above disposes of all of the assignments of error and of the case. It is true that in the brief filed in this court for the plaintiff in error it was argued that the ordinance was invalid because "unreasonable, oppressive, and unconstitutional"; but there is no assignment on which such a contention can properly be predicated, and

the record contains no intimation that any such question was made before the mayor, or in the superior court. This court is, therefore, without jurisdiction to decide it.

Judgment affirmed by five Justices.

(118 Ga. 126)

#### CUNNEGIN v. STATE.

(Supreme Court of Georgia. June 1, 1903.)

##### LARCENY AFTER TRUST—EVIDENCE.

1. The legal question involved in this case is settled by the decisions of this court in *Finkelstein v. State*, 31 S. E. 589, 106 Ga. 617; *Hecox v. State*, 31 S. E. 592, 106 Ga. 625.

2. There was in the present case some evidence to support a finding that the accused fraudulently induced the prosecutor to deliver to him possession of the property stolen, with intent to steal it, and that the element of trust of the character which enters into all cases of larceny after trust was absent. That theory, as well as the contention that the accused was voluntarily intrusted with the possession of the goods, was fairly submitted to the jury, under appropriate instructions from the trial judge. The conviction of simple larceny was fully warranted, and this court will not reverse the judgment of the superior court overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Tom Cunnegin was convicted of larceny, and brings error. Affirmed.

Williford & Middlebrooks, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and E. W. Butler, for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 1097)

#### JOHNSON v. THROWER et al.

(Supreme Court of Georgia. June 3, 1903.)

##### LANDLORD AND TENANT—WARRANT TO DISPOSSESS—INJUNCTION—ESTOPPEL TO DENY TITLE—HARMLESS ERROR.

1. A warrant to dispossess a tenant who is holding over beyond his term, or who has failed to pay rent due, may be issued upon an affidavit made by an agent of the landlord.

2. In a case where the undisputed evidence shows that the relation of landlord and tenant exists between the parties, the execution of a warrant to dispossess the tenant will not be enjoined by a court of equity; the remedy of the tenant, if he has any defense, being to file the counter affidavit provided for by the statute; and this is so though the tenant, on account of poverty, may be unable to give the bond and security required as a condition precedent to the filing of such counter affidavit.

3. The rule that a tenant cannot set up a title to the rented premises in opposition to that claimed by his landlord, is applicable, although at the time the contract of rent was made the tenant was in possession, claiming title to the premises.

4. None of the rulings made during the progress of the trial, even if erroneous, were of such a character as to authorize a reversal of the judgment refusing to grant an injunction; and

§ 2. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 1281.

such judgment was, under the facts, the only proper one which could have been rendered.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by Mary Johnson against M. L. Thrower and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error. O. L. Pettigrew, for defendants in error.

FISH, J. On December 29, 1902, M. L. Thrower, as agent for W. R. Phillips, made an affidavit as the foundation for a warrant to dispossess Mary Johnson from certain described premises, on the ground that she, as tenant of Phillips, had failed to pay rent then due. The warrant was issued, commanding Mary Johnson, as tenant, to deliver possession of the premises to W. R. Phillips or his representative. Notice of the issuance of the warrant was duly given to Mary Johnson, who was in possession of the premises; and she filed a petition in the superior court, praying that the execution of the warrant be enjoined, claiming in her petition that she was the owner of the property in question, and not the tenant of either Phillips or Thrower. The judge refused to grant the injunction, and the plaintiff excepted.

1. At the hearing the plaintiff offered evidence which it is claimed established her contention, whereupon the defendant Phillips offered in evidence a contract, of which the following is a copy:

"We have this day rented of W. R. Phillips the house and lot in the city of Atlanta known as No. 204 Markham street, from this date to the 1st day of May, 1903, and promise to occupy said premises as his tenants, and agree to pay him one dollar per month for the rent of the same, the first payment and each payment to be made on or before the 10 day of each month. At the expiration of said lease we agree to vacate said premises and give the possession of the same to said W. R. Phillips. This Nov. 1st. 1902.

"[Signed Ned Johnson.]

her  
"Mary X Johnson."  
mark

The execution of this contract by Mary Johnson, the plaintiff, was duly proved. The plaintiff objected to the admission of this contract on the ground that the dispossessionary warrant was a proceeding by M. L. Thrower individually against Mary Johnson alone, and the contract, being between W. R. Phillips, on the one side, and both Mary and Ned Johnson, on the other, was irrelevant. The court properly overruled this objection. While it appeared that the affidavit which was the foundation of the warrant was made by Thrower as agent for Phillips, the warrant was issued in the name of Phillips, and, by the express terms of the statute, a warrant against a tenant holding over beyond his term, or failing to pay the rent when due,

may be issued upon an affidavit made by the agent of the landlord. Civ. Code 1895, § 4813. Such an affidavit is properly signed, 'as was the one in the present case, by the agent himself in his individual name; and, when the affidavit contains a recital of his agency, a sufficient compliance with the statute is shown. It appears, therefore, that the "proceeding" was not one by M. L. Thrower as an individual, but by W. R. Phillips, the person claiming to be the landlord. The contract was evidence that the relation of landlord and tenant existed between Phillips and the plaintiff, and the fact that another person joined with her in the obligation to pay the rent did not make the contract irrelevant or inadmissible. That no effort was being made to dispossess her co-tenant affords her no just cause of complaint. There was no effort made by the plaintiff to show that she did not execute the contract, and it must, therefore, for the purposes of this case, be taken as conclusively establishing the facts stated therein.

2. As the relation of landlord and tenant existed between the parties, the remedy of the plaintiff, if she did not owe the rent, was by counter affidavit; and, unless some reason existed why this remedy was not available, the extraordinary powers of a court of equity could not be called to her aid. It is alleged in the petition that such a reason did exist, it consisting in plaintiff's inability to give the bond and security required by the statute. It is settled by repeated adjudications that this constitutes no reason for equitable interference. *Brown v. Watson*, 115 Ga. 592, 41 S. E. 998, and cases cited. The distinction pointed out in that case between the ruling then made and that made in *Brooks v. Stroud*, 111 Ga. 875, 36 S. E. 960, is applicable in the present case; for, while the plaintiff in her petition denies the tenancy, the uncontradicted evidence shows that she had made a contract of tenancy with the defendant Phillips.

3. But even if the remedy by injunction had been available to the plaintiff, she would have been estopped to set up title in herself in opposition to that claimed by her landlord. The doctrine that a tenant cannot dispute his landlord's title while in possession under the contract of tenancy has been so many times ruled by this court that any elaboration of the proposition would be superfluous; and, while there are exceptions to the rule, none of the exceptions apply in the present case. If a tenant in possession desires to litigate with his landlord the title to the premises, he must first pay the rent and surrender possession. By entering under the landlord he admits his title, and the law will not permit him to assume an inconsistent position, either by attorney to any one else as his landlord, or by claiming himself title to the premises. It is wholly immaterial that the landlord may in fact have not even color of title to the property. It is enough that he claimed

it, and that the tenant, by his contract of tenancy, recognized the claim. As against him, the claim is valid, though wholly unfounded. See *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291, where the previous decisions of this court are collated. See, also, 18 A. & E. Enc. L. (2d Ed.) 411-414; 2 *McAdam, Land. & T.* (3d Ed.) 1350, and cases cited, and section 423. The rule is the same where the tenant is in possession, even under a claim of ownership, when the contract of tenancy is made. See *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; 18 A. & E. Enc. L. (2d Ed.) 415, and cases cited in note 3.

4. It follows from the foregoing that the trial judge properly refused to grant the injunction prayed for by the plaintiff. If any error was committed in ruling out a portion of the evidence offered by plaintiff to establish her title to the premises, it resulted in no injury to the plaintiff; for it would have been proper, after the contract of tenancy between plaintiff and Phillips was introduced in evidence, to have ruled out all the evidence relating to the claim of title by the plaintiff. None of the rulings complained of in the bill of exceptions, even if erroneous, were of such a character as to authorize a reversal of the judgment refusing to grant an injunction.

Judgment affirmed by five Justices.

(118 Ga. 73)

#### CALVIN v. STATE.

(Supreme Court of Georgia. May 30, 1908.)

##### CRIMINAL LAW—INSTRUCTIONS—CONFESSIONS.

1. In the trial of a murder case, where the state relies in part upon a confession which is proven by the testimony of one witness only, it is error to charge: "When a confession is made and stated to the jury by a credible witness, it is of the highest order of testimony. There can be but few higher sources of evidence than a confession voluntarily and freely made." (Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Willie Calvin was convicted of murder, and brings error. Reversed.

Wm. Pease and Francis P. Salas, for plaintiff in error. W. W. Osborne, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. The accused was convicted of murder, and sentenced to death. He assigns error upon the refusal of the judge to grant him a new trial. Error is assigned upon the following charge of the court: "All confessions should be received with care and caution, not on account of the character of the testimony, but on account of the fact of their being transmitted through one or two different channels, liable to be some mistake as to what was said, and liable to be some mistake in repeating; but when a

confession is made and stated to the jury by a credible witness, it is of the highest order of testimony. There can be but few higher sources of evidence than a confession voluntarily and freely made." The assignments of error upon this charge are that the court expressed an opinion as to the weight that should be given to a confession, thereby withdrawing from the jury the right to consider what weight should be given to it, and that the court indirectly intimated that the witness who testified to the confession was credible, instead of leaving that question to the jury to decide. In *Cook v. State*, 11 Ga. 59, 56 Am. Dec. 410, Judge Nisbet said: "As a general rule, the confessions of a party, freely and solemnly made, are the highest evidence. So reasonable and well settled is this rule that exceptions to it, to be sustained, ought to rest upon the most unassailable grounds." In *Eberhart v. State*, 47 Ga. 606, Judge McCay said: "A confession in open court is evidence even of treason, and it is a sound rule of law and of common sense that a free confession is very strong evidence of guilt." But it must be remembered, as was said in *Savannah Railway Company v. Evans*, 115 Ga. 318, 41 S. E. 632: "There are many things said by this court, both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury. This court \* \* \* may use language which would be appropriate in a headnote or opinion, but which would be grossly improper when embodied in a charge to a jury." See, also, *Florida Central Railroad Company v. Lucas*, 110 Ga. 127, 128, 35 S. E. 283. In *Hunter v. State*, 43 Ga. 484, 523 (4), it was held that it is not the duty of a judge to classify evidence as to its weight or consideration, or to intimate any opinion thereon. In that case counsel for the state contended that confessions were the highest species of evidence, while counsel for the accused insisted that under the rule laid down in the Code they were not, and the court refused to give in charge to the jury a request of counsel for the accused that confessions were not the highest evidence, but charged the language of the Code on the subject of confessions. It was held that this action of the court was not error. In the case of *Merritt v. State*, 107 Ga. 675, 679, 34 S. E. 361, error was assigned upon the following charge: "Evidence of certain physicians has been admitted, which was offered for the purpose, as you understand, of showing she was a virtuous woman. The law makes the opinion of experts—as they are called experts on any question of science—makes that sort of evidence admissible. The value of that testimony, gentlemen, is dependent upon the degree of the experience and honesty and the impartiality of the witnesses who testified, and its weight varies in proportion as they are experienced, honest, and impartial. Where these elements

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1363.

are undoubted, their testimony is entitled to great weight and consideration; but, gentlemen, it is not so binding, not so authoritative, that you, the jury, are bound by it. It is intended to aid you in coming to a correct conclusion." It was held that this charge was erroneous, notwithstanding it was almost in the exact language of a head-note in the case of *Choice v. State*, 31 Ga. 425; Mr. Justice Lewis, in the opinion, saying: "Ordinarily, a court should not instruct the jury what particular testimony before them is or is not entitled to great weight or consideration, especially where there is no statute or rule of law stating that the particular testimony in question should be considered by the jury as being of great weight." See, also, in this connection, *Raleigh & Gaston Railroad Company v. Allen*, 106 Ga. 572, 32 S. E. 622; *Ryder v. State*, 100 Ga. 529 (6), 533, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334; *Phoenix Insurance Company v. Gray*, 113 Ga. 424, 38 S. E. 992; *Wall v. State*, 112 Ga. 336, 37 S. E. 371 (2). In *Bourquin v. Bourquin*, 110 Ga. 440, 35 S. E. 710 (3), it was held that it is not proper for the judge to inform a jury that particular evidence is entitled to great consideration, but he should leave them free to determine for themselves the weight to be given it. In that case one of the questions was whether a deed had been delivered, and the court was requested to charge the jury that the record of a deed by the grantor was entitled to great consideration. It was held not to be error to refuse to give this request, it being there said: "It is not proper for a judge to instruct the jury that particular evidence is entitled to great weight or great consideration. This is a matter entirely for them. One juror might give certain evidence great consideration, and another might think it entitled to but little weight. This is a matter peculiarly within their province, and they should be left free to determine what weight should be given to particular evidence. \* \* \*

There are cases in which an instruction from the judge that evidence of a certain character is entitled to great weight, or should receive great consideration, would be equivalent to an expression of opinion on the evidence, almost amounting to a direction of a verdict in favor of the party in whose behalf the evidence was introduced." All evidence submitted to the jury is to be weighed by them, and, as a general rule, they are the exclusive judges of the weight of evidence, and in those cases where the jury are, under the law, the exclusive judges of the weight to be given to particular evidence, it is no part of the duty of the judge to call their attention to one class of evidence, and state that it is better or higher, and entitled to more weight, than another class of evidence in the same case. More than this, it is positive error for the judge to do this; and, if an error thus committed is calculated to prejudice the losing party, it

is sufficient reason for setting aside the verdict. In the present case the accused in his statement denied that he was the slayer. One witness, and only one, testified to a confession. This testimony showed a full and complete confession by the accused that he was the perpetrator of the crime. While the state did not rely entirely upon the testimony of this witness, it is apparent that he was an important witness in the case. The effect of the judge's charge was to single out this witness, and call especial attention to him, and indicate to the jury that the character of testimony which he had offered was "of the highest order," and that there were "but few higher sources of evidence." We think this error was calculated to prejudice the accused, especially when taken in connection with the fact that the judge emphasized in his charge that a confession is entitled to this weight when testified to "by a credible witness." This language was calculated to impress upon the minds of the jury that the particular witness was credible, and, when coupled with the statement that his testimony was worthy of high consideration, it was calculated to operate greatly to the prejudice of the accused, and constituted sufficient cause for a new trial.

The ruling made in *Mercer v. State*, 17 Ga. 169, is distinguishable from the one now made. While in that case the judge charged the jury that a confession freely and voluntarily made was the "highest kind of evidence," still he also instructed them, in the same connection, that they should weigh the testimony of the confession "as they did other testimony," and in the opinion of the court stress is laid upon these qualifying words. We are not prepared to say that in a case like the present we would approve a charge in the language of that given in the *Mercer Case*, nor do we say that in all cases a charge in the language of the one given in the present case would be cause for a new trial. The test in each case is whether the charge was calculated to prejudice the accused. Here, however, the judge added no qualifying words of the nature used in the *Mercer Case*, and, in view of the character of the testimony, we think a new trial is demanded. See, in this connection, *Phoenix Insurance Co. v. Gray*, supra. It is true the judge in another part of his charge, and in an entirely different connection, charged the jury that they were the exclusive judges of the weight to be given the prisoner's statement, and that it was "their exclusive province to judge of the credibility of the witnesses in the case." We do not think this language in an entirely different part of the charge cured the error of the charge on the subject of confessions. It is by no means certain that the error would have been cured if the judge had, in another part of the charge, expressly stated that the jury were the judges of the weight to be given to testimony of a confession, as it could not

be said with certainty that even then the impression first conveyed had been removed.

In the course of his charge to the jury the judge said: "There is another thing that it is not inopportune, as a matter of law, to call the attention of jurors to, and of everybody else, as well as the jury. It is unlawful for a man to kill a woman with whom he is living, and who is not his wife, because she sees proper to leave him. It is unlawful for him to kill her because he suspects or believes that she has been guilty of similar conduct with other men—similar to what she has been guilty of with him. He has no superior right in law to her. She is not his wife, and other men—if there are other men with whom she has engaged in illicit intercourse—have just as much right to kill him as he has to kill them. Neither one of them has any right to kill her on account of it. It is a violation of law to sustain such relations, and the law puts no protection around parties who engage in any such life. Barbaric rage and fury towards a woman will not justify men. There is but one law in this country. We judge everybody by one level, horizontal rule. We cannot have one law for the half-savage brute and another law for a philosopher. We have only one law to administer, and, if a man kills under circumstances that would make it murder for one man, it is murder for another man, if he is of sound mind, and capable of knowing and distinguishing between wrong and right." The accused was a negro, and was on trial for the murder of his concubine. The judge, in a note to the motion for a new trial, says crimes of similar nature were of frequent occurrence in his county among the people of the African race, and he states that he thought it appropriate to call the attention of this race to the fact that they had no right to kill their concubines simply because they refused to continue longer in that relation with them. What was said by the judge in the extract from his charge above quoted is common sense, good morals, and sound law; and, even if the fact that he addressed his remarks in part to the spectators at the trial was error at all, it was not in the present case such an error as was calculated to prejudice any right of the accused. See, in this connection, *Bailey v. State*, 70 Ga. 821 (3).

In referring to the recommendation of the jury to life imprisonment, the judge said: "You can do that for any reason you may see proper. It is a right given you without any limitation." It is complained that this charge was error, for the reason that the jury had a right to exercise arbitrarily their discretion to reduce the punishment from death to life imprisonment. We do not think there was any error in this charge. It is true the jury have the absolute right to determine the question of punishment, and that their decision is not subject to be

reviewed by the courts in any way. Still it is not expected that the jury would make the recommendation without some reason. What that reason may be is entirely immaterial if it is satisfactory to them, but they must necessarily be actuated by some reason. In the case of *Perry v. State*, 102 Ga. 365, 30 S. E. 903, while there was some difference of opinion among the members of the court as to some of the questions involved, there was really no substantial difference on this question. See the remarks of Mr. Presiding Justice Lumpkin on pages 379, 380, 102 Ga., and pages 908, 909, 30 S. E., and those of the dissenting justices on page 386, 102 Ga., and page 911, 30 S. E.

The judge inadvertently failed to give to the jury the form of their verdict in case they should acquit the accused, but, upon his attention being called to the omission, he gave the necessary instructions. Under the previous decisions of this court, this omission did not constitute sufficient ground for a new trial, although the judge stated to the jury, when his attention was called to the omission, that he had forgotten to give them the form of their verdict. *Reeves v. State*, 117 Ga. —, 43 S. E. 404, and cases cited. The case of *Smith v. State*, 109 Ga. 480, 35 S. E. 59 (3), did not relate to the form of the verdict, but in that case the court failed to charge upon a substantial defense set up by the accused in sworn testimony.

It is complained that in one part of the charge the judge used language which, in effect, told the jury that the accused was the perpetrator of the offense. Of course, if the language was calculated to have this impression, it was erroneous, because the statement of the accused was, in effect, a denial that he was the slayer. Similar language will probably not be used upon another trial. There are numerous assignments of error upon failure to charge upon different subjects. Even if there was any merit in any of these assignments, the omissions will doubtless be supplied on another trial.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 34)

#### WALKER v. STATE.

(Supreme Court of Georgia. May 30, 1903.)  
CRIMINAL LAW—INSTRUCTIONS—CORROBORATION—CONFESSIONS—CONTINUANCE.

1. Having charged as to the weight which might be given the prisoner's statement, it was not necessary, in defining a reasonable doubt, for the judge further to say that it might arise from the defendant's statement. *Pen. Code* 1895, §§ 1010, 987; *Vaughn v. State*, 16 S. E. 64, 88 Ga. 738 (4); *Lacewell v. State*, 22 S. E. 546, 95 Ga. 349.

2. Where there was no evidence that a witness for the state was an accomplice, the court was not bound to charge *Pen. Code* 1895, § 991, as to the necessity of corroboration, even though the defendant contended the witness

was an accomplice. *Robinson v. State*, 11 S. E. 544, 84 Ga. 674.

3. In the absence of a special request so to do, the court is not bound to charge Pen. Code 1895, § 1005, as to the weight to be given confessions. *Malone v. State*, 77 Ga. 768 (5); *Sellers v. State*, 25 S. E. 178, 99 Ga. 212.

4. Some of the absent witnesses had not been summoned, and, as to all, the showing for a continuance was fatally defective. Pen. Code, 1895, § 962.

5. The verdict was sustained by the evidence, and no error of law was committed, and the refusal to grant a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; B. D. Evans, Judge.

W. B. Walker was convicted of crime, and brings error. Affirmed.

John R. Cooper, E. S. Baldwin, and R. J. Carswell, for plaintiff in error. Jos. E. Potte, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(118 Ga. 26)

#### ALEXANDER v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

#### CRIMINAL LAW—HOMICIDE—DEFENSE OF FATHER—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE.

1. The requests to charge, in so far as they were pertinent and proper, were fully covered in the general charge, which correctly submitted the issues to the jury.

2. The charge as to the right of a son to defend his father was as favorable to the defendant as he could legally ask, and was given without any suggestion as to whether it might not have been lost if the son knew that the father himself would have had no right at the time to kill the deceased.

3. While, in determining whether there was cause for reasonable fear, or whether the homicide was justifiable, the jury might consider the difference in size and physical condition of the parties, it would have been erroneous for the judge to instruct them that they should consider such disparity.

4. For the witness to state what was his intention was not opinion evidence, but proof of a substantive fact, and admissible in this case. The error in excluding such testimony was subsequently cured by allowing the witness to testify to his intention.

5. There was no assignment of error whatever on the charge as given, and this being a second verdict of guilty, and there being no error requiring the grant of a new trial, the judgment is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Early County; H. C. Sheffield, Judge.

R. W. Alexander was convicted of voluntary manslaughter, and brings error. Affirmed.

W. M. Hammond and A. G. Powell, for plaintiff in error. J. A. Laing, Sol. Gen., for the State.

LAMAR, J. The defendant was granted a new trial (*Alexander v. State*, 114 Ga. 266, 40 S. E. 231), and again found guilty of vol-

untary manslaughter. It appeared that he fired several shots, one and probably the last of which killed Cherry. He insisted that he did so to protect his father against a felonious assault by Cherry; that thereupon the latter advanced upon the defendant in a threatening attitude, with an instrument likely to produce death in his hand; and that in shooting he acted under the fears of a reasonable man and in self-defense. The judge fully and fairly submitted the issues raised by the evidence; instructing the jury that the defendant was not guilty if he shot to defend his father against what he believed to be a felonious assault by the deceased, nor would he be guilty if he fired to protect himself, but that if the shot was fired, not for the protection of himself or his father, but because of a sudden heat of passion aroused by the attack made upon his parent, he would be guilty of voluntary manslaughter.

Several of the assignments of error were on the court's refusal to give requests to charge, based on the theory that, even if the father used opprobrious words towards the deceased, that did not warrant Cherry in making a felonious assault, nor would it take away the son's right to defend him from such an assault so caused. The charge on this subject was quite as favorable as the defendant had the right to expect. The jury were told that the son could defend his father from a felonious assault, or what he thought was such. This right was not qualified. It was not made to depend on whether the father was blameless or at fault in starting the altercation, nor whether the father would have been justified in killing Cherry at the time the son fired. Pen. Code 1895, § 74. While the right of husband and wife and parent and child to defend one another is fully recognized, some cases hold that one cannot defend another where the latter himself would not be authorized so to do; others rule that if one brings on a difficulty, or is in a position where it would be murder for him to kill his assailant, the relative would be guilty of a similar offense, if, under these circumstances, he should interpose and kill the blameless opponent. *Saens v. State* (Tex. Cr. App.) 20 S. W. 737; *State v. Brittain*, 89 N. C. 482 (5); *State v. Melton*, 102 Mo. 684 (3) 15 S. W. 139; *State v. Herdina*, 25 Minn. 161. In the present case no restriction or limitations were suggested. The judge gave the defendant the benefit of the fullest and most unqualified right to protect his father, regardless of whether the latter would then have been justified in killing Cherry, and the requests to charge on the subject of the defense of a father by a son were fully covered in the general charge. Pen. Code 1895, § 74.

Error is assigned because the court refused to charge that "in determining whether [the defendant] was acting under the fears of a reasonable man, and in determining whether

¶ 4. See *Homicide*, vol. 26, Cent. Dig. § 237.

it was necessary for him to defend his father from an assault by Mr. Cherry, if any be proven, you should take into consideration any disparity proven to have existed between the physical conditions of Mr. Cherry and Mr. J. W. Alexander, also between the physical conditions of Mr. Cherry and Mr. Robert Alexander," etc. Under the limitations placed by Civ. Code 1895, § 4334, on the powers of a judge, it is generally of doubtful propriety for him to enumerate a given state of facts, and tell the jury what the effect thereof is, or what use they may make of the facts. But it is forbidden for the judge to enumerate a state of facts, and then tell the jury what use they must make of them. If the judge had been requested to charge that the jury might consider the disparity in size and strength between the parties, it might have been proper. The fatal error here was that the judge was asked to instruct the jury that they should consider the difference in size. The request says nothing about the effect of a pistol in the hands of a small man equalizing any disparity in size, nor what should be the effect if both the Alexanders were armed, or only one had a weapon. The finding of the jury that the defendant was guilty of voluntary manslaughter is equivalent to saying that the homicide was not in self-defense and not in defense of his father, but resulted from the heat of passion engendered by the previous assault on the parent. That finding eliminates any legal justification which might otherwise have resulted from a disparity in size. In a proper case the court should instruct the jury that they might consider the difference in strength of the two parties. *Strickland v. State*, 98 Ga. 84, 25 S. E. 908. But the charge here requested was not accurate, and, even if it had been otherwise correct, the failure to give it was harmless. If the defendant had been found guilty of murder, it might have raised a different issue in a motion for a new trial, even if there had been no request to charge on that subject.

The theory of the state was that the two Alexanders had armed themselves and gone to the plantation of the deceased with a view of precipitating a difficulty. The father had been separately indicted for the same homicide, and, when he was put on the stand as a witness on behalf of the son, the court refused to allow him to testify that he "did not intend to have any difficulty." We do not think that this was a mere conclusion of the witness. A man may frequently testify as to his motives, intention, and state of mind. When otherwise relevant, the state of mind can be proved as an independent fact. *Royce v. Gazan*, 76 Ga. 80 (5); *Baxley v. Baxley* (Ga.) 43 S. E. 436. What the person himself testifies is not necessarily conclusive, because the jury is authorized to apply the homely maxim that "actions speak louder than words," and from one's acts they may determine that the intention was direct-

ly opposite from what he says it was. Motive is to be determined as much by what one does as by what he says. Pen. Code 1895, § 32. But while the jury is not bound to accept the statement of a witness as to what was his mental state, it was here relevant and important, and would necessitate the grant of a new trial, but for the fact that the witness later in his testimony made this proof. In the brief of evidence we find that he testified: "I went there for the purpose of getting my hands back. \* \* \* Cherry and Robert never had a cross word in their lives. Robert and myself did not have any conversation in regard to, or looking with reference to, any anticipated difficulty with Cherry that day. \* \* \* Robert led me up there, and I didn't go there with any intention of raising a difficulty with Mr. Cherry." This, we think, cured the error. *Vaughn v. State*, 88 Ga. 732, 16 S. E. 64 (5).

The impeaching witness had been allowed to go as far as was justified by the foundation previously laid, and proved the contradictory statement. On cross-examination he testified to another statement by the witness who was under attack. The defense desired to make further examination, and show that both had been made. This, we think, already appeared; and, while it might have been proper to allow the additional inquiry, the failure to do so was not reversible error, particularly as the question, if not actually leading, was calculated to inform the witness of the answer expected.

There is no assignment of error whatever on the charge as given. It was concise and clear. All proper requests were included therein, and, this being the second verdict, the judgment is affirmed. By five Justices.

(118 Ga. 79)

#### HATELEY v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

#### CRIMINAL TRESPASS—EVIDENCE OF TITLE—INSTRUCTIONS.

1. On the trial of one indicted for criminal trespass, under Pen. Code, § 219, par. 1, where the sole defense of the accused is that he has title to the land, and consequently could not be guilty of trespass upon it, and muniments of title are introduced in evidence to sustain this defense, it is error for the court to give to the jury a charge which, in effect, instructs them to disregard all evidence of title introduced by the accused. Any evidence of title in the accused has a strong probative effect to show the bona fides of his acts alleged to have constituted a trespass.

2. Pen. Code, § 219, par. 1, was not designed to try disputed land titles, but to punish those who willfully, and without claim of right, commit acts of trespass on the lands of others.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

A. J. Hateley was convicted of criminal trespass, and brings error. Reversed.



James Beall and R. D. Jackson, for plaintiff in error. S. Holderness, Sol., and Oscar Reese, for the State.

CANDLER, J. Hateley and others were indicted in Carroll superior court, under Pen. Code, § 219, par. 1, for the offense of trespass. The case was transferred to the city court of Carrollton, where it was tried, and the accused convicted. He made a motion for a new trial, which was overruled, and he excepted. A number of points are made in the record, but in disposing of them it is necessary to deal with only two questions, both of which arise out of the charge of the court. On account of the way the record is made up, we have had considerable difficulty in giving the case the consideration to which it is entitled. The documentary evidence introduced on the trial is briefed in such a manner that it is impossible to tell what it really shows. It is briefed too much, while, on the other hand, the oral evidence is not briefed sufficiently, but abounds in questions and answers, repetitions, and the like. We take this occasion to again call the attention of the bar to the rules of court in regard to this matter, and to the added burdens that are placed upon the members of this bench by reason of the lax methods prevailing in the preparation of records. The General Assembly at each session creates many city courts, from which writs of error lie to this court. The large number of misdemeanor cases presented for our determination from these city courts add greatly to the volume of business here, and render still more crowded an already overcrowded docket. It is our duty to carefully consider all these cases, and, if we are to do it well in the limited time at our disposal, we must ask that counsel bringing cases to this court do the work devolving upon them in such a manner as not to unnecessarily burden us in ascertaining the facts from the records.

The following portion of the charge of the court is assigned as error: "Gentlemen of the jury, you understand about the contentions in this case. It would make no difference when the brothers and sisters of the defendant and the mother of A. J. Hateley agreed that he might have their interest in this land, if they had any. You are not trying his titles to the land. You are not investigating the question as to whether or not A. J. Hateley owned the entire property, or owned any interest in it. The question is, did he honestly and in good faith believe that he owned this property and had the legal right to cut this timber? That is the main question in the case." It is contended that it was erroneous to instruct the jury that they were not trying the title to the land, without further telling them that they might, however, consider the claim of the accused, and the deeds and other evidences of title offered by him, in order to determine whether or not he had entered upon the land in good faith. We

think the exception to this charge is well taken. An examination of the entire charge of the court appearing in the record discloses that the jury were instructed that they were to consider whether or not the accused went upon the land in good faith, but they were also repeatedly told that they had nothing to do with the title, and that they were not trying it. We fail to see how it was possible to give any credit to the claim of the accused that he entered upon the land in good faith, and was entitled to go upon it, without considering the basis of his claim and his contention that he had a better title to the land than had the prosecutors. While it is true that a verdict of guilty or not guilty could not, in a prosecution for trespass, settle the title to the land, the jury, in determining the question of good faith, should have been allowed to investigate the evidences of title submitted by the accused, as well as those offered to sustain the contentions of the prosecutors. The various deeds offered by both sides were all in evidence, and, without considering the various evidences of title offered in evidence by the accused, the jury could not say whether he committed the acts alleged to have been acts of trespass, under a bona fide claim of right, or not. The accused was charged with willfully cutting and felling certain trees and timber upon land, the title to which was alleged to be in other parties named in the bill of indictment. He did not deny cutting the timber, but claimed to have been in possession of the land for 40 years. If he had been in the open, notorious, peaceable, uninterrupted, and adverse possession of the land for that length of time, he had title to it, without reference to whether he had a deed to it from anybody. The statute upon which this indictment was founded was never intended to be used as a mode of settling disputed claims of title. It provides that the act of cutting must be willful, and the sense of the word "willful," as used in this connection, is intentionally, malevolently, "with a bad purpose," "an evil purpose," "without ground for believing the act to be lawful." *King v. State*, 103 Ga. 285, 30 S. E. 30. When a defendant in good faith cuts timber from land upon which he believes he has the legal right to go, from land where he has for many years been cutting timber, and from land to which he has such a title as to justify an honest belief that he has a right so to do, he cannot be convicted of willfully cutting and felling trees and timber, under the paragraph of the Code section upon which the indictment in this case was founded. Where one by mistake commits trespass upon lands of another, bona fide, the injured one can only recover actual, and never punitive, damages in a civil suit. *Georgia R. Co. v. Gardner*, 115 Ga. 954, 42 S. E. 250, and cases cited. In nothing that we say do we intend to intimate that the question of intention and good faith is not one for the jury; but, in order to

authorize a conviction, there must be evidence that the accused acted intentionally, malevolently, and without regard to the property rights of the owner of the land. In cases of bona fide conflicting claims to title, the remedy of the injured party is by resort to the civil courts.

Other than as herein set out, we find nothing in the record to indicate that any error was committed on the trial in the lower court. The case is sent back for another hearing on the sole ground that the court erred in the charge which has been quoted, and that the error must of necessity have been prejudicial to the accused.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 969)

#### KEHRER v. STEWART.

(Supreme Court of Georgia. May 30, 1903.)

#### CONSTITUTIONAL LAW—RETROACTIVE ACT—OCCUPATION TAX—INTERSTATE COMMERCE—EXEMPTIONS.

1. A legislative act which imposes a specific tax on certain business occupations, and which does not become operative until the commencement of the year following its passage, is not retroactive or violative of that section of the federal Constitution which forbids a state's passing any ex post facto law, or law impairing the obligation of contracts.

2. A tax on the privilege of selling goods is, in effect, a tax on the goods themselves.

3. One who, in this state, as the agent of a principal residing in another state, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in this state, and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce.

4. When goods, the property of a resident of another state, are shipped from that state to the owner's place of business in this state, there to be stored and offered for sale in open market by his agent, the business of selling them in this state is not interstate commerce, but is subject to taxation by the state.

(a) The Constitution of the United States protects such goods only to the extent of preventing state legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of the state imposing such burdens.

5. One who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this state, is not rendered exempt from such tax because he also conducts for the same principal other business which is not subject to state taxation.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by F. E. Kehrer against A. P. Stewart. Judgment for defendant, and plaintiff brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. Black & Jackson, for defendant in error.

SIMMONS, C. J. Suit was brought by Kehrer against Stewart in the city court of

Atlanta. This suit was based upon the exaction by the defendant, who was tax collector of the county, of a specific tax assessed against petitioner as agent in Fulton county "of Nelson Morris & Co., a packing house doing business in this state." This tax was alleged to be illegal and void as applied to the petitioner, who had paid it under protest and to prevent the immediate seizure of his property and person. A demurrer to the petition was overruled, and Stewart brought the case to this court, where the judgment was reversed. An amendment to the petition was then made in the lower court and allowed. The demurrer was renewed, and the court sustained the same. To this judgment Kehrer excepted.

The substance of the original petition is stated in 115 Ga. 184, 41 S. E. 680. The amendment, without stating any new facts pertinent thereto, contained several reasons or arguments to show that the exaction of the tax from the petitioner was contrary to the fourteenth amendment to the Constitution of the United States, in that it deprived him of his property without due process of law, was a denial to him of the equal protection of the laws, and abridged his privileges, and also to show that the act imposing this tax was violative of the Constitution of this state, in that the tax was not uniform, but based upon an unjust and arbitrary classification. With these questions we do not now deal. They were raised and passed upon when the case was here before, and have been adjudicated against the petitioner. He cannot review the former decision, or reopen a binding adjudication by adding to his petition a detailed argument of the points already made and decided. We shall therefore confine our discussion to the questions made by the amendment which were not passed upon before, and which are therefore not res judicata. These questions are (1) whether the act imposing the tax is ex post facto, or impairs the obligation of contracts; and (2) whether the act is an illegal interference with interstate commerce.

1. The statutory enactment under discussion imposed a specific tax "upon all agents of packing-houses doing business in this state," and made penal the pursuit of such an occupation by any one who had not paid the tax, which was \$200 per annum. Some five months before the passage of the act, the petitioner entered into a contract of employment with Nelson Morris & Co. under which he was to be paid a stipulated sum per week for his services as chief clerk and manager of their house in Atlanta, Ga. Under these facts, the statute is clearly not retroactive as applied to petitioner, nor can we see how it can be regarded as in any sense retroactive. It does not relate to any act or acts done prior to its passage, but only to the pursuit of the designated occupation after the commencement of the year following the passage of the act, by one

who has failed to pay the tax imposed for the year in which he engages in that occupation. Nor is the petitioner's contract violated. In the first place, it appears that his contract is not for any definite term. He is subject at any time to be discharged without notice, and he was apparently under no obligation to continue his service after the imposition of the tax on his occupation. But even were this not true, the statute would not be objectionable as impairing the obligation of his contract. The state has generally a right to impose taxes upon occupations. One who lives in a state, and pursues therein an occupation which is not taxed, is bound to know that the Legislature may at any time, in the exercise of legislative discretion and power, impose a reasonable tax upon his occupation. He cannot, merely by contracting with other private persons to continue to pursue his occupation, deprive the Legislature and the state of the right to raise revenue by taxing his occupation. If the tax is in other respects constitutional, it cannot be held invalid merely because it adds to his expenses an item which he, not foreseeing a change in legislative policy, had not anticipated when he entered into the contract.

2, 3, 4. The ground principally relied upon was that the tax was an illegal interference with interstate commerce. From the petition as amended, it appeared: That Nelson Morris & Co. are a partnership composed of citizens of the state of Illinois. "A packing house is a place where the business of slaughtering animals, and dressing and preparing the products of their carcasses for food and other commercial purposes, is carried on." Nelson Morris & Co. "do not anywhere within the state of Georgia slaughter, dress, cure, pack, or manufacture products of any animals for food or commercial use." They have in Atlanta a place of business, where, at wholesale, they sell fresh, cured, and salt meats, and the products that have been manufactured from the carcasses of slaughtered animals, but conduct at that place no other kind of business. Petitioner had no interest in the business, other than that of a paid employé. He was the chief clerk and manager of the Atlanta place of business before the passage of the act imposing the tax, and continues to fill the same position. Petitioner, as chief clerk and manager, or superintending agent, is one of the agencies of Nelson Morris & Co., who are engaged in the business of curing and packing meats for commerce, and who, as part of their business, ship to other states in the United States meats, and the products thereof, to be sold to customers calling for same. As a necessary part of this last-mentioned department, they have a place of business in Atlanta where meats, and the products thereof, are put and temporarily held for sale, and, as another part in the conduct of their business, they employ petitioner as chief clerk and

manager, who, in connection with the other employes, conducts the business in Atlanta of selling and distributing the products of the packing house of Nelson Morris & Co., shipped from the packing house to Atlanta. "All these products are manufactured and prepared for market in the state of Illinois, and shipped to the various business places of said Nelson Morris & Co. in the United States, including the said house at Atlanta, Ga. In most cases said goods are sold at or before the day of their shipment, and, when received in Atlanta, delivered in the original packages to the purchasers of said goods; and in all cases title to the goods remains in said Nelson Morris & Co. until sold and delivered to their customers. The rest of said goods so shipped to Atlanta, Ga., are stored in their place of business at Atlanta in the original form and package as when shipped and delivered, and there temporarily remain until in due course of trade the same can be disposed of." In order for Nelson Morris & Co. to dispose of the products shipped from their packing house in Illinois to the city of Atlanta, it is necessary for them to have a place of business in Atlanta where such packing-house products can be stored and preserved until sold and delivered, and to have in their employ at their place of business in Atlanta some person acting in the capacity of chief clerk and manager, as does petitioner. While the statute purports to impose a tax on petitioner as an individual, the tax is in fact on the company which employs him, and is therefore on the business of that company. For these reasons, the petition claimed that the statute imposing the tax was an interference with the exclusive power of Congress to regulate interstate commerce, was violative of the Constitution of the United States, and was void as against petitioner. The demurrer filed by the defendant was a general one, to the effect that the petition set out no cause of action.

It is well established and sound law that, where the burden of a tax falls on the thing which is the subject of taxation, the tax is to be regarded as laid on the thing, rather than on the individual who is charged with the duty of paying it into the treasury. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. A tax or charge for a license to sell goods is, in effect, a tax on the goods themselves. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347. A sale to a customer in this state of goods which are in another state, to be delivered to a common carrier for shipment to him, is interstate commerce. Following the recent case of *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. —, this court has held that "one who in this state, as the representative of a principal residing in another state, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in this state, breaks the original pack-

ages in which they are contained, and distributes them among the customers from whom he obtained such orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce." *Stone v. State* (this term) 117 Ga. 43, 43 S. E. 740. Under these rulings, by which we are bound, that part of Nelson Morris & Co.'s business which consisted in shipping goods to Atlanta to fill orders previously received—the goods being delivered in accordance with such orders—was interstate commerce. It was therefore not subject to taxation or interference by the state, and an act seeking to impose any tax upon such a business would be unconstitutional and void. The occupation of the plaintiff in error as agent for the conduct of this part of the business is so closely and directly connected therewith that, in so far as the tax act seeks to tax him as such agent, the act is void.

From the petition, however, it appears that Nelson Morris & Co. are engaged, also, in a business which is subject to state taxation and control. Where property has been brought into a state, and has become itself subject to taxation therein, its sale in such state is not commerce between the states, but is purely intrastate. While it is exclusively the province of Congress to regulate commerce between the several states, and to protect the same from hostile state legislation, yet, when products are shipped from one state and lodged in another, there to be offered for sale in open market, the business of selling them there is no longer interstate commerce, but assumes a domestic character, and becomes subject to the laws of taxation of force in the state where such business is pursued. The property involved in the conduct of this business, having become intermingled with the general mass of property in the state, has itself become subject to taxation there; and, upon principle, the business of selling it is alike taxable in that jurisdiction. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 122, 25 S. E. 249, 35 L. R. A. 497. Coal shipped from Pennsylvania to New Orleans, and there put up for sale, "had come to its place of rest, for final disposition or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become part of the general mass of property in the state, and as such it was taxable." Such a tax, when not discriminating against goods the product of other states, is not a regulation of interstate commerce. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. See, also, *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430. From the petition it appears that a portion of the meats and other packing-house products handled by the petitioner were shipped to Atlanta without any previous sale or contract to sell. They were, in the original form and package, stored in the Atlanta house of Nelson Morris & Co., and there

preserved and held for sale in due course of trade. This part of the business was subject to state taxation. As to this part, Nelson Morris & Co., through the petitioner, as their manager, were running a branch house in Atlanta, and there carrying on a domestic business. The goods were offered for sale to whomsoever might buy, and, until sale, were stored and preserved. Such a business is not free from state taxation, as interstate commerce, though the title to the goods be in nonresidents who have shipped the goods to the branch house for sale. Of course, "it is true," as was said by Lumpkin, J., in *Singer Mfg. Co. v. Wright*, supra, "that where property has been shipped from one state, to be sold in another, the business of conducting sales of it would be protected from local legislation burdening it with a tax not imposed upon the same business carried on in articles produced within the state levying the tax." See, also, *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *American Harrow Co. v. Shaffer* (C. C.) 68 Fed. 757. When goods are brought from one state into another to be offered for sale, and are commingled with the property of the latter, their sale is not interstate commerce, and the power of the federal government protects them only to the extent of preventing discriminating state legislation which imposes burdens on such goods because of their origin. The statute here involved does not make any discrimination against packing-house products brought in from other states, but imposes the tax upon all agents of packing houses, foreign or domestic, doing business in this state, whether they deal in products of this or of other states. Petitioner, as managing agent, is conducting two kinds of business. One of these has to do with interstate commerce, and cannot be taxed by the state; the other is domestic, and is subject to state taxation. Can he be required to pay the tax imposed by the tax act?

5. Counsel for the plaintiff in error relied upon the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; contending that the tax on the agent affected the whole of the business of Nelson Morris & Co. in this state, and that therefore the tax could not be legally collected, even though a small part of this business were subject to taxation. We think that the case just cited is not applicable. Congress, by an act passed in 1866 (Acts 1866, 14 Stat. 221, c. 230), had declared that the erection of telegraph lines should, as against state interference, be free to companies which accepted the terms and conditions of the act, and that a telegraph company of one state should not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction. It was held not only that the interstate business of such a company was exempt from taxation, but that the company had become an agent of the United States, and that the business it did for the

federal government was in the nature of postal service, and beyond the taxing power of the state. The tax which was held to be unconstitutional sought to prohibit a telegraph company operating under the act of 1866 from doing any business within the state without first paying a specific tax and procuring a license. The court decided that this tax affected the entire business of the company—that which was interstate as well as that which was domestic—that which was done for the government as well as that which was done within the state for private persons. Under this decision the domestic private business even of a telegraph company which has accepted the provisions of the act of Congress is still subject to taxation by the state. The imposition of a specific license tax upon such a telegraph company's business as is not interstate is valid, although it is imposed upon a company which does interstate business also. *Postal, etc., Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871. "A single tax, assessed under the laws of a state, upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation, but were returned and assessed in gross, and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce, but is otherwise valid." *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229. See, also, *Western Union Tel. Co. v. Alabama*, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409. The act involved in the present case imposes a tax on the agents of packing houses which do business in the state. It is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid, and the plaintiff in error would not have been subject to the tax at all, had he confined himself to interstate business. He is, however, agent for a concern which is doing domestic business in this state, and as such agent he is subject to the tax. He is not relieved from paying the tax because he, in addition, does an interstate business which is not taxable. As well might a real estate agent seek to evade the payment of a lawful municipal tax on his occupation, because, forsooth, he also practiced law, and lawyers are not, in this state, taxable as such by municipal corporations. If a man is embarked in a business on which a tax is properly imposed, he may avoid the tax by desisting in due time from the prosecution of such business. If he continues in the business, he cannot render it or himself exempt from taxation by adding to his original occupation another which is not subject to taxation. Nor does it matter that in the present case "most" of the business in which plaintiff in error is engaged is interstate. Agents of Georgia packing houses have to pay the prescribed tax, while this is escaped by the

agents of packing houses in other states which do in this state a business which is interstate commerce. Suppose a packing house of another state should in this state operate a business which was purely domestic; could it be seriously contended that such a concern should be exempt from state taxation? Suppose its business was domestic except when it shipped special goods into this state on special orders which could not be filled from the stock regularly kept here; could it be held exempt from an occupation tax here because such part of its occupation consisted of interstate business? And if the business is taxable when it is principally domestic, what would be the law when it is half domestic and half interstate? What when "most" of the business is interstate, and the remainder domestic? The true rule is that, when one does any business which is subject to an occupation or privilege tax by the state, he is subject to any tax which the state may lawfully impose thereon, irrespective of what other business or occupation he may have. If he would escape the tax, let him avoid business which is subject to the tax, and confine himself to that which is not. If he would continue to pursue the taxed business, let him pay the tax which is imposed upon all who are engaged therein. He cannot continue in that business, and, by engaging also in another and nontaxable business, create an exemption for himself, and thus outstrip those of his competitors who still follow the taxed business only. We conclude that the plaintiff in error is subject to the tax imposed by the tax act upon the agents of packing houses which do a domestic business within this state, and that the demurrer was properly sustained.

Judgment affirmed by five Justices.

(118 Ga. 33)

#### SCALES v. THORNTON'S HEIRS.

(Supreme Court of Georgia. May 30, 1903.)

##### NUNCUPATIVE WILL—PUBLICATION—EVIDENCE.

1. It is essential to the validity of a nuncupative will that the testator should, at the time of pronouncing the same, communicate to some of the persons present his intention to make such a will, and in some way request them to bear witness that the statements about to be made are intended as his will.

2. The evidence in this case demanded a finding against the propounder, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

W. F. Scales offered the will of Mary A. Thornton for probate, and the heirs at law filed a caveat. From a judgment in favor of caveators, petitioner brings error. Affirmed.

W. F. Scales offered for probate a nuncupative will alleged to have been made by Mary A. Thornton. The heirs at law of the de-

ceased filed a caveat, and on appeal in the superior court the jury found in favor of the caveators. A motion for a new trial filed by the propounder was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law and without evidence to support it, and a special assigning error on the following extract from the charge of the court: "One of the necessary requisites of a valid nuncupative will is that the testator shall bid the persons present, or some of them, to bear witness that such is his or her will, or words to that effect. That is to say, that the testator in this case must have bid as many as three persons present, or called upon them, either singly or collectively, to pay attention to her disposition of her property by will, or words to that effect." The assignment of error upon this charge is that it excluded from the consideration of the jury any words or acts of the testatrix that indicated to the witnesses and bystanders that it was her intention to make a disposition of her property after death. The judge appends the following note to this ground of the motion: "The court charged the language complained of after having given section 3349, Civ. Code, in charge. The court did not attempt to amplify or fully explain the words 'to that effect,' not agreeing with counsel in his contention that the acts of the testator or any other person, or any surrounding circumstances, could dispense with testator's orally calling attention to the fact that she wanted them to bear witness to what she wanted done with her property after death." The evidence was conflicting on the issue as to whether at the time of making the alleged will the deceased had sufficient mental capacity. The evidence on the issue as to the *rogatio testium* was substantially as follows: Mrs. Thornton died on June 30, 1901. The day before her death Mrs. Mary A. Crow was sent for by a messenger, who reported that Mrs. Thornton's daughters wanted her to come to their mother's house, as they did not want to be there alone, because their mother was getting very weak. When Mrs. Crow arrived, Mrs. Thornton's daughters, Mrs. Cole, Mrs. Pass, and Mrs. Beard, were at the house. Mrs. Beard was sent for at that time to come into the room. Mrs. Thornton expressed a wish as to the disposition of her property. The exact language of the witness (Mrs. Crow) on this point is as follows: "I noticed that she kept looking at me like she had something to say. I went after a glass of water, and, meeting Mrs. Beard in the hall, I mentioned it to her. Mrs. Beard asked me to ask her mother if she had anything to say. After giving her some water, I sat down by the side of the bed and minded the flies away. She kept looking at me as though she wanted to speak. I said to her: 'Mrs. Thornton, if you have anything to say, say it.' Mrs. Pass said: 'Yes, mother,

if you have anything to say, say it. We are all here to hear it.' Mrs. Thornton then turned herself in the bed, and sorter raised up, supporting herself on her elbow, and said: 'Well, I want the beds weighed and equally divided among the four girls, and the bedclothes the same way.' She then laid back on her bed and said: 'To sum it all up, I want Willis to have one half of my land, and Joanna the other.' Then Mrs. Pass said: 'Mother, do you think it is right for Joanna to have half?' 'I honestly think it is.' Then Mrs. Pass said: 'What about the railroad stock?' She replied: 'I have nothing to do with that. It is done fixed.'" The witness then testified that, in her opinion, Mrs. Thornton knew those present, and knew what she was doing, and that the paper offered for probate contained her wishes as above expressed. Other witnesses testified, in substance, to the same facts as those detailed above.

N. L. Hutchins, for plaintiff in error. W. E. Simmons, for defendants in error.

COBB, J. Nuncupative wills are not favorites of the law, and, in applications for probate of such wills, it must appear that every requirement of the statute has been met. In *re Yarnall's Will*, 4 Rawle, 46, 26 Am. Dec. 115; *Dorsey v. Sheppard*, 12 Gill & J. 192, 37 Am. Dec. 77. One of the requirements of the law of this state is that "it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect." Civ. Code, § 3349. This section of the Code was taken almost literally from the nineteenth section of the statute of frauds, and the part quoted is in the exact language of that section of the statute. Prince's Dig. 917. Simple statements by the person claimed to have made the nuncupative will, indicating a wish or desire as to the disposition of property after death, are not, alone, sufficient to authorize the setting up of a nuncupative will, notwithstanding such statements may have been made in the presence of a sufficient number of competent witnesses. It must appear not only that the person made use of words which would amount to a testamentary disposition, but he must have intended to make a will, and must have indicated in some way to the persons present, or some of them, that he had such an intention, and that he desired them to bear witness to the disposition he was about to make of his property. While it is not necessary that all of the persons present should be called upon to bear witness that what was being said was intended as the will of the party speaking, it is essential that some of them should be so called upon; and, while no given number need be thus called upon, there must be at least three witnesses to the testamentary disposition. See *Smith v. Salter*, 115 Ga. 286,

41 S. E. 621; Pritch. Wills, § 200, p. 220. It has been held that it is not necessary that the bidding of the witnesses should be by word of mouth; that it may be by acts, as by signs and gestures. *Hatcher v. Millard*, 2 Cold. 30; *Arnett v. Arnett*, 27 Ill. 247, 81 Am. Dec. 227; *Winn v. Bob*, 3 Leigh, 140, 23 Am. Dec. 258. It is not, however, necessary in the present case to decide whether the ruling in these cases ought to be followed. It has also been held that, where the nuncupative will is drawn from the witness by interrogatories, stricter proof is required than in other cases. See *Dorsey v. Sheppard*, 12 Gill & J. 192, 37 Am. Dec. 77; *Andrews v. Andrews*, 48 Miss. 220. The statute requires that it should clearly appear that there was an intention to make a nuncupative will, and that the person making it should have in some way communicated this intention to some of the persons present, and called upon them to bear witness to the testamentary disposition about to be made. It would be difficult to lay down any general rule as to how the persons should be bidden to bear witness. If spoken or written words are indispensable, it is certainly not necessary that the exact words of the statute should be used. Any words which adequately communicate the intention to make a will, and amount to a request that the persons to whom they are addressed should bear witness to it, are sufficient. From the nature of things, each case must be decided on its peculiar facts. Strict proof is required, because the opportunity for fraud and the likelihood of a mistake are so great. An examination of the following authorities will throw much light on the subject, and show with how little favor these wills have been regarded, and how strict the rules are as to the quantum of proof necessary: 16 Am. & Eng. Enc. L. (1st Ed.) 1013 (note 5); Pritch. Wills, §§ 200, 201; 1 Under. Wills, § 169; Page, Wills, § 237; 1 Williams, Ex'rs, 168; Burch v. Stovall, 27 Miss. 725; Brown v. Brown, 6 N. C. 350; Morgan v. Stevens, 78 Ill. 287; Parsons v. Parsons, 2 Greenl. 298; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; In re Est. Grossman, 175 Ill. 425, 51 N. E. 750; Est. Wiley, 187 Pa. 82, 40 Atl. 980, 67 Am. St. Rep. 583; Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423; Smith v. Thurman, 2 Helsk. 110; In re Yarnall's Will, 4 Rawle, 46, 26 Am. Dec. 115; Weeden v. Bartlett, 6 Munf. 123; Baker v. Dodson, 4 Humph. 342, 40 Am. Dec. 650; Babineau's Heirs v. Le Blanc, 14 La. Ann. 729; Dawson's App., 23 Wis. 69; Winn v. Bob, 3 Leigh, 140, 23 Am. Dec. 258; Biddle v. Biddle, 36 Md. 640; Garner v. Lansford, 12 Smedes & M. 558; Gwin v. Wright, 8 Humph. 639; Broach v. Sing, 57 Miss. 115; Dockum v. Robinson, 6 Fost. 372; Sykes v. Sykes, 20 Am. Dec. 40, 44, and notes; Offutt v. Offutt, 3 B. Mon. 162, 38 Am. Dec. 183; In re Will of Hebben, 20 N. J. Eq. 473; Scaife v. Emmons, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383.

Upon a careful examination of the testimony in this case, we are unable to find anything which would amount to a bidding of persons to bear witness to the alleged will. It is not pretended that there was any oral request on the part of the testatrix to any one to bear witness that she was making a will. There is nothing shown by the testimony which would be the equivalent of a bidding. The testimony indicates nothing more than that the decedent made certain statements showing what disposition she wanted made of her property. It does not clearly appear that she knew she was making a will. For aught that appears from the testimony, she may have expected merely that her wishes would constitute a moral obligation upon her heirs at law. She may not have intended to make a legal will. But even if she did, there is no evidence that she communicated this intention to anybody, or requested any one to bear witness that she was making such a will. In short, the testimony comes far short of the strict rule required in such cases; and, even if the charge of the judge was in any respect erroneous, it would not be cause for a new trial, as the evidence demanded a finding against the propounder. See *Sampson v. Browning*, 22 Ga. 293.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(118 Ga. 42)

## RIVERS v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

WITNESS—COMPETENCY—HUSBAND AND WIFE  
—CRIMINAL LAW—INTENT—GAMING HOUSE.

1. Where a married woman is jointly indicted with another, and there is a joint trial, the husband is incompetent as a witness for or against her. Where there has been a severance, and the offense does not require the joint act of the persons indicted, he is not incompetent to testify on a separate trial of the other defendant.

2. Where the knowledge or intent with which an act is done constitutes an element of a criminal offense, it is ordinarily impossible to prove the actual mental state of the defendant; the prosecution being only required to show the ability and opportunity to know.

3. One cannot refrain from following up a clew, for fear of discovering the truth, and then shield himself behind such intentional ignorance.

4. A special presentment against one for keeping a gaming house is not evidence of his guilt, but is a public charge to that effect, calculated to put one on inquiry; and such presentment is admissible, with a view of establishing the reputation of the person to whom the house is rented.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Pope Barrow, Judge.

Horace Rivers was convicted of crime, and brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LAMAR, J. In criminal cases, neither husband nor wife is competent or compellable as a witness for or against the other; but, where neither is a party to the case on trial, the husband or wife is not necessarily incompetent, although the testimony may furnish the means by which the husband or wife may be prejudiced on another trial, for section 1011 (4) of the Penal Code does not apply in terms to such cases, and the evidence may be received notwithstanding such possible results, unless it be of the nature of the confidential communications absolutely prohibited by Civ. Code 1895, § 5198 (1). These are privileged, are excluded from principles of public policy, and not receivable in any trial, regardless of whether they are for or against the other. There was a joint indictment, and, had there been a joint trial, the husband could not have testified for or against the wife. There had been a severance, however, and the husband was not incompetent to testify on the separate trial of *Rivers*. *Whitlow v. State*, 74 Ga. 819; *Williams v. State*, 69 Ga. 13 (15); *Askea v. State*, 75 Ga. 356; *Ficken v. State*, 97 Ga. 814, 25 S. E. 925. See, also, *Thomas v. State*, 115 Ga. 236, 41 S. E. 578; *Com. v. Eastland*, 1 Mass. 15; *Cornelius v. Com.*, 3 Metc. (Ky.) 431.

Where the offense charged requires the joint act of the persons indicted, in order for either party to be guilty, then the husband or wife would not be competent to testify against such joint defendant, even if there was a severance on the trial. *Howard v. State*, 94 Ga. 587, 20 S. E. 426.

The defendant, a real estate agent, was jointly indicted with his principal, under Pen. Code 1895, § 398, for knowingly renting a certain house on November 24, 1902, with a view of the same being used for gambling. Over the objection of the defendant, special presentments against the owner for renting, returned in May and July, 1901, and against Monihan, Rosenthal, and Henderson, returned in July, 1901, for keeping a gaming house, were admitted in evidence. In view of what had already been established, these special presentments were admissible. As to one case, it appeared that the defendant had gone on the owner's bond. From his testimony in a previous case, which was offered against him on his own trial, it appeared that he knew that the house had for years been used as a gaming place; that he had been therein, and seen the gambling paraphernalia. From his own statement, it appeared that prior to February, 1902, he charged \$150 a month when he knew that gambling went on, and less after that date, when the house was not used for that purpose. He stated that he did not personally know of any gambling within two years; did not know what these persons who were specially indicted did, "but had an idea"; that there was a special clause in the lease that no gambling should be carried on. Nei-

ther under civil (Civ. Code 1895, § 3933) nor criminal law can one refrain from following up a clew, for fear of discovering the truth, and then shield himself behind intentional ignorance. The exculpatory provision that no gambling should be carried on may itself amount to an incriminating circumstance, if the other facts tend to show that it was a mere subterfuge. Pen. Code 1895, § 32. The purpose with which the house was leased can be proved only by facts and inferences therefrom. Civ. Code 1895, § 5157. If it was rented to one generally known as a gambler, or if the house has theretofore been used for gaming purposes, these facts may have a tendency to show guilty knowledge. *McCain v. State*, 57 Ga. 390. Each fact is proved separately, and the case cannot be made out all at once. If enough is not shown, the defendant cannot be convicted, but no relevant fact can be excluded because by itself it does not prove the whole case. See *People v. Saunders*, 29 Mich. 272; *Harwood v. People*, 26 N. Y. 192, 84 Am. Dec. 175. The restrictive rules of evidence are intended to prevent verdicts from being based on surmise, not to exclude facts which, with others, tend to establish the charge. The statutes with reference to receiving stolen goods, knowing them to be stolen (Pen. Code 1895, § 171), and renting houses with a view of their being used for illegal purposes (Pen. Code 1895, § 398), involve proof of the defendant's mental state; and as positive and direct evidence of such knowledge is, in the nature of things, ordinarily beyond the reach of the prosecution, all that the state can do is to prove facts from which knowledge can reasonably be inferred. The reputation of the persons renting the premises is one circumstance to be considered by the jury, having more or less weight according as this reputation is more or less notorious; and the fact that the inmates to whom the room had from time to time been rented had been presented for keeping a gaming house was a circumstance—a link in the chain of evidence. The presentment did not prove their guilt, but it was a public charge—a fact which the jury could consider along with all the other testimony. The presentments themselves would have had no probative value unless the defendant knew thereof, but the state could prove them as a source of knowledge, just as it could prove the general reputation of the persons conducting the gambling room. But after proving such reputation, or any other fact calculated to excite inquiry, it was not necessary to do more, and to show that these facts were actually within the knowledge of the defendant. In proving the full opportunity to know that these tenants were publicly accused of being gamblers, the state had done all that could be required, and it was then for the defendant to show that he was ignorant of such charge having been made. In view of all



that had been brought to the attention of the jury, it was not error to admit the special presentments.

If not absolutely demanded, the verdict was amply sustained by the evidence, and the judgment is affirmed by five Justices.

(118 Ga. 122)

**CITY OF NEWMAN v. DAVISTON.**

(Supreme Court of Georgia. May 30, 1903.)  
**MUNICIPALITIES — DEFECTIVE SIDEWALKS — PLEADING—INSTRUCTIONS—DAMAGES.**

1. A petition alleging that plaintiff, in walking along a city sidewalk, fell and was thrown to the ground, her foot going into a hole or washout, practically concealed by grass, which had existed for two weeks or more, could be amended so as to charge that the fall, and damage resulting therefrom, were by reason of stepping into the hole, and, as amended, set forth a cause of action.

2. The suit being for damages occasioned by keeping and maintaining the sidewalk in a defective condition, it was irrelevant, but harmless, to charge that the law requires of cities ordinary care in constructing and keeping their sidewalks in a safe condition.

3. Taking the charge as a whole, and considering the instructions complained of in connection with their immediate context, the judge did not express an opinion as to what had been proved. Civ. Code, § 4334.

4. Where the charge fully sets forth the general principles applicable to the case, if either party desires more specific instructions, requests to that effect must be presented.

5. The evidence was conflicting, the damages were not excessive, the verdict was not contrary to law, and the judgment is affirmed.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by E. S. Daviston against the city of Newnan. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Glass and W. C. Wright, for plaintiff in error. H. A. Hall and W. S. Hubbard, for defendant in error.

**PER CURIAM.** Affirmed.

**LUMPKIN, P. J.,** absent on account of sickness.

(118 Ga. 133)

**RING v. RING.**

(Supreme Court of Georgia. June 3, 1903.)  
**DIVORCE—CRUEL TREATMENT—USE OF MORPHINE.**

1. "Cruel treatment," within the meaning of section 2427 of the Civil Code of 1895, which provides that such treatment shall be a ground for divorce, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. Odom v. Odom, 36 Ga. 286, approved and followed; Gholston v. Gholston, 31 Ga. 625, and Myrick v. Myrick, 67 Ga. 771, doubted, criticised, and distinguished.

2. It follows that the habitual and intemperate use of morphine, unaccompanied by any conduct coming within the definition laid down in the preceding headnote, is not such cruel treatment as the law recognizes as a ground for divorce.

3. The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by G. W. Ring against M. S. Ring. Judgment for plaintiff, and defendant brings error. Reversed.

M. W. Harris, for plaintiff in error. John P. Ross, for defendant in error.

**CANDLER, J.** As will be seen by reference to the case of Ring v. Ring, 112 Ga. 854, 38 S. E. 330, the defendant in error in the present case at first brought a suit for divorce against his wife, Mrs. Mamie S. Ring, under section 2427 of the Civil Code of 1895, on the ground of her habitual intoxication from the intemperate use of morphine and other opiates. The jury returned a verdict finding a total divorce for him, but the judgment of the lower court was reversed by this court, on the ground that "intoxication," as used in section 2427 of the Civil Code of 1895, which provides for the granting of a divorce on the ground of 'habitual intoxication,' means drunkenness produced by alcoholic liquors, and not the condition resulting from the excessive use of morphine." The plaintiff then dismissed his suit, and brought the present action, which is based upon the ground of cruel treatment of the plaintiff by the defendant, consisting of the habitual use of morphine. The petition sets forth various acts of misconduct on the part of the defendant, but it affirmatively appears from the allegations made that these acts were committed while the defendant was under the influence of morphine, and as a direct result of the use of that drug; and the petition, taken as a whole, presents definitely, as a ground of divorce, alleged cruel treatment, consisting in the persistent and intemperate use of morphine. To this petition the defendant demurred generally, "and particularly, for the reason that the allegations of fact therein contained do not constitute cruel treatment under the law." This demurrer was overruled. The defendant also filed an answer, and the issue thus formed was submitted to a jury, who found for the plaintiff a total divorce. The defendant made a motion for new trial, which was denied, and to the overruling of her motion and of her demurrer she now excepts.

It is agreed by counsel on both sides that the only real questions before this court are made by the demurrer, and the general grounds of the motion for a new trial that the verdict was contrary to law and the evidence. It may be said at the outset that the evidence for the plaintiff fully sustained the allegations of his petition, and in this connection the following, quoted from the testimony of the plaintiff as contained in the brief of evidence, is worthy of notice as bearing upon the real meaning and intent

of the petition: "The use of morphine was the only objection that I ever had to her. That was the only complaint I made, and the only complaint I make now." We have, then, presented for our determination the clear-cut question, is the habitual use of morphine such cruel treatment as will constitute a ground for divorce under the laws of Georgia?

1, 2. This court has, both by approval of definitions given by other courts, and by its own rulings, set forth its understanding of the meaning of the "sævitia" of the English law, or "cruel treatment," as it is known in our own. In the earliest case on this subject to be found in our reports, that of *Head v. Head*, 2 Ga. 191, Nisbet, J., delivering the opinion, held that the English law, as construed by the courts of that country, prevailed in this state, and that only for the causes prescribed by the common law, as of force in England at that time, could divorces be granted here. On page 206, the court said: "In determining what is sævitia by the ecclesiastical law, it has been adjudged to be necessary that there should be a reasonable apprehension of bodily hurt; the causes must be grave and weighty, and show a state of personal danger, incompatible with the duties of married life; mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to the cruelty against which the law can relieve." In *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362, the *Head Case* was considered, and the conclusions therein announced distinctly upheld, to the effect that the English ecclesiastical law, as there held, was in effect in Georgia until the passage of the act of February 22, 1850. The act of 1850 (Civ. Code 1895, § 2426 et seq.), in setting out the grounds for divorce in this state, did not define cruel treatment, nor make any attempt to change the construction already placed upon the expression by this court. It did change the law so as to authorize the jury trying the case to grant a total or partial divorce on this ground, according to the circumstances of the case. Prior to its passage, the common-law rule prevailed in Georgia, and for cruel treatment only a partial divorce could be procured. It is difficult for us to believe that the Legislature intended, at one and the same time, to make more far-reaching the effects of cruel treatment, and to put a more lax construction upon that expression. The act of 1850 was probably brought about by the decision in the *Head Case*, cited supra, as the effect of the judgment rendered in that case was to cut off divorces on some of the grounds on which they had previously been granted in Georgia, and the purpose of the act was evidently to extend the law so as to increase the number of grounds upon which divorces could be obtained. The court had, in the *Head Case*,

expressly approved the definition of the term "cruel treatment" given by the English courts, and there is nothing in the act of 1850 to indicate that the General Assembly had any intention to give it a different construction.

We will now consider what were the rulings of the English ecclesiastical courts on which the judgment in the *Head Case* was based. In the leading case of *Evans v. Evans*, 4 Eng. Ecc. Rep. 310, decided in 1790, the court declined the task of laying down a direct definition of the term, but said: "The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. \* \* \* What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offenses in the moral state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. \* \* \* There must be a reasonable apprehension of bodily hurt." In the case of *Westmeath v. Westmeath*, 2 Haggard, 238, the court quotes from the *Evans Case*, and says that the ecclesiastical courts have been uniformly strict in holding that, to make out a case of legal cruelty justifying a divorce, there must be proof of actual injury, or of real apprehension of injury as it may affect the safety or the health of the person. In all cases where the infliction of mental suffering has been held to justify a divorce, except where the decisions were controlled by peculiar statutes, the judgments have proceeded upon the idea that the mental anguish caused was so grievous as to endanger the health of the complaining party.

We have already seen that prior to the passage of the act of 1850 the English definition of the term "cruel treatment" was the one adopted by our court, and this doctrine prevailed until 10 years after the passage of that act, as is shown by the opinion of Judge Benning in the case of *Buckholts v. Buckholts*, 24 Ga. 238, where, on page 244, the following language was used: "And may we not lay it down for law that, to make out a case of cruelty, 'there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence'?" Citing *Bish. Mar. & Div. § 454*, note 1. In the case of *Johns v. Johns*, 29

Ga. 722, Chief Justice Lumpkin, in passing upon a charge given by the trial judge where a husband was seeking a divorce from his wife on the ground of cruel treatment, recognized the doctrine that, to sustain a suit for divorce on this ground, the libellant must show that there was a reasonable apprehension of danger from living with the defendant, and held that any conduct of the husband tending to show that there was no such apprehension on his part was admissible to rebut the charge of cruelty. The decisions of the English courts are also cited in the opinion to sustain another branch of the decision in that case, and it is manifest that the court did not construe the act of 1850 as changing the law as it existed in England and Georgia prior to its passage, except in so far as a particular intention to do so was clearly shown.

Apparently somewhat antagonistic to this doctrine are the Case of Gholston, 31 Ga. 625, decided at the November term, 1860, of this court, and Myrick v. Myrick, 67 Ga. 771, which was decided at the January term, 1861, but the opinion in which was, for some unknown reason, withheld from publication for over 20 years. Both of these cases were suits brought by the wife against the husband on the ground of cruel treatment, and the specific acts of cruelty shown in both were amply sufficient to bring them within the strictest construction of the rule laid down by the ecclesiastical courts and the earlier decisions of this court. In neither of these cases was there any suggestion of reviewing the earlier Cases of Head, Johns, and Buckholts, nor was there anything in the pleadings or the facts of either that called for such a review. A careful consideration of the Gholston Case shows that what was said in the Myrick Case to have been therein held was in reality not held—an error which probably grew out of the misleading nature of the third headnote in that case. The headnote referred to is as follows: "The charge of the court below (incorporated into the opinion) correctly expounds the law of divorce, in such a case, upon all the points made against it in the bill of exceptions." In the opinion is set out a rather lengthy extract from the judge's charge, much of which was then and still is sound, a portion of it, however, being in conflict with the previous rulings of this court. But the motion for new trial pointed out no error in this extract. While the rule as to assignments of error on charges in this court was not so stringent at that time as now, still the writer cannot see, even under the rule as it then was, where a long extract in a charge is excepted to, and most of it is good law, how a new trial could be granted on a small part of it that was not sound, no exception being made to the bad alone. The court dealt with all the exceptions to various extracts of the charge in the following general manner: "We overrule all the ex-

ceptions from the 3d to the 8th, inclusive, holding that, on all the points therein made, the court gave the law in charge to the jury." The Gholston Case was decided December 3, 1860. The Myrick Case, which was decided February 12, 1861, cites the Gholston Case as authority, but, as before stated, does not mention any of the earlier cases, one of which was decided before, and the others after, the passage of the act of 1850. In so far, therefore, as it essays to lay down any rule by which to determine what is cruel treatment, within the meaning of the law of divorce, different from that already expounded by the courts of this state and of England, it is in no manner binding as authority, because it was in the teeth of prior adjudications to the contrary. In the case of Odom v. Odom, 36 Ga. 286, this court, speaking through Chief Justice Warner, evidently did not consider either the Gholston or the Myrick Case binding as precedent, for in the opinion, on page 317, it is said: "In view of the various grades and conditions of mankind in society, it is extremely difficult to assert any definite rule, applicable to all classes of society, as to what will constitute legal cruelty. Legal cruelty may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt. What must be the extent of the injury, or what particular acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case. The acts of cruelty must be such as to render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife"—citing *Evans v. Evans*, and *Westmeath v. Westmeath*, supra. The case cited was one in which the wife was the libellant, but under our law the doctrine announced is equally applicable in a case where the husband is the complaining party. The case of *Glass v. Wynn*, 76 Ga. 319, cites the Myrick Case approvingly, but it holds nothing to the contrary of the Odom Case, and the language used was not necessary to the ruling made. The case of *Ray v. Ray*, 106 Ga. 260, 32 S. E. 91, which was an alimony proceeding, also cites the cases of *Myrick v. Myrick* and *Glass v. Wynn* as authority for the proposition that slanderous reports made by the husband against the wife, and which were brought to the wife's attention, to the effect that she had been untrue to her marital vows, was such cruelty as would justify the wife in separating herself from her husband, and that, having left him for that reason, she would be entitled to alimony. Such conduct on the part of a husband has by numerous courts been held to be cruel treatment, on the idea that a man who would so outrage the feelings of his wife, and so brutally trample upon her sensibilities, is not a safe person for her to live with; that such a man is necessarily of an extremely

jealous temperament, and subject to violent paroxysms of passion, the occurrence of which would reasonably create an apprehension of bodily harm to the wife; and that the knowledge by a virtuous wife that she was thus being subjected to the vilest calumny by the one from whom she had the right to expect the tenderest consideration would have a tendency to cause her such mental anguish as to seriously threaten her physical well-being. 1 Bish. Mar. & Div. § 1574. As has been noticed, however, the Ray Case was an alimony proceeding, and the language of the court to the effect that the conduct mentioned would sustain an action for divorce was plainly obiter.

So much has been said for the purpose of demonstrating that on the question under consideration neither this court nor the law-making power of the state has ever departed from the well-settled conservative principles of the English law. On the other hand, from the date of the adopting statute in 1784 down to this good hour, it has been the policy of the law in this state to refuse divorces when sought for reasons of convenience, or on account of differences of temperament, or petty grievances, between man and wife.

3. The original act providing for cruel treatment as a ground of divorce used the words "in case of cruel treatment on the part of one towards the other." To the mind of the writer, this language expresses an idea altogether at variance with that upon which the petition in the present case is based. Cruel treatment, such as must have been in the contemplation of the law-makers, necessarily involves the doing of some act with the intention of causing pain or suffering to the other party; else why the language, "on the part of one towards the other"? Plainly the meaning is an act done, a word spoken, abuse directed, towards the other; a setting in motion by one party, by word or act, of something the purpose of which is to cause pain and suffering to the other. It must be the intention of the offending party to injure—to wound. It must be a willful act the purpose of which is to hurt. Words spoken or acts done may cause the greatest pain, the most acute suffering, but in the absence of an intention to wound they do not constitute the cruel treatment contemplated by the law as a ground for divorce. In the present case, the allegations of the petition and the testimony of the witnesses show that Mrs. Ring was guilty of conduct highly disagreeable in its consequences to her husband, but there is an entire absence of any showing that she was actuated by any desire or intention to inflict the pain which he is alleged to have endured. It seems that she had, previously to her marriage, been the victim of a railroad accident, in which she suffered severe internal injuries, and that while undergoing medical treatment for those inju-

ries she became addicted to the habitual use of morphine, which continued during the eight years that she and her husband lived together. Its use was to her a seeming necessity, and when in want of it she suffered intensely. It appears that, in order to quiet her, her husband himself on occasions procured the drug and gave it to her. When deprived of it she would, at times, make exhibitions of her condition which amazed not only her husband but the neighborhood in which they lived, and caused him much humiliation. Her frantic screams, when begging for morphine, often caused the neighbors to believe that he was mistreating her. While all this must necessarily have been very mortifying to her husband, none of her acts were done with that intention. None were willful, malicious, or wanton, but all were the result of her uncontrollable desire for this terrible narcotic.

We are not alone in the position that intention is a necessary element of the cruel treatment which the law recognizes as a ground for divorce. Massachusetts has a statute which allows a divorce on the ground of "cruel and abusive treatment." In the comparatively recent case of *W— v. W—*, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491, Mr. Justice Holmes, who is now an Associate Justice of the United States Supreme Court, delivering the opinion, said: "The single question reserved is whether the practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is 'cruel and abusive treatment' within the meaning of the law." "We will assume, although it is not found as a fact, that the libelee knew how his conduct worked upon his wife, and we fully agree that, in general, foresight of a consequence of one's act has the same effect upon liability for procuring it as intent to produce that consequence. \* \* \* But the actual intent and purpose with which an act is done may be of importance when the question is not one of liability, but of dissolving the marriage tie. Certainly they may be made so by statute. The words 'cruel and abusive treatment' seem to import on their face conduct directed towards the other party, and with a malevolent motive. Without deciding that a case could not be imagined which would fall within the meaning of the words without such a motive, it is enough to say that purely self-regarding conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense, merely because its folly, its disgusting character, or its wickedness disturbs her nerves or conscience, and thus affects her health." In another case from the same state, that of *Ford v. Ford*, 104 Mass. 198, it was held that to make out a case of cruel treatment the same must be "intentionally inflicted."

In the case of *Miller v. Miller*, 78 N. C. 108, the court said: "The husband's conduct was not consciously or willfully to the annoyance of the wife. His acts were not intended or expected to annoy her. \* \* \* The indignity to her feelings was not willful on his part;" and it was held that the petition of the libelant must be dismissed. In *Everton v. Everton*, 50 N. C. 210, which is another case decided by the same court, the court said: "Whether any other circumstances of insult and injury, short of violence to, or threats against, her person, would be a sufficient ground of relief, and if any, what, it is not necessary for us now to say. If there be any such, they must have, as an essential ingredient, a willful and malicious intent to offer insult and do injury, and such intent must be alleged and proved. A wrong inflicted from mere thoughtlessness, or without due consideration for the feelings or situation of the wife, may deserve censure, but, in the absence of a malicious intent, it cannot be allowed the effect of sundering the strong bond of marriage." To the same effect, see *Shaw v. Shaw*, 17 Conn. 189; 1 Bish. Mar. & Div. § 1575, where it is laid down that an unintentional act, "though occasioning pain and injury, will not warrant a divorce." The reason of this doctrine grows out of the rule that prevails both in the ecclesiastical law and the law of most, if not all, of our states, viz., that there must be, arising out of the cruel treatment complained of, a reasonable apprehension of danger to life, limb, or health.

In those states where the greatest latitude is allowed in the grant of divorces, where threats, unkind words, jealous accusations, and the like, are held to be cruel treatment within the meaning of the law, the decisions proceed upon the idea that those things imply a state of bad feeling which in the nature of things will eventually result in danger of bodily harm to one party or the other. While habitual drunkenness is, by statutory enactment in many states, including our own, made a ground for divorce, in but few jurisdictions has drunkenness, unmixed with other misconduct, been held to constitute cruel treatment. In 73 Am. Dec. 628, in a note to the case of *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615, it is said: "Drunkenness, although long-continued and excessive, is not of itself such cruelty as will constitute ground for divorce. It may entail upon the wife much misery, and a lifelong trial of patience and fruitless hope, but if unaccompanied by real or apprehended physical injury it is insufficient; the court will not unsettle the law, or depart from the decided cases, to indulge its feelings or to sympathize with a petitioner's misfortunes"—citing *Hudson v. Hudson*, 3 Swab. & T. 314; *Brown v. Brown*, L. R. 1 P. & D. 46; *Waskam v. Waskam*, 31 Miss. 154; *Haskell v. Haskell*, 54 Cal. 262. In *Haskell v. Haskell*, *supra*, the court said: "That adultery or

habitual intemperance would in a popular sense constitute extreme cruelty, we do not question. And so would willful desertion or willful neglect. But, in a legal sense, extreme cruelty is something different from any of the other causes of divorce, and constitutes a separate and distinct cause of action; otherwise it would be unnecessary to specify any other cause than extreme cruelty as a ground of divorce in any case." Again, where a brutal stepfather beat and mistreated the children of his wife, but the purpose of his conduct was not to distress or annoy the wife or to wound her feelings, but was due solely to his hatred or ill will toward the children, it was held not to be cruel treatment. *Wallscomb v. Wallscomb*, 11 Jur. 134. *Perry v. Perry*, 1 Barb. Ch. 516, holds practically the same principle, where the wife was cruel to the children of the husband. But where the beating was done in the presence of the wife and for the purpose of wounding her sensibilities, it was held to be cruel, on the idea that her suffering, although mental, was a menace to her health, and showed such a disposition on the part of the husband as to justify an apprehension on the part of the wife of bodily harm to herself. *Bramwell v. Bramwell*, 3 Hagg. 618; s. c. 5 Eng. Ecc. R. 232; *Friend v. Friend*, 53 Mich. 543, 19 N. W. 176, 51 Am. Rep. 161; *Gleason v. Gleason*, 16 Neb. 15, 19 N. W. 784. There is authority for the position that the word "treatment" includes any behavior of one party which affects the other physically or mentally, whether with a malevolent motive or not. *Robinson v. Robinson* (N. H.) 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632. The decision in that case, however, was made under a statute which authorized divorce for conduct seriously injuring the health or endangering the reason of the complaining party. It was held that under that statute a malevolent motive need not be proved; that divorce is not intended as a punishment of the offender, but for the protection of the sufferer. "Whether the behavior proved is a sufficient ground of divorce depends on the question whether it has seriously injured health or endangered reason." The decision is placed solely on the words of the statute, although the reasoning employed is opposed to the idea set forth in the Massachusetts case of *W— v. W—*, *supra*. In many former decisions of this same court defining "cruelty of either party to the other," there is much authority for the construction placed by us on our statute. In *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664, *Richardson, C. J.*, says: "In the judgment of law, any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty. \* \* \* Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provoca-

tion used, the wife can hardly be considered safe." The case of *Harratt v. Harratt*, 7 N. H. 196, 26 Am. Dec. 730, holds that under the statute in New Hampshire a divorce will not be granted on the ground of cruelty for conduct not wanton and willful, and directed towards the innocent party. In the *Robinson Case*, supra, it appeared that the New Hampshire statute had been enlarged, and the court held that it was for the very purpose of providing for divorce in cases like the one now under consideration, where the conduct complained of did not fall within the established definition of cruel treatment.

We have carefully examined all the cases cited in the brief of the able counsel for the defendant in error which were decided by courts other than our own, and which lay down a different doctrine from that here announced, and we find that in many instances they are controlled by special statute utterly unlike our own. Thus, in the case of *Dawson v. Dawson*, 23 Mo. App. 169, where it was held that "the habitual use of opiates, whose tendency is to render the user callous, reckless, untruthful, and stupid, to cause physical prostration, to undermine and destroy all the objects of the marital relation, and which habit is usually incurable, constitutes such indignities as furnish ground for a divorce," it appears that the Missouri law especially provides for the grant of a divorce where either the husband or the wife "shall offer such indignities to the other as shall render his or her condition intolerable." So, also, the Texas case of *Sheffield v. Sheffield*, 3 Tex. 79, was decided under a statute which declared that "a divorce from the bonds of matrimony may be obtained where either the husband or wife is guilty of excesses, cruel treatment," etc. The case of *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, besides being directly contrary to the ruling in the earlier California case of *Waldron v. Waldron*, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487, proceeds under a special provision of the law of that state which expressly defines cruel treatment to be "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

If the General Assembly sees fit to extend the provisions of the Georgia law on this subject, it has, of course, the power to do so. This court has neither the power nor the inclination. We can find no authority of law in this state for granting divorces to either party for any conduct, no matter how disastrous its consequences, which does not amount to intentional violence to the injured party, or create a reasonable apprehension of such violence. Our Legislature has not seen fit to enact that any violation of the penal laws shall constitute cruel treatment, but has expressly provided that for one other than those in which the defendant has been found guilty of a felony and

sentenced to at least two years in the penitentiary shall a divorce be granted, except for the one misdemeanor of adultery. Both these, however, are made a distinct ground for divorce. The writer can conceive of nothing more distressing or harrowing to mind and body than to be united in marriage to an insane person, yet no General Assembly in Georgia has so reflected on the humanity of our civilization as to insert in our law a provision that insanity occurring after the marriage shall be a ground for divorce. Under our marriage contract, husbands and wives still take one another "for better or for worse," and the divorce laws of this state do not confer upon the courts the discretion to annul the contract of marriage in all cases where, from considerations of expediency, or by reason of the incompatibility of temperament of the parties, such a course might seem desirable. The defendant in error has doubtless suffered much on account of the unfortunate habit of his wife, but the only bad habit which the law of Georgia recognizes as a ground for divorce is habitual intoxication from the use of alcoholic liquors.

It may not be amiss to say, in conclusion, that in making this decision we announce no new doctrines or strange theories. On the contrary, we but declare what has been the law in Georgia ever since Georgia has been. If, upon occasions, this court has seemed to depart from those ancient principles, the effect has not been to change the law, but to stray from it.

Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

SIMMONS, C. J. (concurring specially). I concur in the reversal of the judgment, on the ground that the habitual use of morphine by a wife is not, under the Code, such cruel treatment as will authorize a divorce.

(117 Ga. 993)

#### LAMAR et al. v. HARRIS.

(Supreme Court of Georgia. June 2, 1903.)  
PARENT AND CHILD—RELEASE OF CUSTODY—  
TESTAMENTARY GUARDIAN—HABEAS  
CORPUS—DETERMINATION.

1. A father may, in this state, release to another the right to the custody and control of his minor child.

2. One to whom the parental power over a minor is awarded has no power to appoint a testamentary guardian for such minor.

3. W., by a written agreement, released to L. and wife (his parents-in-law) all his parental power, custody, and control over his minor son, a child less than two years old. L. confided the personal care of the child to his daughter, H., and she has since that time occupied in every way the relation of a mother to the child. L. survived his wife, and died when the minor was nine years old, leaving a will in which he undertook to appoint his son guardian of the minor. H. continued to exercise parental power over the child for more than five years, without interference from the father, and with his full acquiescence. The father, since the agreement with L., has never contributed any-

thing to the support of his child. *Held*, that the father, by long acquiescence in the control of the minor exercised by H. since the death of L., and his failure to contribute anything to its support or to assert his parental authority in that time, has lost his right to the custody of the minor.

4. In habeas corpus cases for the custody of a minor, the paramount consideration is the welfare and happiness of the minor; and, in determining that, the trial court is vested with a large discretion. Where the circumstances justify it, the wishes of the minor may properly be consulted in determining to whom the custody shall be awarded.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by V. L. Harris against H. J. Lamar and another. From the judgment, defendants bring error, and plaintiff files cross-bill of exceptions. Judgment on main bill of exceptions affirmed, and on cross-bill dismissed.

Bacon, Miller & Brunson and Thos. E. Matthews, for plaintiffs in error. Dessau, Harris & Harris and Hardeman, Davis, Turner & Jones, for defendant in error.

CANDLER, J. This is a habeas corpus case from Bibb county, involving the custody and control of a minor. The minor in question, Lamar Washington, is a son of one of the plaintiffs in error, W. H. Washington, and his wife, Alberta Washington, née Lamar. He was born on March 6, 1887, at the home of his mother's parents, Col. and Mrs. H. J. Lamar, in Vineville, near Macon. About two weeks after his birth his mother died. His father's home was in Nashville, Tenn. Shortly after the death of Mrs. Washington, W. H. Washington returned to Nashville, leaving his infant son in the care of the Lamar family. About two years later, he returned to Bibb county for the purpose of taking the child back to Nashville with him. In the meantime, however, the Lamars had become very much attached to the child, and objected strongly to having him taken from them. After some negotiations between Col. Lamar and Mr. Washington, the following written agreement was entered into between them:

"State of Georgia, County of Bibb. This contract and agreement, made and entered into this 1st day of January, in the year of our Lord eighteen hundred and eighty-nine, between W. H. Washington, of the county of Davidson and state of Tennessee, of the first part, and Henry J. Lamar, of the county of Bibb and state of Georgia, of the second part, witnesseth:

"That whereas, the said W. H. Washington, the party of the first part, is the father of a certain male child named Henry J. Lamar Washington, now about twenty-two months old, said child being the grandchild of the party of the second part;

"And whereas, the mother of said child is now deceased; and whereas, since the death

of said mother of the child the same has been taken care of and nurtured by the said party of the second part and his wife;

"And whereas, the said party of the second part hereby promises, proposes and undertakes for the future to care for, provide for, maintain and educate the said child as one of his own children, and in all respects to maintain and occupy towards said child the relation of parent and father and to stand 'in loco parentis' towards said child;

"And whereas, the said party of the first part hereby expresses his voluntary consent that the said party of the second part shall have the right to care for, maintain and educate said child as one of his own children and in all respects to maintain and occupy towards said child the relation of parent and father, and to stand 'in loco parentis' towards said child:

"Now therefore, in consideration of the foregoing premises, and all and singular the same, so far as they relate to and concern him, the said party of the first part hereby voluntarily releases and relinquishes personally unto the party of the second part, and to his wife, Valeria B. Lamar, all his paternal control and power over said child, Henry J. Lamar Washington, and confides to the said party of the second part and his wife all his paternal power and control over said child, and agrees that the said party of the second part and his wife shall stand 'in loco parentis' toward said child.

"In testimony whereof, the said W. H. Washington has hereto set his hand and seal, and the said Henry J. Lamar has also hereto set his hand and seal as signifying his acceptance of the same."

This agreement was signed by both the parties, and was executed in the presence of two witnesses. Henry J. Lamar died December 25, 1896; his wife having died about two years previously. Shortly after his birth, the infant, Lamar Washington, was intrusted to the care of his maternal aunt, Mrs. Valeria L. McLaren, now Mrs. Valeria L. Harris, the defendant in error, and ever since that time he has lived with her, in every respect as her own child. Henry J. Lamar left a will, which contained, among others, the following provision: "Having received by due transfer all the parental powers of his father over my said grandson [Henry J. Lamar Washington], I hereby appoint Henry J. Lamar, Jr. [a son of the testator], guardian of his person, and in the event of his failure or inability to act, I appoint Walter D. Lamar such guardian in his stead." Certain real and personal property were also bequeathed to H. J. Lamar, Jr., in trust for H. J. Lamar Washington, and the trustee was directed to apply the income thereof to the education and maintenance of the cestui que trust during his minority, "provided he remains, and so long only as he remains, under the control and influence of, and is domiciled with, my immediate family, or some member thereof;

but in the event my said grandson should be removed beyond the limits of the state of Georgia, or should otherwise be taken from the control and influence of my said immediate family, of some member thereof, or his domicile be changed therefrom, said income, interest and profits shall no longer be applied to his support, maintenance and education, \* \* \* but shall revert to and become a part of my estate."

On April 5, 1902, Mrs. Harris filed in the superior court of Bibb county her equitable petition, in which she set out substantially the foregoing facts, and also the following: Since the death of H. J. Lamar, Sr., W. H. Washington has never set up any claim or asserted any rights to the custody and control of Lamar Washington, but Mrs. Harris has had such custody and control. She has stood in the position of a mother to said minor, and has the affection of a mother towards him, while he has the affection of a son towards her. On the day the petition was filed, Henry J. Lamar, Jr., gave notice to Mrs. Harris that on the following day W. H. Washington would be in Macon, and that Lamar Washington would have to return with his father to Nashville, Tenn. From the time that the child was turned over to petitioner as an infant, she has had charge of him. She nurtured him in his infancy, nursed him through several illnesses, attended and watched over him, and in every respect brought him up as her own child, and learned to love him as her own offspring. The petition prayed for an injunction to restrain Henry J. Lamar and W. H. Washington from interfering with her possession, custody, or control of Lamar Washington, for general relief, and for process. Subsequently she amended her petition, claiming that she was entitled to the custody of the child, and praying for a writ of habeas corpus, and for an order decreeing her to be the lawful custodian of the child.

The defendants filed separate answers. Both claimed that under the will of H. J. Lamar, Sr., the testamentary guardian was entitled to the custody of the child, and denied that Mrs. Harris had had such custody since the death of her father, except by the permission of the guardian, H. J. Lamar, Jr., who, it was averred, had been the legal custodian of the child since the death of H. J. Lamar, Sr., and had been recognized as such by Mrs. Harris. By an amendment to his answer the defendant Washington set up that "if the court should determine that, under the law, the provisions of said will [of H. J. Lamar, Sr.] are inoperative and of no effect, then respondent submits to the court that the right to the custody and control of said child has reverted in this respondent, and he alone has such right; and, in the event the law prevents Col. Lamar's wishes as to the custody of said child from being carried into effect, then this respondent here and now asserts his right to the custody of

said child, as his father, and prays the court \* \* \* to award to this respondent the custody of said child."

The evidence introduced on the trial was voluminous, and in many particulars conflicting. Throughout the record it is apparent that, as in all cases where members of the same family are pitted against each other, with flesh and blood as the stake, the trial was marked by much bitterness of feeling. In the foregoing statement we have studiously endeavored to eliminate all points as to which there was a conflict, and to recite only those facts which were not disputed, and which have a material bearing on the decision of the questions at issue. On the trial the court passed an order in which it was "adjudged that the custody of said Lamar Washington is awarded to the plaintiff, and the defendants are enjoined as prayed in the petition." The defendants thereupon excepted.

1. There can be no doubt that the agreement between H. J. Lamar, Sr., and W. H. Washington, concerning the custody and control of the minor, was valid and binding, and gave to Lamar and his wife the right to direct and control the child. It is expressly provided by statute that parental power over a child may be lost "by voluntary contract, releasing the right to a third person," and this court has so often upheld such contracts that the right to make them is no longer open to question in this state. Civ. Code, § 2502 (1); *Janes v. Cleghorn*, 54 Ga. 9; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48; *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960.

2. The common law of England, and, so far as we are aware, the statute law of every state in this country, if not in the civilized world, recognize the father as the legitimate, natural guardian of his child. The law does not fly in the face of nature, but rather seeks to act in harmony with it, and to that end encourages the formation and continuance of those ties which, by the inscrutable providence of God, bind man to his own flesh. A father may part with the legal control over his offspring, but the one to whom such control is granted cannot perpetuate the alienation of child and parent by the appointment of a testamentary guardian for the former. As has been seen, the agreement between Washington and Lamar, Sr., was a valid contract, and binding upon the parties. By its terms, however, the parental control over the minor was released only "unto the party of the second part [Lamar] and his wife." No provision was made for the continued separation of father and child after the death of Col. Lamar and his wife, and, in the absence of such a provision in the contract, the law will not presume that the parties intended that the agreement should extend over and beyond its expressed limitations. In the early case of *Taylor v. Jeter*, 33 Ga. 195, 81



Am. Dec. 302, the parents of the minor had been divorced, and the custody of the child awarded to the mother, who subsequently died, leaving a will in which she undertook to appoint her father guardian of the minor. Afterwards the father (the grandfather of the minor) died, leaving a will in which he confided the guardianship of the minor to his son. The father of the minor obtained a writ of habeas corpus, on the hearing of which the custody of the child was awarded to him, and on writ of error the judgment of the lower court was affirmed. The court, in the opinion (page 200, 33 Ga., 81 Am. Dec. 302), said: "Is the office of guardian or trustee, appointed by the chancellor, transmissible by the will of the appointee? We hold that it is not. It is a personal trust, revocable, during the life of the appointee (upon a proper case made), by the rightful tribunal, and invariably terminating with that life." So, also, in *Grimsley v. Grimsley*, 79 Ga. 398 (2), 5 S. E. 760, it was ruled: "A father may appoint a testamentary guardian for his own children, but not for the children of anybody else. Under the appointment of one as testamentary guardian of children of a person other than the testator in this case, the appointee became a trustee for such children, and held the property devised as such, and not as guardian." See the rule on this subject laid down in *Woerner*, Am. L. Guard. § 20, p. 61, where the *Grimsley* Case, *supra*, is cited as authority.

3. It follows, then, from what has been ruled, that upon the death of Col. Lamar the right to the custody of the minor, Lamar Washington, again vested in his father, W. H. Washington. The father, however, did not at that time see fit to resume his parental control, nor does he now seek to do so, except in the event that it is decided "that, under the law, the provisions of said will touching the custody of said child are inoperative and of no effect." On the contrary, he "fully acquiesces in all the provisions of Col. Lamar's will touching the control of Lamar Washington, and desires still that the same be carried out." In the meantime, it must be borne in mind, Lamar Washington has been, almost since the hour of his birth, under the direct personal care and attention of Mrs. Harris, the defendant in error. Always a delicate child, she has nursed him in sickness, worried with him through all the peevish and fretful years of childhood, traveled with him both in this country and abroad, and has ever lavished upon him the devotion and the watchful tenderness of a mother. To quote from the able brief of learned counsel for the plaintiffs in error, "this youth is no longer a milk-fed baby, or an infant of tender years, especially needing a woman's nursing and care." We do not think, however, that that fact is in itself an argument for tearing apart the ties that have slowly formed during the tedious years when he was a milk-fed baby and an infant of

tender years. The acquiescence of the father in Mrs. Harris' custody of his child was complete, before and after the death of Col. Lamar. He was well aware of the stringent provisions of the will left by the latter—that Lamar Washington should, during his minority, remain "under the control and influence of, and [be] domiciled with, my immediate family, or some member thereof." He knew with which member of the Lamar family the child was domiciled, and under whose control and influence he was, and no word of protest did he utter. During the time that he might legally have claimed the child, he did not do so. He waited for more than six years, until this controversy arose, and now says that, if the court should hold that the appointment of a testamentary guardian is invalid, he wishes to reassert his parental rights. On this branch of the case, we think that the decisions in *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399, and *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960, are controlling. In the first of those cases, it appeared that the child, an infant of tender years, had been confided by its parents to a maternal aunt. As to whether there was an express verbal contract on the subject between the parents and the aunt, the evidence was conflicting. At the time the transfer of custody was made, the child was sick, and the aunt kept it for five years, and nursed it "into vigor and renewed life." The father sued out a writ of habeas corpus, and the court below decided in favor of the retention of the child by the aunt. This court affirmed the judgment, and in the opinion Jackson, J., said: "The contract, when made and executed in part, as in this case, is clearly irrevocable by the parent, unless for good cause. This change of mind is not such good legal cause. It would be wrong to hold that, after the child has been nursed and loved and cherished under the contract for five years, it could be revoked at pleasure by the parent. If the child were badly treated, it might be annulled; if any other good legal reason arose, it could be set aside as any other contract which was violated; but for no cause at all, it cannot be."

We are not unmindful of the argument contained in the following paragraph of the brief of counsel for the plaintiffs in error:

"If, even under the contract of adoption in this case, Col. Lamar did not acquire the testamentary power of appointing a guardian for the child, his exercise of that power has been recognized, approved, and ratified by W. H. Washington, the father, by solemn declaration in *judicio*, as well as by actual, continuous, and continuing acquiescence, both in word and deed, since Col. Lamar's death in 1896. This is equally true, also, as to every member of the family—especially as to Mrs. Harris herself, who testifies that she procured the appointment to be made."

Unquestionably, in a contest between Washington and the appointee under the

will, this argument would carry great weight, but can the same thing be said as to Mrs. Harris? It is true that she testified that she suggested the appointment of her brother as guardian for her nephew, and it is equally true that for a long time after her father's death she regarded her brother as the child's guardian. We have seen, however, that that appointment was inoperative and had no effect upon the relations between the minor and his uncle. Can Mrs. Harris be said to have acquiesced in the nonexistent guardianship of Lamar, any more than Lamar can be said to have acquiesced in the very real custody of the child by Mrs. Harris? She had the actual, physical possession of the minor. He had only a fictitious authority. The acquiescence of all parties to the arrangement subsisting inured to her benefit, rather than to his. The difference between her position and Washington's is apparent at a glance. Washington had, at the time of Col. Lamar's death, the right to the custody of the child. She had not. The lapse of time without a change in the status of the child worked against Washington and in favor of her. Both, of course, were chargeable with knowledge of the legal inefficacy of Col. Lamar's appointment of a guardian. His failure to assert his parental rights tended to prevent their assertion, while her erroneous belief that the testamentary guardianship was valid had, in our opinion, no effect upon her rights one way or the other.

4. It is hardly necessary to reiterate the well-recognized and universally applied doctrine that, in habeas corpus proceedings for the possession of a minor, the paramount consideration is the welfare of the child; that in determining this question the trial court is invested with a large discretion; and that on writ of error that discretion will not be controlled, unless abused. There is nothing to indicate in the present case that the trial judge did not use his discretion wisely and cautiously. The case was ably and warmly contested, and, as before stated, much bitterness was exhibited. In reaching a proper conclusion, it was necessary to make many allowances for the personal feeling of the parties. Aside from the purely mercenary aspect of the case, the trial judge evidently took into consideration the wishes of the minor himself, who, in an affidavit, expressed his desire to remain with his aunt, who since his earliest infancy has been his only mother. This was of itself a weighty consideration. He is no longer a child, but a youth bordering on manhood, and is fully capable of deciding in a matter of this sort what will work best to his happiness. We do not see any error in the use by the court below of the discretion vested in it by law.

The defendant in error, by cross-bill of exceptions, complained of the refusal of the court to admit certain evidence, and to allow a petition of the minor to be filed as a part

of the record in the case. As the judgment on the main bill of exceptions is affirmed, the writ of error on the cross-bill will, in accordance with the settled practice of this court, be dismissed.

Judgment on main bill of exceptions affirmed, and cross-bill dismissed, by five Justices.

(118 Ga. 105)

# ACH & CO. v. MILAM et al.

(Supreme Court of Georgia. May 30, 1903.)  
MORTGAGE—FORECLOSURE—CLAIM OF HOMESTEAD—PETITION—ESTOPPEL.

1. Where a homestead was set apart under the Constitution of 1868, and a mortgage on the homestead property was given in 1898, it was permissible for the defendant to set up the homestead in defense to an action to foreclose the mortgage.

2. Where the original petition for such a homestead showed that the legal title to the land sought to be set apart was in the wife, who made the application, evidence was admissible to show that, subsequently to the filing of the original petition, she conveyed the land to her husband, and so amended her petition as to show that the title to the land was in him, and pray that the homestead be set aside out of his property.

3. The defendant in an action to foreclose a mortgage, by the terms of which the mortgagor waives all rights to homestead or exemption, is not estopped by the recitals of the mortgage to deny the right of the mortgagee to sell the land covered thereby, under such a judgment as would deprive her of the use of the homestead property during her life.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by Ach & Co. against S. E. Milam and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

John W. Akin, for plaintiffs in error. Thos. W. Milner & Sons, for defendants in error.

CANDLER, J. On the 4th day of August, 1898, Mrs. S. E. Milam, Ruby P. Milam, and Pearl L. Milam executed and delivered a promissory note to Samuel Ach & Co. for the principal sum of \$1,486.94. This instrument contained a waiver of all homestead and exemption rights, and to secure its payment a mortgage was executed contemporaneously, and was duly recorded. The consideration expressed in the mortgage was the principal sum of the note, "and the better securing the payment of the aforesaid note." The language used in the conveying clause was, "do hereby sell and convey." This was followed by the usual habendum clause, with warranty of title. The mortgage also contained a clause waiving homestead and exemption rights, in the usual language, as well as a power of sale. The property described in the mortgage was a tract of land in Bartow county known as the "W. P. Milam Place." The plaintiffs below filed their petition in Bartow superior court to foreclose this mortgage. Mrs. S. E. Milam filed an answer objecting to the foreclosure, in which she aver-

red that the mortgage in question was upon property which had, by proper order of court, and in conformity to law, been set apart to her and her minor children, and that, while her children were of age at the time of the filing of her answer, she claimed the benefit of the estate so set apart to her during her life or widowhood, and asked that no decree selling the homestead property be granted as prayed. Her answer also set up that she is now the widow of W. P. Milam, deceased, and that the property embraced in the mortgage is the property set apart from the estate of the said W. P. Milam as a homestead for her benefit, and that the homestead estate is still of force, as she is unmarried, and has never removed her citizenship or home from the state of Georgia. The mortgage appearing to have been executed in Alabama, and reciting that the defendants lived in that state, the answer further averred that, while the defendant had visited her children in Alabama, she had never abandoned her residence in Georgia with a view to changing her citizenship, but has always regarded and now regards the homestead estate as her home. The plaintiffs, before the introduction of any evidence, demurred to Mrs. Milam's plea on the grounds (1) that no copy of the homestead referred to was annexed to the answer as an exhibit; and (2) that such homestead could not be set up against the plaintiffs as a defense to the proceeding instituted, the defendant being concluded from setting up the homestead by reason of the mortgage, the execution and delivery of which were admitted in another portion of the plea. This demurrer was overruled, and the plaintiffs excepted.

On the trial the plaintiffs introduced their note and mortgage, and a warranty deed made by W. P. Milam to his wife, Mrs. S. E. Milam, conveying the property in dispute in fee simple. The date of this deed was December 22, 1874. They also introduced the following paper, dated August 31, 1895: "In consideration of Samuel Ach & Co. selling my daughter, Miss Ruby P. Milam, goods on time, I agree to become responsible to them for any goods she may buy, agreeing that if she does not pay for them within a reasonable time, I will, and hereby waive all homestead and exemption rights I may have under or by virtue of the constitution or laws of the state of Georgia or the United States. [Signed] Mrs. S. E. Milam." It also appeared that the consideration of the note which the mortgage was given to secure was goods sold by the plaintiffs to Ruby P. Milam. Mrs. S. E. Milam offered in evidence the record of a homestead, the material parts of which were as follows: The petition was by Mrs. Milam, and recited that she was the wife of W. P. Milam; that W. P. Milam was the head of a family, consisting, besides the petitioner, of two minor children, in addition to the defendants Ruby Milam and Pearl Milam; that W. P. Milam had declined to

make application for a homestead; and that the application was therefore made by the wife, Mrs. S. E. Milam. The personalty described in the schedule was the property of W. P. Milam; the realty, that of Mrs. S. E. Milam, under the deed which has already been mentioned. A schedule of personalty was attached, and also a schedule of realty, embracing the land described in the mortgage in this case. The usual affidavit, order to the county surveyor, plat, and return of the surveyor, followed, after which appeared the following: "In Re Sallie E. Milam, Application for Homestead. Court of Ordinary, Bartow County, Georgia. And now comes Sallie E. Milam and amends the application originally filed by her, and says that she has, in terms of section 2018, Code Ga. 1873, relinquished and assigned and set over to her said husband all right, title, and interest she ever had in the lands described in her said original application as her separate estate. A copy of her deed of assignment is hereto attached as a part of this amendment. And now she prays that said land, as well as all of the other property set forth in her schedule heretofore filed, both real and personal, be set apart to her and her said family as a homestead under the laws in force in Georgia." This paper was dated February 27, 1875. This was followed on the record by a paper signed by Sallie E. Milam and W. P. Milam, reciting that in consideration that the law requires that where a husband, being the head of a family, shall have no property of sufficient value out of which to set apart a homestead, and the wife has a separate property subject to her debts, she may relinquish, assign, or set over the same to her husband, and then, under the law, apply to have same set apart as a homestead; that Sallie E. Milam has a separate estate in the lands mortgaged, and known as the "W. P. Milam Place," which she "holds under a deed of gift from my husband, William P. Milam, dated 23rd December, 1874, and whereas, I am now desirous of applying to the court of ordinary to have said lands set apart as a homestead under the laws of force in said state, I do hereby assign, relinquish, set over, and convey, upon the consideration above set forth, all my right, title, and interest in and to said land to my husband, William P. Milam. To have and to hold said land free from all claims whatever from myself or my heirs or assigns forever." This was signed and sealed in the presence of two witnesses, and was recorded in the office of the clerk of the superior court of Bartow county. The record showed an order of court overruling "the objections filed by the creditors of William P. Milam," and appointing appraisers to value the property. The appraisers made this return on March 18, 1875. The following judgment of the ordinary appears also in the record, following the return of the appraisers, of date March 19, 1875: "The within schedule of personalty approved, and the plat as

returned by the appraisers approved, and judgment for \$18.30 costs rendered against the objectors." The record does not disclose who were the objectors, or the grounds of objection.

The plaintiffs objected to the introduction of all of the evidence for the defendants as above set out, on the grounds (1) that the alleged homestead was void, in that it was set apart at the instance of a married woman not the head of a family, and out of her own property; (2) that the defendants were estopped by the mortgage and its recitals and covenants from attempting to set up the homestead as against the plaintiffs; and (3) that the defendants could not set up the alleged homestead, because the same was no defense to the judgment sought in this case, the "defendants' remedy, if any, being by claim to levy under execution issued from judgment in this case, or some other remedy not defensive to this suit." These objections were overruled, and the evidence admitted. It appeared from the evidence that W. P. Milam died in Georgia in 1891, intestate, and that no administration was had upon his estate. It further appeared that the youngest child of William P. and Sallie E. Milam was 26 years old when the mortgage was given, and that the daughters were all married. It seems to have been admitted that Mrs. Milam had not abandoned her residence in Georgia (although there is no express declaration in the bill of exceptions to that effect), as nothing appears to indicate that there was any contention on this question. The plaintiffs, after all the evidence was in, moved the court to direct the jury to find for the plaintiffs against Mrs. S. E. Milam, and to find that the mortgage be foreclosed, and that the defendants were estopped to set up the homestead or to rely thereon. This the court refused to do, but, on the other hand, charged the jury that the homestead was valid, and that the mortgage was invalid, except as to the interest in reversion of those heirs at law of William P. Milam who were parties to this case. The jury returned the following verdict: "We, the jury, find in favor of plaintiffs against Miss Ruby P. Milam as principal, and against Mrs. S. E. Milam and Miss Pearl F. Milam as securities, with homestead exempt, and further find in favor of foreclosure of mortgage on reversionary interest. Principal, \$1,486.94; interest, \$528.65; attorney's fees, \$149.69." The plaintiffs except to the overruling of their objections to the evidence for the defendants; to the charge of the court that the defendant Mrs. S. E. Milam could assert her homestead as a defense to this suit, and that the homestead was a valid homestead; to the holding that Mrs. S. E. Milam was not estopped by the mortgage from setting up her homestead; and to the direction to the jury to find in favor of Mrs. S. E. Milam to the extent of denying and refusing a foreclosure of the mortgage as against her

homestead estate. Neither in the oral argument before this court, nor in their briefs, did counsel for the plaintiffs insist upon the first ground of their demurrer. The second ground goes to the substantial questions involved in the case, and the questions made by this ground of the demurrers are raised also by the objections to the admission of the evidence from the records of the ordinary's court, so that both may be treated together.

1. We are satisfied that Mrs. S. E. Milam had a right to object to the foreclosure of the mortgage on the homestead set apart to her and her children, when the proceedings were instituted in the superior court. She did not object to a verdict and judgment against her on the note, and the jury found against all of the defendants for the full amount claimed thereon. She being *sui juris*, and having been duly served with the petition asking for a judgment, and for a foreclosure of the mortgage on the land, and for an immediate sale thereof, such an adjudication would have settled not only the question as to the debt being due, but that the land in question was subject to sale for the then payment of same. The note which was the basis of the suit contained a full and explicit waiver of homestead, as did also the mortgage which the plaintiffs were seeking to foreclose; and, if she had sat still and allowed a judgment to be taken as prayed, the plaintiffs might well have claimed, in any subsequent proceeding, that she was precluded. Civ. Code, § 2746, provides that, when a rule nisi to foreclose a mortgage has been granted, the mortgagor may appear at the return term of the court and object to the foreclosure of such mortgage, and may not only set up and avail himself of any defense which he might lawfully set up in a suit instituted on a debt or demand secured by such mortgage, but may make any defense which goes to show that the applicant is not entitled to the foreclosure sought. Section 2750 provides that when the mortgagor, after being directed so to do, fails to pay the principal, interest, and costs, as required, and also fails to set up and sustain any defense against the foreclosure of the mortgage, the court shall give judgment for the amount due on the mortgage, and shall also order the mortgaged property to be sold. Mrs. Milam's defense was directed to the prevention of any order decreeing a sale of the homestead property, but did not seek to prevent a sale of the reversionary interests of the other defendants. While, in the determination of this case, it is unnecessary to decide whether or not the defendant might not, under some other proceeding, have prevented a sale of her interest in the homestead property, from other decisions of this court it is, to say the least, doubtful whether or not, if she had not at this time made a defense, she could ever have done so. See *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 32

S. E. 898, 73 Am. St. Rep. 109; *Bank of Forsyth v. Gammage*, 109 Ga. 220, 34 S. E. 307; *Evans v. Piedmont Nat. B. & L. Ass'n*, 117 Ga. —, 44 S. E. 2, and cases therein cited.

2. The original petition for a homestead filed by Mrs. Milam in the court of ordinary of Bartow county in behalf of herself and her minor children showed that the legal title to the land which she sought to have set aside was in her, and not in her husband. Prior to the order setting aside the homestead, however, she conveyed the land to her husband; and by an amendment to her petition she alleged that the title to the land was not in her, but in her husband, and attached to her amendment a copy of the conveyance to her husband. There is no question that, under the law as it then existed, it was necessary for the title to be in her husband before the property could be set apart to her, or that it was necessary to the validity of the homestead that her petition should show that the title was in her husband. *Jones v. Crumley*, 61 Ga. 105; *Coffee v. Adams*, 65 Ga. 347; *Bechtoldt v. Fain*, 71 Ga. 495; *Williams v. Webb*, 99 Ga. 301, 25 S. E. 654. Code 1873, § 2018 (Acts 1870, p. 71), authorized the conveyance of the title to the land which was in the wife to the husband, in order that she might have it set apart to herself for the use of herself and her children as a homestead, and the making of this deed to W. P. Milam by Mrs. S. E. Milam, and the amendment of her petition so as to show that fact, were proper, as well as necessary; and when the court of ordinary, over the objections of the creditors of the husband, set apart this homestead for the use of the widow and children, the question of the sufficiency of her petition was adjudicated. By this judgment it was legally determined that she was entitled to have the land set apart to her, and when the judgment so setting it apart, together with all the proceedings in connection therewith, was duly recorded as provided by law, the world was put on notice of its existence.

3. The court below properly held that Mrs. Milam was not estopped by the mortgage to deny the right of the mortgagee to sell the land under such a judgment as would have deprived her of the use of the homestead property, and it was accordingly not error to instruct the jury that the homestead estate could not be sold under the mortgage. The judgment of the court of ordinary setting apart the homestead being in every respect regular, and being duly recorded, all presumptions were in favor of the validity of the homestead thus set apart. It is true that this homestead was set apart under the Constitution of 1868, but in the case of *Planters' Bank v. Dickinson*, 83 Ga. 711, 10 S. E. 446, this court held that, since the adoption of the Constitution of 1877, a homestead, though taken under the Constitution of 1868, cannot be mortgaged for any purpose, either by the

husband, or by the wife who applied for the homestead out of the husband's property, he having refused to apply. In the same case it was held that the wife, having made such a mortgage, is not estopped to deny its validity. The homestead in the present case having been recorded long before the credit was given for the goods, for the payment for which the note and mortgage were given, the mortgagees were not such innocent parties as that the law will protect them, rather than the beneficiary of the homestead. They knew, or ought to have known, when the first agreement was signed, upon the faith of which they claim to have given the credit, that the land in question was exempt from levy and sale during the life and widowhood of Mrs. Milam, and that the Constitution of this state forbade its being incumbered. See *Sharp v. Mortgage Co.*, 95 Ga. 415, 22 S. E. 633. In the argument before this court, we were cited to the cases of *Lowe v. Webb*, 85 Ga. 731, 11 S. E. 845; *Miller v. Crozier*, 105 Ga. 54, 31 S. E. 122; *Stringfellow v. Stringfellow*, 112 Ga. 494, 37 S. E. 767; *Goodell v. Hall*, 112 Ga. 435, 37 S. E. 725. None of these cases are applicable to the case at bar, as each is clearly distinguishable from it on its facts. In each of the cases cited, the homestead estate was merged into a greater estate in the lands which had been set apart. In the case at bar, Mrs. Milam is still in possession under the exemption allowed her. She has no greater estate in it, into which the homestead estate could be merged.

The jury, by direction of the court, found a verdict to the effect that the mortgage be foreclosed as to the reversionary interest of the defendants; and there is no reason, under this verdict, why execution should not issue and be levied upon these interests, whatever they may be, and the same sold as provided by law. Therefore nothing herein ruled is contrary to the decisions of this court in *Huntress v. Anderson*, 110 Ga. 427, 35 S. E. 671, 78 Am. St. Rep. 105, and *Walker v. Hodges*, 118 Ga. 1042, 39 S. E. 480.

Judgment affirmed by five Justices.

(118 Ga. 55)

#### McWHORTER v. STATE.

(Supreme Court of Georgia. May 30, 1903.)  
INDICTMENT—FORMER SENTENCE—BURGLARY—PUNISHMENT—EVIDENCE—WITNESS—COMPETENCY—CONFESSIONS.

1. The fact of a former sentence must be charged in the indictment, where a second conviction would affect the grade of the offense or require the imposition of a different punishment.

2. The maximum penalty might be imposed on a first conviction for burglary, and the requirement of Pen. Code 1895, § 1042, that it must be imposed in the event of a second conviction, does not alter the character of the original offense nor provide for a different punishment.

3. Allegation and proof that the defendant had previously been sentenced to imprisonment in the penitentiary would tend to his prejudice, and need not be made as a basis for the im-

position of the maximum penalty provided by Pen. Code 1895, § 1042.

4. After a second conviction the judge may inspect the record of the former trial, act on his own knowledge, or hear evidence to satisfy himself of the identity of the accused.

5. One who stands near by and watches while his confederate breaks and enters a house with intent to steal therefrom, is guilty of burglary as principal in the second degree. The act of one is the act of both, and, as principals in the first and second degree are punished alike, no distinction between them need be made in the indictment. *Leonard v. State*, 77 Ga. 764; *Collins v. State*, 14 S. E. 474, 88 Ga. 347; Pen. Code 1895, §§ 42, 43.

6. Where a witness who has been put under the rule remains in the courtroom, he is not thereby rendered incompetent. He might be subject to attachment for contempt; but to exclude him altogether might deprive a party of the only witness by which a fact in issue might be established. *May v. State*, 17 S. E. 108, 90 Ga. 800.

7. The preliminary proof was sufficient to admit the confession, and the verdict was sustained by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Bibb County: W. H. Felton, Jr., Judge.

Eugene McWhorter was convicted of burglary, and brings error. Affirmed.

Lewis B. Herrington and Glawson & Fowler, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

**LAMAR, J.** The plaintiff in error insists that the maximum penalty under Pen. Code 1895, § 1042, could not be legally imposed on him, as the fact of the former conviction was not set out in the indictment and found by the jury. Where the second conviction changes the grade of the offense, or authorizes a higher penalty than could otherwise have been imposed, the former conviction enters as an element into the new offense, and must be alleged as a necessary part of the description and character of the crime intended to be punished. *Hines v. State*, 26 Ga. 614; *Cobb's Digest*, 827. Under the Code the punishment for the second offense does not exceed that which might be legally imposed for the first conviction, and had the judge, without the aid of this section, sentenced the prisoner for the longest term, there would be no right in this court to control his discretion. In mercy to the defendant, the law will not require the first conviction to be set out in the indictment, nor allow it to be proved. Such allegation and proof would naturally tend to his prejudice. It would in effect tend to prove bad character, a fact which the law will not ordinarily allow to be shown, unless the defendant himself tenders the issue. After conviction, if it is sought to show that the maximum penalty must be inflicted, the court may satisfy himself by an inspection of the previous record, act on his own knowledge, or hear evidence to satisfy himself as to the identity of the person. In this manner the purpose of the law may be subserved with-

out multiplying the issues and embarrassing the defendant on his second trial.

One who stands near by and watches while his confederate breaks and enters a house and steals therefrom is guilty of burglary as principal in the second degree. The act of one is the act of both, and, principals in the first and second degree being punished alike, no distinction need be made in the indictment. *Leonard v. State*, 77 Ga. 764; *Collins v. State*, 88 Ga. 347, 14 S. E. 474; Pen. Code 1895, §§ 42, 43.

The rights of the parties should not be affected by the acts of a witness where he has been put under the rule, returns to the courtroom, and hears the testimony of other witnesses; nor does he, by so doing, render himself incompetent to testify. He may be subject to attachment for contempt; but to exclude him might deprive a party of the testimony of the only person by whom a fact in issue could be established. *Rooks v. State*, 65 Ga. 330; *May v. State*, 90 Ga. 800, 17 S. E. 108. In the present instance the witness had not been summoned, but was the codefendant, in the custody of an officer, and the Solicitor General did not know he would be used as a witness at the time the others retired.

The preliminary proof was sufficient to admit the confession by the prisoner, and the verdict was sustained by the evidence.

Judgment affirmed by five Justices.

(118 Ga. 35)

#### BARKER v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

STATUTE — AMENDMENT — CONSTITUTIONAL LAW—CRIMINAL LAW—INDICTMENT — TITLE OF ACT—INTOXICATING LIQUORS—PROHIBITORY LAW—CONSTRUCTION.

1. If an act which purports to amend a section of the Code be for any reason unconstitutional, the validity of the section sought to be amended is not affected, and an accusation, the terms of which are such as to come within the provisions of the law as it existed before the passage of the amendment, may stand, notwithstanding the invalidity of the amendatory act.

2. Even if an act from which a section of the Code of 1895 was taken be subject to the constitutional objection that it contains matter different from what is expressed in its title, this defect in the act would not render invalid the section of the Code.

3. A local act which prohibits the sale of intoxicating liquors otherwise than through the medium of a dispensary established by the act and operated by the state, or one of its subordinate political divisions, is a prohibitory law, within the meaning of Pen. Code 1895, § 428, making penal the sale of such liquors in any county where the sale is "prohibited by law, high license, or otherwise"; and this is true though the local act prescribes no penalty for a violation of its terms. The section of the Code is not to be construed as relating in any way to sales by the state, the language of the section neither expressly nor by necessary implication requiring such a construction.

4. An act absolutely prohibiting the sale of intoxicating liquors in a given place suspends the operation in such locality of a general law providing that there shall be no sale without

¶ 6. See Criminal Law, vol. 14, Cent. Dig. §§ 1559, 1560.

the payment of a tax or the procuring of a license, or the performance of some other condition. Such an act would not, however, suspend the operation of a general law making penal the sale in places where the sale is prohibited by law, and, where two such laws exist, a person making a sale may be indicted under either. This rule is more especially applicable where one of such laws expressly provides that the sale shall be penal only in those places where it is prohibited by some other law. In such a case it was manifestly intended that the two laws should stand together.

(Syllabus by the Court.)

Error from City Court of Floyd County; Jno. H. Reece, Judge.

B. A. Barker was convicted of illegal sale of liquor, and brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

COBB, J. In 1902 Barker was arraigned under an accusation framed under Pen. Code 1895, § 450. The case came to this court, and the conviction was set aside on the ground that the accused could not be convicted under that section of the Code for the offense with which he was charged. See 117 Ga. —, 43 S. E. 744. The accused was subsequently arraigned under an accusation charging that on the 14th of October, 1902, he "did sell spirituous, malt, and intoxicating liquors, the same not being domestic wines, in the county of Floyd, in the state of Georgia, where the sale of such liquors was at the time prohibited by law, to wit, by the act of December 11, 1901 [Laws 1901, p. 620], creating a dispensary in the city of Rome and county of Floyd; said sale not being made from or by the dispensary located in the city of Rome, county of Floyd, under said act of December 11, 1901." The accused demurred to the accusation on the following grounds: (1) The accusation does not charge any crime under the laws of the state, and does not charge the violation of any criminal law in force in Floyd county either now or at the time the acts complained of were alleged to have been committed. (2) In so far as the accusation alleges a violation of the dispensary law for Floyd county, passed December 11, 1901, it does not charge the accused with any crime, for the acts alleged to have been committed are not made criminal by such dispensary act. (3) In so far as the accusation alleges a violation of the local dispensary act, it fails, also, to charge any crime for which the accused can be punished, as the acts alleged to have been committed are not made penal by the dispensary act, and no penalty is provided by that act. (4) In so far as the accusation seeks to charge the accused with a violation of section 428 of the Penal Code of 1895, as amended by the act of 1897 (Acts 1897, p. 39), it does not charge any offense, for that section, as amended, has no application to Floyd county, and is a general law, which is suspended by the enactment of the local law known as

the "Dispensary Act." (5) Such section of the Code, as amended by the act of 1897, is unconstitutional and void, because the act of 1897 contains matter different from what is expressed in its title; the demurrer pointing out wherein the act is claimed to be defective. (6) Section 428, as amended, cannot apply to Floyd county, in that such section, as so amended, if it applies at all, must apply to every sale of the article, the sale of which is made penal by such law in that county; and, inasmuch as the same cannot be made to apply to the manager and clerks in the dispensary, it cannot be made to apply to any sale in that county. (7) Section 428, as amended by the act of 1897, applies only to territory where the sale of the liquors named is prohibited altogether, and cannot be made applicable to a county having a dispensary act in force. (8) The dispensary act of Floyd county having been passed by the Legislature as a local act, and submitted to the people for ratification, and by them ratified, section 428, as amended, cannot be construed as a part of that local law; it not being referred to in any way in the local act, and never having been submitted to the people of such county for ratification. (9) The act of 1893 (Acts 1893, p. 115) from which section 428 was taken is unconstitutional and void, because it contains matter in the body which does not appear in its title (such matter being pointed out in the demurrer), and for this reason section 428 of the Code is unconstitutional and void. This demurrer was overruled, and the accused excepted.

1. Pen. Code 1895, § 428, is as follows: "If any person shall sell, or solicit, personally or by agent, the sale of spirituous, malt or intoxicating liquors, in any county where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor." By an act approved December 9, 1897, this section was amended so as to read as follows: "If any person shall sell, contract to sell, take orders for, or solicit, personally or by agent, the sale of spirituous, malt or intoxicating liquors, in any county or town or municipal corporation or militia district or other place where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor." Acts 1897, p. 39. The first section of the local dispensary act for the county of Floyd and city of Rome, therein, provides "that the sale of" spirituous, malt, vinous, and other intoxicating liquors, except domestic wines of a certain kind and in a specified quantity, "within the limits of said city and county otherwise than by said dispensary be prohibited." No penalty was, however, provided by the act for a violation of the provision quoted. Acts 1901, p. 620. As the accusation in the present case can be properly treated as having been framed under Pen. Code 1895, § 428, it is not important to consider what would have been its effect, had it charged solely a violation of the local dispen-

sary act. It is therefore unnecessary to consider the first and second grounds of the demurrer. Even if the act of 1897 which amends the section of the Code is unconstitutional for the reason alleged in the demurrer, this would, of course, not affect the validity of the section of the Code. If the act is void, the original provisions of the section are of full force and effect. The act of 1897 was intended to extend the provision of the section to cases where there was no sale, but simply an agreement to sell, as an order taken either by the owner, or by some one in his behalf, as an agent or drummer. The section, before amendment, made penal sales by any one, and this provision is unaffected by the amendment. The accusation in the present case charges a sale which is a violation of the terms of the section as it originally stood, as well as in its amended shape. The enumeration in the act of 1897 of municipal corporations, militia districts, and other places, was doubtless intended to refer to those counties where the sale was not prohibited over the entire county. But whether this is so or not, the accusation charges a sale in a county; and the section of the Code, as it originally stood, covers this offense, and is in this respect unaffected by the amendment. So construing the accusation, it is to be determined whether any of the other objections set up in the demurrer were well taken.

2. Even if the act of 1893 from which the section of the Code was taken be subject to the constitutional objection that it contains matter different from what is expressed in the title, this defect in the act would not render invalid the section of the Code. *Daniel v. State*, 114 Ga. 533, 40 S. E. 805, and cases cited; *McFarland v. Donaldson*, 115 Ga. 567, 41 S. E. 1000.

3. The main grounds of the demurrer relied on by the accused are those which set up, in effect, that the sale of intoxicating liquors is not prohibited in Floyd county, within the meaning of Pen. Code 1895, § 428. When the first case against the accused was here, it was suggested that, inasmuch as the local dispensary act contained a section which prohibited the sale of such liquors otherwise than through the medium of the dispensary, it might be considered a prohibitory law, within the meaning of the section of the Code. Counsel for the plaintiff in error in the present case has made a strong and earnest argument to combat this suggestion, but, after more mature consideration, we are satisfied that the view suggested in the other case is correct. It is argued that penal laws are to be construed strictly, and that, in a strict sense, no law can be considered a prohibitory law which permits the sale of liquor in any form or in any manner. This argument would be unanswerable if directed to a law which allowed the sale of liquors in any way by private individuals. But the question here is not whether the county of Floyd is,

in a popular sense, a prohibition county, or whether the local dispensary act for that county is a prohibitory law, as that term is commonly understood, but whether the sale of intoxicating liquors is by that act prohibited, within the meaning of that word as used in section 428 of the Penal Code of 1895. The dispensary is a state institution. No private individual has any direct interest in its operation. The dispensary was established in furtherance of temperance, and in certain localities it has been thought better to sell intoxicating liquors under direct governmental supervision and regulation, than to undertake to prohibit the sale altogether, or to allow it by private individuals. Dispensary laws have been several times before this court for consideration. Dispensaries are governmental agencies designed to curtail the consumption of intoxicating liquors. This was the nature and purpose of the local act for Floyd county. See *Mayor and Council of Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602; *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751. The local act for Floyd county was under consideration in *Chamlee v. Davis*, 115 Ga. 266, 41 S. E. 691, and was there held not to be invalid for any reasons set up in that case. The question, therefore, is, did the General Assembly, in passing the act of 1893, from which section 428 of the Penal Code of 1895 was taken, intend to refer to localities where the state was prohibited from engaging in the sale of intoxicating liquors? Acts of the General Assembly do not include the state, unless they expressly or by necessary implication so declare. Hence it has been held that the state was not embraced within the terms of the general local option liquor law, and that a special act establishing a dispensary to be operated by the state, or one of its subordinate political divisions, was not a special law, in a case for which provision was made by the local option law. See the last three cases cited *supra*. There is nothing in section 428 which would require a construction that it was intended to include the state. On the contrary, its terms indicate that nothing but prohibitions by private individuals was in the legislative mind. It is doubtless true, as contended, that the General Assembly did not have in contemplation local dispensary laws when the act of 1893 was passed, though there was a dispensary in existence at that time in the city of Athens. See 2 Acts 1890-91, p. 436. But a dispensary law which prohibited the sale by private individuals would not for this reason be excluded from the operation of the terms "prohibited by law," occurring in the section. Laws broad enough in their terms may embrace instrumentalities and methods afterwards coming into existence, although unknown at the time the laws were enacted. See, in this connection, *Savannah Railway v. Williams*, 117 Ga. —, 43 S. E. 751; *Pensacola Tel. Co. v. Western Union*



Tel. Co., 96 U. S. 1, 24 L. Ed. 708. The sale of intoxicating liquors is prohibited by law in Floyd county, within the meaning of the Code. No private individual is allowed to sell such liquors there under any circumstances, and the fact that the state, through governmental agency, is engaged in the sale, does not make the county any the less a place where the sale is prohibited by law, within the meaning of the section. The fact that no penalty is imposed by the local dispensary act for a violation of its provisions does not make it any the less a prohibitory law, as was said in the first case against the plaintiff in error. That act contains a prohibition. Section 428 imposes a penalty for selling in places where the sale is prohibited. It may be that one could not be indicted under the local act, and the penalty prescribed by the section of the Code be imposed upon him. But one guilty of a sale can be indicted and punished under the section of the Code. Whether, from a metaphysical point of view, there can be an offense without a punishment, or whether a violation of the dispensary act would be a crime, in the absence of section 428 of the Code, the local act, even though no penalty is provided by its terms, is sufficient to bring the county where the act is in force within the description of counties where the sale of intoxicating liquors is prohibited by law. The section of the Code supplies the omission in the act, and subjects to punishment persons guilty of a violation of the terms of the section, and the fact that they may also be incidentally guilty of a violation of the local act does not make the section of the Code inapplicable.

4. It is further contended that under the principle of the decision in *Patton v. State*, 90 Ga. 714, 6 S. E. 273, which was followed in several later cases—notably *Brown v. State*, 104 Ga. 525, 30 S. E. 837; *Collins v. State*, 114 Ga. 70, 39 S. E. 916; and *Batty v. State*, 114 Ga. 79, 39 S. E. 918—the general law contained in section 428 of the Penal Code of 1895 was suspended in Floyd county by the passage of the local dispensary act. We do not think the principle of these decisions is applicable. They simply rule that general laws prohibiting the sale without the payment of a tax or the procuring of a license, or compliance with some other condition, are suspended in a given locality upon the passage of a law absolutely prohibiting the sale. The reason upon which these decisions is founded is that when the Legislature, by the passage of an act, manifests an intention to absolutely prohibit, at all events, the sale of intoxicating liquor in a given place, no law which allows the sale upon the compliance with some specified condition would be applicable in such locality after the passage of the prohibitory act. There is nothing in those decisions which would prevent a general law making penal a sale where no sale was permitted by law of any character from being applicable in a

place where the sale is already prohibited either by a local or a general prohibition law, and in such a case no reason occurs to us why one guilty of a sale might not be indicted under either law. This view is in entire harmony with what was said in the other case against the plaintiff in error; it being there said that "where a law is enacted, prohibiting the sale of liquors in a given locality, the operation of all laws regulating the sale of such liquors is suspended, and an indictment or accusation charging the sale of any liquor, the sale of which is absolutely prohibited under all circumstances, should be framed under the prohibitory law." In addition to this, section 428 of the Code is by its terms made applicable only in those localities where the sale is prohibited by some law. It was manifestly intended that the section of the Code and the prohibitory law, whether general or local, should stand together. While this section may have been useless legislation in many localities of the state, the local prohibitory law or the general local option liquor law being sufficient to prevent the sale, still there may be two laws making penal the same act in the same locality. The present case is an illustration, however, of the fact that, at least so far as Floyd county is concerned, section 428 of the Code was not only not useless, but very wise, legislation.

There was no error in overruling the demurrer. Judgment affirmed by five Justices.

(117 Ga. 710)

### JONES v. STATE.

(Supreme Court of Georgia. May 30, 1903.)

CRIMINAL LAW—CONDUCT OF TRIAL—ADVICE TO JURY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—COMPETENCY OF JUROR—MURDER.

1. It is not improper for the judge, for the purpose of informing himself as to the probability of the jury being able to agree upon a verdict, to inquire of the individual jurors as to whether there is any likelihood of an agreement.

2. When the judge is informed by some of the jurors that there is no likelihood of an agreement, and by others that it is doubtful whether an agreement can be reached, it is not error, requiring the granting of a new trial, for the judge to say: "Well, you are sensible men. I do not wish to force you to make a verdict, but I will stay with you the day. Retire to your room and see if you can agree upon a verdict."

3. The discretion of the trial judge in refusing to grant a new trial on the ground of newly discovered evidence will not be controlled, when evidence as to part of the facts alleged to have been newly discovered would be inadmissible, and the other part is of such a character that it ought not to, and most probably would not, change the result.

4. When passing upon a ground of a motion for a new trial in a criminal case, based upon an alleged expression of opinion of one of the jurors before the trial as to the guilt of the accused, the trial judge occupies the place of a trier; and his finding that the juror was competent will not be reversed, unless, under all the facts, the discretion of the judge was manifestly abused.

5. There was no error in the charge requiring the granting of a new trial. The evidence, though entirely circumstantial, was sufficient to authorize the verdict, and there was no abuse of discretion in refusing to set aside the finding of the jury.

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. W. Flite, Judge.

Wyly Jones, Jr., was convicted of murder, and brings error. Affirmed.

J. J. Northcutt, A. J. Camp, W. E. Spinks, M. V. Sanford, and J. M. McBride, for plaintiff in error. W. K. Fielder, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. The accused was convicted of murder, and sentenced to life imprisonment. His motion for a new trial having been overruled, he excepted.

1, 2. It appears from the motion for a new trial that, after the jury had been for some time deliberating, the judge sent for them, and inquired if they had agreed upon a verdict, or were likely to agree. Upon being told that they had not agreed, he then inquired if their differences related to a question of fact or a question of law, and, upon being told that the failure to agree arose from a question of fact, the judge responded that in that event he could afford them no assistance. They then retired, and about two hours afterwards were sent for again by the judge, who again inquired if an agreement had been reached, and, if not, whether there was any probability of an agreement. To this inquiry the foreman responded that they were not likely to agree. The judge then propounded to each one of the jurors the following question: "Do you think it likely that you will agree?" Three of the jurors replied that they did not think so, and nine of them responded that it was doubtful about their being able to agree. The judge then said: "Well, you are sensible men. I do not wish to force you to make a verdict, but I will stay with you the day. Retire to your room and see if you can agree upon a verdict." The jury then retired, and about four or five hours afterwards, during the middle of the afternoon, brought in their verdict. This conduct of the judge is assigned as error. It is neither unusual nor improper for a judge, after the jury have had a case under consideration for some time, to call them in and ask whether there is any likelihood of an agreement. Generally this question is addressed to the foreman, who answers for the jury as a whole. There is no impropriety, however, in the judge, if he sees proper, asking each individual juror the question as to whether, in his opinion, an agreement is likely to be reached. The foreman is in no better position than the other members of the jury to express an opinion upon this subject. All of the facts and circumstances are within the knowledge of each member of the jury, and it may be

they will differ in opinion as to the probability of an agreement. It would, of course, be improper for the judge to ask each juror which side he thought ought to prevail, and in this way ascertain how the jury stood upon the questions at issue. The questions propounded by the judge in this case were not of this character, and we see no impropriety in the questions asked. Nor do we think there was any such error as required the granting of a new trial in the judge's stating to the jury that they were sensible men, and, while he did not want to force them to make a verdict, he would stay with them during the day. The judge was holding court out of the county of his residence. It is probable that he had concluded all the business of the session, except the case under consideration by the jury. It is true, the judge, in effect, told the jury that he would not discharge them from the consideration of the case until the day was over; but, even if he had said this in so many words, it would not have required the granting of a new trial. The time the jury should be held, before a mistrial is declared, is left entirely to the discretion of the judge. We do not think there was anything in the conduct of the judge which was calculated to so unduly interfere with the deliberations of the jury as to require a reversal of the judgment refusing a new trial. See, in this connection, *White v. Fulton*, 68 Ga. 512; *Parker v. Railway Company*, 83 Ga. 549, 10 S. E. 233 (9); *Central Railroad Company v. Neighbors*, 83 Ga. 447, 10 S. E. 115 (2); *Cochran v. State*, 113 Ga. 736, 39 S. E. 337 (7).

3. The evidence against the accused was entirely circumstantial. He was charged with the murder of a young woman with whom his father was living in a state of adultery. The evidence made a clear case of assassination by somebody. The deceased was killed while in her house at night by a shot from a gun, which came through a window near which she was working. The relations between the deceased and the father of the accused had resulted in a separation between his father and mother, and estrangement between his father and all his children. One ground of the motion for a new trial is based upon alleged newly discovered evidence. A sister of the accused made an affidavit that at the time of the homicide her mother was at the house of the affiant, and that on the evening of the homicide, about sundown, she saw her mother give her nephew, one Smith, a young man about 20 years old, \$25. Smith received the money, and went away toward the place where the deceased lived, and where she was killed that night, carrying with him a double-barreled shotgun. Smith at that time was hiding from officers of the law in Alabama, who were seeking to arrest him on a charge of murdering his brother-in-law. The last that affiant saw of him after he received the money was when he went away toward the house of the deceased, and

she has never heard from him since. After giving the money to Smith, and after he had gone, affiant's mother turned to her and said: "Them McDowell women [referring to deceased and her sister] has broken peace between Son Jones [her husband] and me forever, and now my people will break peace with them." Affiant's mother died before the trial. It appears from an affidavit of the Solicitor General that the affiant was present in the courthouse during the trial, and sat by the accused. If a new trial were granted, this new witness would not be allowed to testify to the conversation between her mother and herself, and therefore the question is whether a new trial should have been granted simply for the purpose of allowing the jury to consider evidence that the witness had seen her mother, on the day of, and a short time before, the homicide, pay Smith \$25, and that he had left the presence of the witness and her mother with a double-barreled shotgun, going in the direction of the house of the deceased. There was nothing in the evidence at the trial to connect Smith in any way whatever with the transaction. While, of course, this evidence would have been admissible as a circumstance to be considered by the jury, still it was of such a character that it ought not to, and in all probability would not, bring about a different result. It is not to be presumed that a jury would be influenced by this evidence to bring in a verdict of acquittal. In any event, this court cannot say that the judge has abused his discretion in refusing a new trial on this ground. Applications for a new trial, based on the ground of newly discovered evidence, are addressed largely to the discretion of the trial judge, and in no case will this discretion be controlled by this court unless there has been a manifest abuse of it. See *White v. State*, 100 Ga. 659, 28 S. E. 423 (5).

4. One ground of the motion complains that Owens, one of the jurors, was not a fair and impartial juror; having previously to the trial stated that he believed that the accused was guilty, that no one else could have done it, and that it would not do for him to be on the jury. On this ground the judge heard evidence attacking the juror, and also his explanation, as well as evidence as to his conduct in the jury room and as to his character, and decided that he was a competent juror. In *Vann v. State*, 83 Ga. 46, 9 S. E. 945 (15), it was held that, on a motion for a new trial in a criminal case because of the previously expressed opinion of one of the jurors who rendered the verdict, the circuit judge, on this question, occupies the position of a trier, and this court will not undertake to control his discretion, unless it is clear and manifest from the record that he has erred. We cannot say that he erred in this case. See, in this connection, the cases cited in *Vann v. State*, 83 Ga. 60, 9 S. E. 945; *Buchanan v. State*, 24 Ga. 286 (2); *Brinkley v. State*, 53 Ga. 296 (3); *Durham v. State*, 70 Ga. 265

(12); *Huff v. State*, 104 Ga. 521, 30 S. E. 808 (7); *Allen v. State*, 102 Ga. 619, 29 S. E. 470.

5. The remaining grounds of the motion for a new trial which were insisted on in this court, other than the general grounds, assign error upon different parts of the judge's charge. After a careful examination of these assignments of error, we have reached the conclusion that, even if any error was committed in the charges complained of, it was not of such a character as to require the granting of a new trial. Charges on the subject of the prisoner's statement, similar to that given by the trial judge in this case, have been held not to be erroneous. See *Hackett v. State*, 108 Ga. 46, 33 S. E. 842 (4); *Murray v. State*, 85 Ga. 381, 11 S. E. 655 (2). The evidence, though entirely circumstantial, was sufficient to authorize the verdict. The credibility of the witnesses was for the jury, and we cannot say that the judge has abused his discretion in allowing their verdict to stand.

Judgment affirmed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 977)

#### JONES v. STEWART, Tax Collector, et al.

(Supreme Court of Georgia. June 4, 1903.)

#### OCCUPATION TAX—ILLEGAL BUSINESS—DEALING IN FUTURES.

1. In framing the general tax act of 1900, the Legislature did not contemplate that one illegally conducting a stock exchange should be dealt with otherwise than as an offender against the laws of this state, and, as such, subject to fine and imprisonment under criminal process. This being so, such an offender is not properly to be regarded as a tax defaulter, against whom a tax collector has authority to issue an execution, with a view to compelling payment of the occupation tax which that act imposes upon dealers in "futures," who lawfully embark in business agreeably to its provisions.

(Syllabus by the Court.)

While the lawmaking power of the state may provide, as the exclusive method of collecting the public revenue for the indictment of the delinquent taxpayer, and thus have the state dependent for its revenue upon the uncertainties of the administration of the law in the criminal courts, legislation providing such a system as the only mode of collecting taxes being so opposed to common sense, sound business principles, and a wise public policy, no court should ever hold that the lawmakers intended to adopt it, and thus leave the collection of the revenue to the uncertainties of verdicts of juries in criminal cases, unless the language of the law which is claimed to have this effect is so unequivocal that there cannot possibly be any escape from the conclusion that such was the intention of the lawmakers.

There is nothing in the general tax act of 1900 which unequivocally indicates that it was the legislative intention that any of the specific taxes therein provided for were not to be collected by execution, but only by indictment of the delinquent taxpayer.

While construing the tax act above referred to as simply providing a cumulative remedy by indictment may, under the peculiar phraseology of that act, have the effect of working a hardship upon the delinquent taxpayer, and possibly in double-taxing him, it is rather to be inferred

that the Legislature intended this hardship upon the delinquent taxpayer, than that it intended the inconvenience and loss to the public that would necessarily result from a construction holding that the larger portion of the specific taxes provided for in that act could be collected only through the processes of the criminal courts.

Per Cobb and Lamar, JJ., dissenting.

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by A. P. Stewart, tax collector, and others, against J. S. Jones. Judgment for plaintiffs, and defendant brings error. Reversed.

Anderson, Anderson & Thomas, for plaintiff in error. Brown & Randolph and Rosser & Brandon, for defendants in error.

FISH, J. This case turns upon the question whether or not, in view of the provisions of the general tax act for 1901-1902 with respect to the occupation tax imposed upon dealers in "futures," a tax collector has power, under Pol. Code 1895, § 894, to issue a tax execution against one who, without registering or paying the tax provided for by that act, engages in the business of conducting a stock exchange. See Acts 1900, pp. 21, 25, 27, 28. If such an execution can lawfully issue, the tax collector is undoubtedly the official authorized to issue it, for the Code section just cited designates him as the proper official to issue all tax executions to enforce the payment of "taxes against persons who are not required to pay to the treasurer," while it is expressly declared in section 3 of the act of 1900 that the occupation tax imposed on dealers in "futures" shall be "paid to the tax-collectors of the counties where" the business of such dealers is conducted. So the precise point presented for determination is, does that act contemplate that a person who assumes to embark in such business without first complying with the requirements therein mentioned, as to registering and paying in advance an occupation tax, shall be regarded by the tax collector as occupying the situation of a mere tax defaulter, and proceeded against accordingly? The answer to this inquiry must depend entirely upon the intention of the General Assembly, as indicated by the language employed in the expression of its legislative will, for its powers in the premises were, as we shall endeavor to show, practically unlimited and supreme. On the argument before us, counsel for the plaintiff in error insisted that, looking to the character of the business of buying and selling cotton "futures," and the amount of the tax laid thereon, the evident purpose of the Legislature was to exercise the police powers residing in the state, with a view to discouraging the transaction of a business which had a demoralizing influence upon the public, and was therefore to be frowned upon, if not altogether prohibited. In other words, that the burden imposed upon the occupation

pursued by those engaged in this business was a license or privilege tax, pure and simple. On the other hand, opposing counsel contended that this burden was imposed merely for the purpose of raising revenue, and accordingly, the intent of the General Assembly was simply to exercise the taxing power of the state by imposing an occupation tax upon those engaged in a business which was recognized as entirely lawful and legitimate. Our opinion is that, so far as the present case is concerned, it makes not a particle of difference which of these two conflicting views is correct. "Under the Constitutions of the various states, the Legislatures may require a license to engage in any trade, business, or profession," though, of course, the license "must be uniform, and must not discriminate in favor of one class and against another." 13 Am. & Eng. Enc. L. 520. The sovereign power of a state to lay a revenue tax upon any business or profession is not to be questioned; and it may at one and the same time impose such tax, and, in the exercise of its police powers, prescribe reasonable regulations as to the manner in which any occupation shall be conducted. Cooley on Tax. (2d Ed.) 586-7. "The right of any sovereignty," says Judge Cooley, "to look beyond the immediate purpose to the general effect, neither is nor can be disputed. The government has general authority to raise a revenue, and to choose the methods of doing so, and has also general authority over the regulation of relative rights, privileges, and duties; and there is no rule of reason or policy in government which can require the Legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless cases of this nature are to be regarded as cases of taxation. Revenue is the primary purpose, and the regulation results from the methods of apportionment that are resorted to in obtaining the revenue. Only those cases where regulation is the primary purpose can be specially referred to the police power." Black on Intox. Liq. § 107. "And where the Legislature has power to tax an occupation, it has the further power to make it a penal offense to engage in that occupation without first paying the tax imposed." Id. "An act making it indictable to practice any trade without a license is constitutional." 2 Dext. on Tax. 772. So it "is competent to provide for enforcing license taxes by imprisonment of the delinquent." Id. 770. And it has been held, "a statute abolishing imprisonment for debt does not prevent imprisonment for nonpayment of taxes"; nor does the "Bill of Rights \* \* \* forbid the enforcement of a tax by imprisonment of the delinquent, when no personal property can be found out of which to make the tax." Id. 769. That is to say, there is no legal or constitutional obstacle in the way of a legislative body providing for the collection of any kind of taxes by crim-

inal process, if such body is vested with general powers over the subject of taxation, and has a right to exercise the police powers of the state. "When a city has the power both of taxation and police delegated to it, it is immaterial under which the license is required." *Burroughs on Tax*, 392. But of course, the naked power to tax conferred upon a municipality does not comprehend authority to regulate or to tax unto death. *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485. "A tax laid for the double purpose of regulation and revenue must be grounded on both the police and the taxing power, and the grant of the power to tax will not authorize the imposition of a burden in its nature and purpose prohibitory." 2 *Desty on Tax*, 1384. As is pointed out in *Judson on Tax*, § 411: "The power of taxation in the licensing of employments is closely allied to the police power of regulation. A license may be imposed for the purpose of regulating an employment as a police measure for the public safety, and also as a means of revenue. \* \* \* There is no necessary connection between a license and a tax upon the right to engage in a business. The former confers a privilege; the latter is levied for the exercise of a privilege. But both taxation and regulation may be effected in the form of a license by the same statute. This right to tax and regulate occupations for purposes of revenue and under the police power may be delegated by the state to municipalities, and the latter can then exercise such power without violation of due process of law." In this connection, the author cites approvingly the case of *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, and quotes the following extract from the opinion therein delivered: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizen are necessarily, and in a manner wholly arbitrarily, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference." See, also, *Alexander v. State*, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859.

It is to be observed that in the present case the right of the General Assembly to impose the occupation tax laid upon dealers in "futures" is in no way questioned. Were this otherwise, we would, in conformity to the view expressed in *Racine Iron Co. v. McCommons*, 111 Ga. 542, 543, 546, 547, 36 S. E.

886, 51 L. R. A. 134, unhesitatingly hold that the purpose of the general tax act now under consideration was to "raise revenue for the support of the state government," and that the laying of the occupation tax imposed upon such dealers was therefore properly to be regarded as "an exercise, not of the police power, but of the taxing power," of the state. The provisions of that act with regard to registering, as well as the penalty prescribed for conducting business without first acquiring, in the way therein pointed out, a right to engage in the occupations mentioned, are, of course, to be referred to the police powers of our sovereign, the state. That the General Assembly, by one and the same statute, exercised both taxing and police powers in providing upon what terms a given occupation could be pursued, cannot, as has been seen, affect the validity of that statute, since no one who is either unwilling or unable to bear his share of the expenses of government by paying a revenue tax required of all persons following a particular business calling has any constitutional right to engage therein, however innocent and legitimate that calling may be. In discussing this feature of the case, our object has been to point out the fact that, in endeavoring to ascertain and give effect to the legislative will, we are free to adopt that construction of the act of 1900 which appears most likely to be in accord with the true intent and purpose of the General Assembly, rather than one which, though based upon less plausible reasoning, should control, were we embarrassed by being constrained to follow that cardinal rule of construction which contemplates that, whenever possible, a statute should be so construed as to render it constitutional.

The scheme of the Legislature, as evidenced by the provisions of the general tax act of 1900, seems to have been (1) to fix the yearly occupation tax to be paid by dealers in "futures" at \$1,000; (2) to provide for a record disclosing the names of all dealers lawfully engaged in the business, to the end that they might readily be known and distinguished from such persons as should unlawfully embark therein; (3) to require each dealer who registered to pay in advance to the tax collector, as a condition precedent to the right to commence business operations, the revenue tax just mentioned; (4) to provide a punishment for every person who should attempt to carry on business without complying with the requirements of the statute; and (5) to enforce by criminal process its terms, with a view to discouraging any violation thereof, and at the same time protecting the interests of both the state and all legitimate dealers by exacting, in the way of a fine, a double tax from each and every offender who should seek to evade the common burden which all such dealers were called upon to bear. It was in that act (section 4, p. 27) expressly declared that, "be-

fore any person" should "be authorized to carry on said business," he should "go before the ordinary of the county" wherein he proposed "to do business, and pay [the stipulated occupation tax] to the tax-collector"; that it should "be the duty of said ordinary to immediately notify the Comptroller-General and the tax-collector"; and that "any person failing to register with the ordinary, or, having registered, failing to pay the tax" required, should "be liable to indictment for misdemeanor, and on conviction [should] be fined not less than double the tax, or be imprisoned as prescribed by section 1039 of the volume 111 of the Code of 1895, or both, in the discretion of the court." The act also contained, in this connection, the following provision: "One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for use of officers of court."

It was earnestly insisted by counsel for the defendants in error that the General Assembly contemplated that every dealer in "futures," whether lawfully or unlawfully engaging in business, should be civilly liable for the payment of the tax laid, and that the punishment prescribed for persons failing to comply with the terms of the statute was intended as a mere penalty, to be imposed irrespectively of whether they had been or might be required by civil process to pay such tax. In support of this position, counsel present the argument that, under the express terms of the act, "there is to be an indictment in case of failure to register, as well as for failure to pay the tax," and as "he who pays and does not register is none the less guilty," it is not to be presumed the Legislature intended that one failing to comply with his civil obligation to pay should stand upon any better or worse footing than another, who, like himself, had failed to register before commencing business, but who had subsequently voluntarily or involuntarily actually paid his tax. The suggestion is also made that the mandate of the statute with regard to the application to be made of every fine imposed by the court really affords no aid in arriving at the intention of the Legislature respecting a delinquent's liability under civil process, for that mandate must necessarily prove meaningless and impossible of observance in many cases, since "one half of said fine" cannot, as directed, be "applied to the payment of the tax," if, as matter of fact, the offender paid it before commencing business, and is fined for his failure to register. The weakness of this position consists in the unwarranted assumption on the part of counsel that there can arise, in the regular order of things, a case where "the man to be punished may have paid the tax, only failed to register." The General Assembly evidently did not, and could not reasonably be expected to, anticipate such an emergency. It could arise in one of two ways only: (1) By a person wishing to be-

come a dealer by pursuing precisely the opposite course to that he was directed to follow, viz., by first having audience with the tax collector, instead of the ordinary, in his quest for qualification to do business; and (2) by the enforcement of a tax execution issued against him by the tax collector. That our lawmakers did not provide for an emergency of this kind, when directing how fines should be applied, tends very strongly to indicate that they did not contemplate that such an emergency should be brought about by the involuntary payment of a tax *fi. fa.* issuing from the tax collector's office. It was contemplated that dealers should first register, then pay—not first pay, and then register. Otherwise it would doubtless have been declared to be the duty of the tax collector "to immediately notify" the ordinary that a prospective dealer had paid the required tax. Nor was it anticipated that a tax collector should demand or permit payment of the tax until after the requirement as to registering had been complied with, for to do so would be to give countenance to a needless departure from the course that the Legislature declared should be pursued.

After carefully considering the provisions of the general tax of 1900 in the light of prior legislation with regard to the taxing of dealers in "futures," we have reached the conclusion that the legislative intent, as expressed in that act, was that persons who should engage in buying and selling those speculative commodities should be treated as belonging to one or the other of two classes, viz., one composed of authorized dealers, and the other of criminals. So far as we can gather from the language employed in that act, no recognition was given to a third class, to be known and regarded as delinquent or defaulting taxpayers. In the absence of a clear expression of legislative will, it is never to be assumed that the members of a legislative body have deemed it consistent with the dignity of a sovereign state to call upon criminals to share with it the fruits of an illegal enterprise into which they have ventured.

We are satisfied that, in passing the act now under consideration, the General Assembly hoped the severe penalty prescribed for a violation of its terms would, if offenders were treated as criminals and promptly brought to trial and conviction, result in deterring others from seeking to evade the tax, and thus bring about a state of affairs more beneficial to the public interests than could be expected to flow from a statute providing for a mere nominal penalty, and contemplating that the tax collector should proceed to enforce by civil process payment of the tax, if collectible. The legislators might well have concluded that a sheriff armed with a bench warrant can more readily find the person against whom it is directed than he can discover the subject-matter to which a *fi. fa.* placed in his hands refers in general

terms. Taking into consideration that the court has no discretion over the amount of the fine to be imposed; that it must be "not less than double the tax," in any case which calls for punishment by fine; that "one half of said fine shall be applied to the payment of the tax"; and that, if the court thinks proper, the offender may be still further punished by imprisonment—we think it far from probable that the General Assembly contemplated that after the full penalty had been imposed upon an offender, and he had served out his sentence, paid in full his fine, reformed, and entered upon a life of usefulness, the sheriff should, at the instance of the tax collector, enforce payment of an execution issued for the purpose of collecting the tax which such offender had neglected, before commencing business, to pay. If such an execution could, at any time before conviction, lawfully be issued, it could as well issue after conviction, and be enforced even after the death of the offender, if it and a sufficient estate survived him.

The expedient of requiring, under penalty, registry with the ordinary and payment in advance to the tax collector of an occupation tax was for the first time in 1881 resorted to by the General Assembly of this state. Acts 1880-81, pp. 42, 43. Only liquor dealers came under the operation of this new scheme for raising revenue. Subsequently an occupation tax was laid upon dealers in "futures," but they were not required to register or to pay in advance, nor were they made subject to any penalty for nonpayment. Acts 1882-83, pp. 34, 37. Evidently the legislative intent was that the tax imposed upon this class of dealers should be enforced, in the ordinary and usual way, under a tax *fi. fa.* issued by the tax collector. The general tax act for the years 1885-86 provided that this tax should be payable at the time of commencing business, though no change in the mode of its collection was adopted. Acts 1884-85, pp. 20, 24. Nor was any such change effected by the tax act for the years 1887 and 1888. Acts 1886, pp. 14, 17, 19. For the first time in 1888 were dealers in "futures" required to register with the ordinary. Failure to do so was made a misdemeanor, punishable by a fine of "not less than fifty dollars, nor more than two hundred dollars," but no penalty for failure to pay the tax before commencing business was imposed. Acts 1888, pp. 19, 22, 23. However, in the next general tax act it was expressly declared (1) that failure to pay the tax should be deemed a misdemeanor; (2) that the punishment for such failure should be a fine of "not less than double the tax," or imprisonment, or both, in the discretion of the court; and (3) that "one half of said fine [should] be applied to the payment of the tax." Acts 1890-91, vol. 1, pp. 35, 38, 40. This new plan of coercing dealers in "futures" into paying in advance the occupation tax imposed upon them has since been adhered to by the General Assembly as being

best in accord with its policy in such matters. See Acts 1892, pp. 25, 27; Acts 1894, pp. 21, 23; Acts 1896, pp. 25, 26; Acts 1898, pp. 25, 27; Acts 1900, pp. 25, 27; Acts 1902, pp. 23, 26.

If the radical change in policy above pointed out was not intended to have the effect of introducing a new and exclusive mode of dealing with persons embarking in business without authority, we are at a loss to perceive why this change should have been considered either necessary or expedient. Presumably the General Assembly concluded to abandon entirely the "credit system," as applied to dealers in "futures," by requiring them to pay in advance, and to discountenance altogether, by regarding and punishing as criminals, all persons who should unlawfully engage in the business. To intelligently and faithfully carry into effect this scheme would obviate all necessity of issuing a tax execution against anybody who dealt in "futures." No one lawfully pursuing his occupation could possibly owe to the state any business tax. Persons violating the law should be promptly arrested and called upon to settle with the court, and not with the tax collector. That official has no general authority of law, and should not be expected, to issue a *fi. fa.* designed to compel payment of an occupation tax by one who follows the calling of a professional burglar, or that of any other class of criminals—not even excepting that class of criminals who commit the offense of dealing in "futures" contrary to the provisions of a penal statute.

Counsel for the defendants in error cited and relied on the case of *Hight v. Fleming*, 74 Ga. 592, as sustaining their position that a tax execution could lawfully be issued by the tax collector, despite the provisions of a statute such as that we are now called upon to construe. The first headnote to that case reads as follows: "A tax collector is authorized to issue an execution for an unpaid liquor tax." This would seem to indicate that the court, in passing upon that case, undertook to consider, in all of its aspects, the question whether or not there was any legal obstacle in the way of issuing such an execution against a person engaged in the liquor traffic who had failed to pay the revenue tax imposed upon that business. But the headnote, being prepared by the reporter, instead of by the court, is not to be regarded as its official utterance. In point of fact, the court did not undertake to deal exhaustively with that question. It appears from the bill of exceptions and the record in the case, which are of file in the office of the clerk of this court, that the objection urged against the issuance of the *fi. fa.* was that the law did not contemplate that a tax collector should issue an execution to collect a tax imposed upon any business calling, since he did not have before him the proper or sufficient data upon which to rest a decision as to the liability of a particular person to pay that kind

of a tax. What this court really ruled was that the tax collectors were the officials designated by law to pass upon the liability of any individual to pay any given occupation tax, and accordingly had full power to issue against him an execution therefor, if satisfied he was subject to, but had not paid, the same. Mr. Justice Blandford, who delivered the opinion of the court, thus summarily disposed of the point relied on by the excepting party: "The plaintiff in error insists that the tax collector had no authority to issue an execution for the liquor tax, but we think section 886 of the Code answers this objection." That section contained the same provisions as are now embraced in our present Political Code (Pol. Code 1895, § 894), which, in general terms, declares that tax collectors are authorized to issue executions "for nonpayment of taxes against persons who are not required to pay to the treasurer, \* \* \* as soon as the last day for payment has arrived." The construction which the court in that case placed upon this language entirely meets with our approval, and we are content to follow the decision which was actually rendered, though we cannot regard it as having any controlling influence over the case in hand.

Our attention was also called to the case of *Sasser v. Adkins*, 108 Ga. 228, 33 S. E. 881, wherein it appeared that a tax collector had issued against Sasser a tax *fi. fa.* for a certain amount claimed to be due as "special state taxes for selling spirituous liquors," and that Sasser had filed an affidavit of illegality to such *fi. fa.* In the brief filed in behalf of the defendants to the present writ of error, their counsel very candidly concede, however, that "no question was made in that case as to the right of the tax collector to issue the *fi. fa.*" There are other cases appearing in our Reports, wherein the authority of a tax collector to issue executions of this character might, perhaps, have been successfully challenged, but was, in point of fact, not even questioned. See *Sheffield v. Board of Commissioners*, 111 Ga. 1, 36 S. E. 302; *McCommons' Case*, supra; and *Stewart v. Kehrer*, 115 Ga. 184, 41 S. E. 680. They should have no weight in the determination of the question with which we are now confronted, and upon which we do now undertake to expressly and definitely rule.

Judgment reversed.

SIMMONS, C. J., concura. LUMPKIN, P. J., absent.

CANDLER, J. I concur in the judgment rendered, as does also the Chief Justice, and agree with the views expressed by Mr. Justice FISH. In my opinion, the General Assembly, in order to prevent persons dealing in the business of a stock exchange from trifling with the state authorities, intended to provide, as the exclusive remedy for the collection of this tax, for the prosecution in

the criminal courts of those who should default in its payment. On the evidence appearing in this record, I do not think there would be any doubt about the conviction of the plaintiff in error upon a criminal prosecution. The facts relied upon by him to excuse his failure to pay the tax furnish no legal defense to such a prosecution, and I am satisfied that the danger of a fine in double the amount of the tax, with the possibility of a jail sentence, or sentenced upon public works, or all three, in the direction of the court, will go far toward enforcing the prompt collection of this tax. As a rule, those who carry on this class of business have no visible property upon which a tax execution could be levied. The judges who preside over the criminal courts of the state, and the jurors who pass upon the facts submitted to them, can be relied upon to do their duty, keeping in view the fact that the General Assembly has placed upon them the burden of collecting such taxes from those who refuse to pay.

COBB, J. (dissenting). The usual and recognized method for the collection of taxes due the state is by an execution issued by the tax collector against the property of the taxpayer. Pol. Code, §§ 894, 949 (5); *Hight v. Fleming*, 74 Ga. 592. This method has been recognized as the usual one by the courts of this state, as well as by the legislative and executive departments of the government, for nearly 100 years. See *Gledney v. Deavors*, 8 Ga. 479; *Hight v. Fleming*, supra; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249; *Sasser v. Adkins*, 108 Ga. 228, 33 S. E. 881; *Stewart v. Kehrer*, 115 Ga. 184; Code 1863, § 858 (5); Code 1868, § 3499; Code 1873, § 886; Code 1882, § 886. In view of this fact, whenever the General Assembly provides for the collection of taxes, either upon property, or of specific taxes upon occupations, it is to be inferred that the tax was to be collected in the usual way (that is, by execution), and that, if any other method is provided, it is intended to be merely cumulative of the method of collecting by execution. So well established is the practice of collecting taxes by execution against the property of the taxpayer, that the substitution of any other method as the exclusive method must result from express enactment couched in unequivocal words. The law-making power of the state may, if it sees proper, use the processes of the criminal courts to aid in the collection of its revenue. While these processes are effectual as aids in the collection of taxes in some cases, to rely upon them entirely would imperil the collection of the revenue, and the support of the government would be dependent upon the uncertainties of verdicts in criminal cases. The state has the power to look exclusively to such a system for the collection of its revenue, but it will never be presumed that such was the intention of the lawmaking body.



unless the language of the law claimed to have this effect is such as to expressly exclude the method of collecting by execution. A system which is exclusively dependent upon prosecutions by indictment of the delinquent taxpayer is so opposed to common sense, sound business principles, and a wise public policy, that it will not be presumed that any body of lawmakers intended to leave the state dependent for its revenue for the support of the government upon the uncertainties of such a system. It may be that, under the peculiar language of the tax act under consideration, hardships may result upon the taxpayer who has failed to comply with the law; but it is better that the taxpayer who has failed to comply with the law after having had abundant opportunity to do so should suffer, than that the public should suffer by giving a construction to the act which would bring about the disastrous consequences which would inevitably follow from the state's relying for the collection of its revenue upon verdicts in criminal cases. For the foregoing reasons, I am compelled to dissent from the judgment rendered in the present case.

I am authorized by Mr. Justice LAMAR to say that he concurs in the views above presented.

(118 Ga. 97)

#### DILLARD v. DILLARD.

(Supreme Court of Georgia. May 30, 1903.)

##### NOVATION—WHAT CONSTITUTES—NOTE—CONSIDERATION.

1. Where, by mutual agreement, a note was given by J. to A., the latter having accepted the former as a substitute for his original debt, W., this was a novation, and the debt from W. to A. was abrogated. *Ferst v. Bank*, 36 S. E. 773, 111 Ga. 232.

2. The fact that it subsequently appeared that the note was for an amount greater than W.'s indebtedness to A. would certainly not wholly defeat a recovery thereon.

3. Where there had been a novation and substitution as above set forth, an executory agreement by A. to surrender this note and take another from J. for the correct amount, with a provision that it was never to become due unless W. completed a contract to build a house for J., was not enforceable, being without any benefit or consideration moving to A. It was, therefore, error to dismiss the certiorari from a judgment that A. was not entitled to recover on the original note. Civ. Code, §§ 3732, 3734.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; R. B. Russell, Judge.

Action by A. L. Dillard against H. D. Dillard. From a judgment dismissing certiorari to the judgment for defendant, he brings error. Reversed.

W. S. Paris, for plaintiff in error. Jas. R. Grant, for defendant in error.

LAMAR, J. Judgment reversed. All the Justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(117 Ga. 1001)

#### SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. HARRIS et al.

(Supreme Court of Georgia. June 3, 1903.)

##### CONTRACT—ENFORCEMENT—PAROL EVIDENCE—DEFENSES.

1. Where one enters into a written contract granting to a telephone and telegraph company the right to construct lines of telephone and telegraph over property which he owns or in which he has an interest, it is error, in a suit brought by the company to enforce the contract, to admit parol evidence showing that it was the understanding of the parties, when the contract was entered into, that the contemplated line of telephone and telegraph was to be erected along a specified portion of property owned by the other party to the contract.

2. Where a contract contains a recital of the payment of one dollar as its consideration, the contract is valid, though the sum named was not actually paid. It creates an obligation to pay that sum, which can be enforced by the other party.

3. In a suit brought by the telephone and telegraph company to enforce a contract of the nature indicated in the first headnote, it is not competent for the other party to set up as a reason for its nonenforcement that he was not the sole owner of the property; his alleged co-owners not being parties, and raising no objection.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by the Southern Bell Telephone & Telegraph Company against M. C. Harris and another. Judgment for defendants, and plaintiff brings error. Reversed.

Hooper & Dykes and Allen Fort & Sons, for plaintiff in error. J. H. Lumpkin, for defendants in error.

FISH, J. The Southern Bell Telephone & Telegraph Company applied to the judge of the superior court for an injunction to restrain Mrs. M. C. Harris and one Bray, alleged to be her agent, from interfering with the plaintiff in the erection of a telephone and telegraph line across the lands of the defendant Mrs. Harris. The defendants filed an answer in the nature of a cross-bill, denying the plaintiff's right to an injunction, and praying that it be enjoined from proceeding further with the erection of the telephone and telegraph line described in its petition. On the hearing the court denied the injunction prayed for by the plaintiff, and granted that asked for by the defendants. The plaintiff excepted.

1. The undisputed evidence showed that the defendant Mrs. Harris entered into a contract with the plaintiff, of which the following is a copy: "\$1.00. Received of Southern Bell Telephone and Telegraph Company ——— 100 dollars, in consideration of which I hereby grant unto said company, its successors and assigns, the right, privilege, and authority to construct, operate, and maintain its lines of telephone and telegraph, including the necessary poles and fixtures, upon and over the property which I own, or in which I have an interest in the ——— of ——— coun-

¶ 1. See *Novation*, vol. 37, Cent. Dig. § 5.

ty of Sumter and state of Georgia, and along the roads, streets, or highways adjoining the said property; said sum is received in full payment for said right, and the right to trim and cut trees along said line necessary to keep the wires cleared at least 25 feet, and the further right to erect the necessary guy and brace poles, and attach to trees the necessary guy wires. It is agreed that the company pay all damages to crops in constructing and maintaining said line. Witness my hand and seal this 26th day of Nov., A. D. 1902, at Americus, Ga. M. C. Harris (Landowner). Witness: J. H. Cheney." Mrs. Harris offered evidence tending to show that the agent of the plaintiff who induced her to sign the contract represented to her that the telephone and telegraph line would be erected along or near to a public road which traverses her land, and that she signed the contract believing this representation to be true, and with the understanding that the line would be so constructed. The plaintiff objected to the introduction of this evidence on the ground that it sought to vary by parol the terms of the written contract between the parties. The overruling of this objection constitutes one of the plaintiff's assignments of error. We think this objection was well taken, and should have been sustained. The familiar rule that ambiguities in written contracts may be explained by parol evidence has no application to the present case. The written contract signed by Mrs. Harris was not ambiguous. The mere fact that it did not specify the particular portion of the land through or across which the line was to be constructed did not constitute an ambiguity, within the meaning of the rule. The terms of the contract, so far as they went, were plain and unambiguous. Under the contract, the line was to be constructed upon and over the property which Mrs. Harris owned, or in which she had an interest; and evidence which sought to restrict the contract to a designated portion of such property, thereby excluding all the remainder of it, certainly varied the terms of the contract. This point in the case is controlled, in principle, by the decision in *Burch v. Railroad Co.*, 80 Ga. 290, 4 S. E. 850. In that case Burch agreed that, if the survey of the railroad company should run through his lands, he would give a right of way through them 30 feet in width. On the trial of an action of trespass brought by Burch against the railroad company, the plaintiff sought to prove by parol that the agreement he made with the agent of the company was that it might come through his land, but must come along a certain ditch. The trial court rejected this testimony on the ground that it varied the written contract between the parties, and this ruling was affirmed by this court. The two cases are not distinguishable upon principle, and the ruling made in the Burch Case is controlling here. See, also, *Lee v. Savannah Ry. Co.*, 115 Ga. 64, 41 S. E. 246. There was in the present

case no prayer for a reformation of the contract, nor any allegation of fraud, accident, or mistake. This being so, and the ruling of the trial judge in admitting the parol evidence being of such a character as to influence, if not control, his decision in granting an injunction at the instance of the defendants, his judgment in so doing must be reversed.

2. It is said, though, that the judge could have found from the evidence that Mrs. Harris never received any consideration for the contract; that the sum stated in the contract as the consideration moving her to execute it was never, in fact, paid to her, and she never received the benefit of it. Granting that this is so, this would not make the contract a nudum pactum, and for this reason unenforceable. It expresses a consideration of \$1, and the payment of this sum may be enforced by Mrs. Harris. The contract binds Mrs. Harris to allow the use of her land in the manner therein specified, and creates a corresponding obligation on the part of the company to pay the sum named as the consideration for the right granted it. *Nathans v. Arkwright*, 66 Ga. 179. See, also, *Martin v. White*, 115 Ga. 868, 42 S. E. 279. Mere inadequacy of consideration would, of course, constitute no reason for disregarding the contract; and, even if the small sum stated in the contract was the only consideration which moved the defendant Mrs. Harris to execute it, she entered into it voluntarily, and must be bound by its terms. There is no suggestion that she could not read, or that any fraud or imposition was practiced upon her. She accepted at her peril verbal statements of the company's agent differing from the terms of her contract, and the courts are bound to enforce the written contract as made.

3. There is some slight intimation in the defendants' answer, which was used as an affidavit on the hearing, that Mrs. Harris is not the sole owner of the land across which the plaintiff is building its telephone and telegraph line. The allegations with reference to this matter are, however, entirely too loose and general to avail the defendants anything, even if the fact that the defendant Mrs. Harris did not have the entire interest in the property would constitute any reason for granting an injunction at her instance. The intimation in the answer is that her children are part owners of the property, but the children are not complaining. Mrs. Harris defended the plaintiff's suit, and prayed for an injunction in her individual right, and not as the representative of her children, and they are not represented in court by a guardian ad litem or otherwise. Mrs. Harris would clearly be estopped to deny ownership of land which she claimed to own when the contract was made. And in addition to this, the contract states in terms, that the plaintiff shall have a right to construct its line over property owned by Mrs. Harris, or in which

she has an interest. So long, therefore, as the children do not complain, it does not lie in her mouth to set up their joint ownership with her as a reason why the plaintiff ought not to be allowed to construct its line. The court erred in granting the injunction prayed for by the defendants, but ought to have granted an injunction to the plaintiff, restraining the defendants from interfering with the erection of its telephone and telegraph line across the property described in the petition.

Judgment reversed by five Justices.

(53 W. Va. 522)

**TAYLOR COUNTY COURT v. HOLT,**  
Judge, et al.

(Supreme Court of Appeals of West Virginia.  
April 16, 1903.)

**JUSTICE OF THE PEACE—JURISDICTION.**

1. A justice of the peace has jurisdiction to entertain an action against a county court for the recovery of money due on contract, when the demand may be sued upon as provided in section 1, c. 39, Code 1899.

Brannon, J., dissenting.

(Syllabus by the Court.)

Application by the county court of Taylor county for a writ of prohibition to John H. Holt, Judge, and William Clark. Writ denied.

G. H. A. Kunst, for petitioner. W. R. D. Dent, for respondents.

**McWHORTER, P.** This is a rule in prohibition against Hon. John Homer Holt, judge, and the circuit court of Taylor county, and William Clark, against the enforcement of payment of a judgment rendered by said circuit court, on appeal from the judgment of a justice, against the county court of said county for \$36, and costs, recovered as the balance of a claim for \$72 for services rendered under contract with the board of health of said county, one-half of which claim had been allowed and paid by the said county court. It appears from the record that the account was filed in the office of the clerk of said county court, and presented for allowance at its July term, 1901, and \$36 of said amount was allowed, and no order made as to the remainder, and that a regular term of said court was held October, 1901, and said court adjourned without allowing or disallowing said balance, after which the claimant brought his action thereon before a justice.

The question presented by the petition in this case is the want of jurisdiction of a justice of the peace to entertain an action upon said claim, and insisting that the only remedy the claimant had was by writ of mandamus to compel its payment. The defendant William Clark filed his answer and demurrer to the rule, and praying that the

same be dismissed. By section 1, c. 39, Code 1899, "the county court of every county shall be a corporation by the name of 'The County Court of ——— County,' by which name it may sue and be sued, plead and be impleaded, and contract and be contracted with." Const. art. 8, § 1, names the justices with those to whom the judicial power of the state is distributed, and section 28, same article, provides: "The civil jurisdiction of the justices of the peace shall extend to actions of assumpsit, debt, detinue, and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars." This provision is positive and unequivocal, and absolutely negatives any authority to the Legislature to regulate or restrict such jurisdiction, and it means that justices shall have jurisdiction of all actions of the class named against all parties liable to be sued. This is a jurisdiction not liable to be taken from justices, by statute or otherwise, while the Constitution so remains, in all such actions where the amount claimed is within the limit prescribed. The same section contains a provision saying: "The Legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars." Here is power given to the Legislature to give additional jurisdiction to justices, but none to reduce or restrict that granted by the Constitution.

It is contended that the Legislature has power to regulate and restrict the jurisdiction of justices, but there is no such provision in the Constitution, not even by implication. The regulations and restrictions mentioned apply solely to the additional jurisdiction and powers which the Legislature may confer on justices. The framers of the Constitution, recognizing the fact that as a rule justices are not learned in the law, wisely empowered the Legislature to provide for appeals from judgments of justices in such manner as might be prescribed by law, and properly the appeal is made to lie as a matter of right.

It is contended that the proceeding by mandamus in the circuit court, provided for in section 43, c. 39, Code 1899, is an exclusive proceeding as far as justices are concerned, depriving them of the jurisdiction given them by section 28 of article 8 of the Constitution. As we have seen, this cannot be done; but, if this construction be correct, it as clearly ousts the circuit court of jurisdiction to try any action of assumpsit or debt against the county court, and the only proceeding remaining against such county court on any claim or demand whatever, however small it may be, is by writ of mandamus under said section 43, c. 39; and this would force every person who had a claim, if no more

¶ 1. See Counties, vol. 12, Cent. Dig. § 245; Justices of the Peace, vol. 21, Cent. Dig. § 126.

than \$1, against the county court, to apply to the circuit court for mandamus to enforce his claim, which would be in very many cases an utter denial of justice. No poor man, having a small claim, however just, would be willing to risk so expensive a litigation as he would find that in the circuit court to be, and would probably not be able, if willing. Such requirements would be unreasonable and oppressive, and the Legislature never contemplated any such construction of section 43, c. 39. This section, however, would appear to give jurisdiction to the circuit courts by mandamus on any claim against the county court, without reference to the amount thereof, which jurisdiction the Legislature has the power to confer under the last provision of section 12, art. 8, of the Constitution; but in all matters involving not exceeding \$300 the justice of the peace has concurrent jurisdiction with the circuit court to try the legal rights of the parties in respect to the demand or claim made against the county court, with right of appeal to the circuit court as in any other case.

It is contended that "It is against public policy to permit the county court to be sued up 'Possum Run and 'Coon Hollow, before justices in the country." I am unable to see the force of this proposition. Suit cannot be prosecuted without service of process, giving ample notice to the defendant; and, if it does not choose to be represented at the hearing, it has a right, after judgment, to take it by appeal to the circuit court, where the matter may be heard at the courthouse, where all the records are kept, and the record evidence, if any, is at hand. This court cannot raise the question of public policy, or say that jurisdiction conferred by the Constitution or statutes on any officer or tribunal shall not be exercised, because the court may doubt the wisdom thereof. It is enough that it is so, and must be upheld until the power which conferred the jurisdiction shall see fit to change it. Section 8, c. 50, Code 1899, provides that "the jurisdiction of justices within their several districts and counties shall extend to all civil actions for the recovery of money or the possession of property, including actions in which damages are claimed as compensation for an injury or wrong; provided the amount of money or damages or the value of the property claimed does not exceed three hundred dollars, exclusive of interest and costs; subject nevertheless to the exceptions hereinafter contained." The statute then proceeds to name the exceptions, and actions against the county court upon contract are not included in any of the exceptions. Said section 8 is as broad as the Constitution in that regard, extending "to all civil actions for the recovery of money," subject only to the limitations and exceptions expressed.

As to whether the proceeding by mandamus is exclusive of all other forms of action on such claims and demands, as applied to

the circuit courts, is immaterial, since under the rulings of this court such pleadings and proceedings may be had therein "as in ordinary common-law suits, till an issue of law or fact is reached and tried." *Fisher v. City of Charleston*, 17 W. Va. 595. Contracts made by the county court are clearly placed upon the same footing as contracts of other corporations or individuals, except, when prosecuted in the circuit court, it may be by mandamus.

The justice had jurisdiction, and the writ must be denied.

BRANNON, J. (dissenting). I am not ready to say that a county may be sued and compelled to attend every justice on its contracts. A county court is part of the state government. The state can allow itself or a county to be sued, if at all, only in the manner and form and in the court it chooses. Code 1899, c. 39, § 43, exempts county property from execution, and provides the writ of mandamus to compel it to pay a debt. It has given that remedy. I contend that such is the only remedy for reasons given in *Ratliff v. County Court*, 33 W. Va. 94, 10 S. E. 28; *Canby v. Board*, 19 W. Va. 93; *Johnson v. Town of Alderson*, 33 W. Va. 473, 10 S. E. 815; *Thomas v. Town of Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

The constitutional provisions as to jurisdiction of justices cited by Judge McWHORTER are simply the general scheme or plan or outline of jurisdiction, and do not take away the well-known power of the Legislature to prescribe particular remedies for particular grievances, or prescribe tribunals in which they shall be prosecuted. The fact that "judgment" is mentioned in said statute does not import that there may be suit in a justice's court or elsewhere on a contract. Ordinary action to get a judgment may be brought against a county for unliquidated damages, as in tort; but not on contract. That must be by mandamus.

(101 Va. 658.)

#### TAYLOR v. FORBES' ADM'X et al.

(Supreme Court of Appeals of Virginia. June 25, 1903.)

##### LIMITATIONS—AGREEMENT BY GRANTEE TO ASSUME DEBT—NATURE—PARTIES.

1. An agreement by the grantee in a deed to assume an outstanding debt is a simple contract, and not a specialty, and is barred in three years.
2. In a suit to subject land to the payment of liens thereon, the heirs of a deceased co-owner are necessary parties.

Appeal from Corporation Court of Roanoke.

Bill by the West End Land Company against Martha H. Taylor and the personal representative, heirs, and devisees of L. May Forbes. Decree dismissing the bill as to all the defendants except Martha H. Taylor, and refusing to permit her to file a bill and

amended bill of review, and she appeals. Affirmed in part, and reversed in part.

Scott & Staples, A. B. Coleman, and S. Hamilton Graves, for appellant. O. A. McHugh and J. E. Yonge, for appellees.

BUCHANAN, J. C. P. Harrison purchased from the West End Land Company of Roanoke City two lots, paid part of the purchase price in cash, and executed two negotiable notes for the residue, each for \$375, dated September 23, 1890, and payable respectively in one and two years from date. On the 25th of October following, Harrison sold and conveyed the lots to Mrs. Martha H. Taylor, the appellant, and Mrs. L. May Forbes, jointly, who paid the purchase price in cash, except the amount of the two notes executed by Harrison to the land company, which they assumed to pay. Mrs. Taylor paid her half of each note. To collect the other half of the notes the West End Land Company filed its bill, naming as defendants Mrs. Taylor and Mrs. Forbes. The latter having died after the notes matured and before the suit was brought, an amended bill was filed, making defendants thereto, in addition to Mrs. Taylor, the personal representative, heirs, and devisees of Mrs. Forbes, and the trustee in the deed of trust executed by Harrison upon the lots to secure the payment of the notes which he had executed to the land company, and whose payment had been assumed by Mrs. Taylor and Mrs. Forbes.

The personal representative of Mrs. Forbes filed a plea, in which she alleged that the right of action had accrued more than three years prior to the institution of the suit; and, upon a hearing of the cause upon the supplemental bill, the papers formerly read, and the plea of the statute of limitations, and replication thereto, the plea was sustained, and the suit dismissed as to the personal representative, heirs, and devisees of Mrs. Forbes. From that decree, and a decree refusing to permit Mrs. Taylor to file a bill and an amended bill of review, this appeal was granted.

The first error assigned is that the court erred in holding that that portion of the purchase price of the lots for which Mrs. Forbes was personally liable, and unpaid, was barred by the statute of limitations.

There is no question that more than three years had elapsed from the maturity of the purchase-money notes, before the amended bill was filed, if the time between the death of Mrs. Forbes and the filing of the amended bill is counted. This period, it was claimed in the petition for appeal, should be excluded, in ascertaining the time during which the statute had been running. That claim was abandoned in argument.

The contention of the appellant is that the statute of limitations applicable to the case is ten years, and not three, as the trial court held.

The determination of that question depends upon the character of the contract by which Mrs. Taylor and Mrs. Forbes assumed the payment of the notes in suit. The deed by which Harrison conveyed the lots to Mrs. Taylor and Mrs. Forbes states that the parties of the second part assume, and covenant to pay off and discharge, the said notes. Neither Mrs. Taylor nor Mrs. Forbes signed the deed, but they accepted it and took possession of the lots under it.

The authorities are agreed that, by accepting a deed like the one under consideration, the grantee becomes liable to perform any promise or undertaking therein imposed upon him, but they are in conflict as to the character of the undertaking.

It is held in some of the states that an agreement of the grantee in a deed signed and sealed by the grantor only is in the nature of a covenant under seal, and consequently a specialty. In others it is held that such an agreement is in the nature of an assumpsit or implied contract arising from the acceptance of the deed, and consequently a simple contract.

Counsel have not cited, nor have we found in our investigation, any decision of this court in which that question was considered and passed upon. That such an agreement is not a specialty or contract under seal, and that an action of covenant will not lie upon it at common law, is the accepted doctrine in this state, as we understand it.

Mr. Conway Robinson, a text-writer of the highest authority upon common-law pleading and practice in this state, was of this opinion. In his *New Practice*, vol. 3, p. 362-3, he says: "Of the action of covenant, it was said by Abbott, C. J., that 'it cannot be maintained, except against a person who by himself, or some other persons acting in his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as is maintained in *Co. Lit.* 231a) has by deed agreed to do a certain thing.' *Burnett v. Lynch*, 5 *Barn. & Cress*, 589, 12 *Eng. Com. Law*, 331. It would, however, be a mistake to suppose that an action of covenant can be maintained against the grantee in a deed poll under any circumstances, or against any one else who had not sealed it. *Lock v. Wright*, *Str.* 571; *Maule v. Weaver*, 7 *Bair*, 331. For in the case obscurely stated in *Co. Lit.* 231a, the form of action proves to be a debt, and not covenant. This has been ascertained by Mr. Platt, on reference to the *Year Book* 38 *Ed. III*, 8a, from which the case is extracted. The case in the *Year Book* 3 *H. VI*, c. 26h, referred to in *Co. Lit.*, Mr. Platt states, also was an action of debt, and related to the defeasance of an obligation. *Platt on Cov.* 12, 13. Covenant, then, will lie only where the instrument is actually signed and sealed by the party, or by his authority."

This view is sustained by the decisions of courts of the highest authority.

In *Pike v. Brown*, 7 Cush. 133, Chief Justice Shaw said: "The principle is well settled that where one by deed poll grants land and conveys any right, title, or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use or benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment or perform such duty, and, not having sealed the instrument, is not bound by it as a deed; but, it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie."

The Supreme Court of Pennsylvania, in *Maule v. Weaver*, 7 Pa. 329, in an opinion delivered by Chief Justice Gibson, held that covenant would not lie against a grantee in a deed poll under any circumstances, or against any one else who had not sealed it.

In *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531, the Supreme Court of the United States (Chief Justice Fuller speaking for the court) held that the grantee's liability by reason of his acceptance of a deed, without executing it, containing a covenant on his part to assume a mortgage on the premises conveyed, was a simple contract, not a specialty, and subject to the statute of limitations applicable to simple contracts.

To the same effect is the decision of the Supreme Court of West Virginia in *W. Va., etc., R. Co. v. McIntire*, 44 W. Va. 210, 216, 217, 28 S. E. 696. The syllabus in the case on that point states exactly the opposite of what the court decided.

We are of opinion that the agreement of Mrs. Taylor and Mrs. Forbes was a simple contract, not a specialty, and that the court did not err in sustaining the plea of the statute of limitations, but it did err in dismissing the cause as to the personal representative, heirs, and devisees of Mrs. Forbes. One of the objects of the amended bill was to subject the lots purchased by Mrs. Forbes and Mrs. Taylor to the payment of the notes sued on. They or their representatives were necessary parties to the suit.

The court by its decree of the May term, 1902, passed upon no question in the case, except the plea of the statute of limitations set up by the personal representative of Mrs. Forbes. The determination of that question did not adjudicate or affect any question between Mrs. Taylor and Mrs. Forbes' estate growing out of the purchase of the lots for which the notes sued on were given.

That decree was not a final decree as to the appellant. She still had the right, under section 3275 of the Code of 1887, to file an answer, and, but for the dismissal of the suit as to Mrs. Forbes' representatives, could have made all the defenses and asserted all the rights she could have made and asserted if that decree had not been made. When that decree is corrected in that respect, as we

have seen it must be, she is in no way prejudiced by it.

Having reached that conclusion, it is unnecessary to consider the assignments of error as to the refusal of the court to permit the appellant to file her bill and amended bill of review to set aside that decree.

The decree of the May term, 1902, must be reversed in so far as it dismissed the bill against the personal representative, heirs, and devisees of Mrs. Forbes, and affirmed in other respects, and the cause remanded to the corporation court to be further proceeded with in accordance with law, and not in conflict with the views expressed in this opinion.

(101 Va. 644)

#### PRICE v. CROZIER.

(Supreme Court of Appeals of Virginia. June 25, 1903.)

#### INDEMNITY BOND — MISAPPROPRIATION OF FUNDS—MEASURE OF RECOVERY—CONSTRUCTION OF BOND.

1. Two persons purchased land. One of them delivered to the other a sum sufficient to discharge one-half of the last installment of the purchase money, which the latter misappropriated to his own use. The land was sold for non-payment, and at the sale brought an amount much less than the sum delivered to the defaulting purchaser, who had given a bond to indemnify the other purchaser against loss. *Held*, that the measure of recovery on the bond was the amount placed in the hands of the defaulting purchaser, and not one-half the value of the land, as determined by the sale.

2. The bond given by the defaulting purchaser recited, "To indemnify and save harmless the said [other purchaser] from any and all loss of every kind and description which he may sustain on account of the failure of the said [defaulting purchaser] to pay to [the vendor] the amount paid to him," etc. *Held* to expressly cover the money paid to the defaulting purchaser by the other purchaser.

Keith, P., dissenting.

Appeal from Circuit Court of City of Roanoke.

Action on an indemnity bond by H. C. Price against T. W. Crozier. Judgment for defendant. Plaintiff appeals. Reversed.

Scott & Staples, for appellant. S. & M. Griffin, for appellee.

**HARRISON, J.** It appears that the appellee, T. W. Crozier, bought from the Exchange Building & Investment Company three lots (Nos. 19, 20, and 21), at the price of \$1,000 each, aggregating \$3,000. Of this sum \$1,000 was paid in cash, and the lots were conveyed to Crozier, who executed a contemporaneous deed of trust to secure the two deferred payments of \$1,000 each. It further appears that this purchase was made for the joint and equal benefit of the appellant, H. C. Price, and the appellee. It further appears that, when the last deferred installment of \$1,000 became due, each of the parties had contributed his full share of the purchase money theretofore paid; and the appellant then placed in the hands of the

appellee \$577.34—one half of the last outstanding payment, including interest—with the understanding that appellee would supply the remaining half, and pay the whole to the Exchange Building & Investment Company in discharge of their entire obligation. Subsequently appellant discovered that appellee had made default, and had not paid off the last deferred payment, but had appropriated to his own use the \$577.34 paid him by appellant in discharge of the entire balance due from him on account of the joint purchase. Thereupon appellant obtained from appellee a bond for \$1,300, with collateral conditions to indemnify him against loss, and secured the same upon the undivided half interest of Mary A. Crozier, the wife of appellee, in a lot owned jointly by her with appellant and his brother G. W. Price. Subsequently to this transaction, appellee, having procured from the Exchange Building & Investment Company a release of their deed of trust as to lot No. 19, conveyed that lot to appellant in part discharge of his obligation under the bond of indemnity. This left appellant still entitled to one-half of another lot, the title to which still remained in appellee. The balance of the purchase money due the Exchange Building & Investment Company remaining unpaid, that company proceeded to foreclose its deed of trust on lots Nos. 20 and 21 by a sale, at which those two lots brought \$15 each.

Upon this state of facts, the bill in this case was filed by appellant for a partition of the lot owned jointly by Mary A. Crozier, G. W. Price, and himself, and for the enforcement of his deed of trust upon the undivided half interest of Mary A. Crozier, securing the bond of indemnity. The demurrer to the bill was properly overruled. Code 1887, § 2562, as amended by act passed February 23, 1898 (Acts 1897-98, p. 488, c. 452).

The commissioner to whom the cause was referred reported that the lot was not susceptible of division in kind, and found the facts already stated with respect to the lien on the interest of Mary A. Crozier, leaving the court to determine the amount appellant was entitled to recover under and by virtue of the bond of indemnity in question. The circuit court held that \$7.50 (one-half the price that one of the lots brought at the sale under the Exchange Building & Investment Company deed of trust) was the measure of damage sustained by appellant, and all that was secured to him by virtue of the indemnifying bond. From this decree the present appeal was taken.

We are of opinion that appellant is clearly entitled, under the facts stated, to recover from Crozier the \$500, and its interest, which had been placed in his hands. The last deferred payment was due September 18, 1892—\$500 and interest by appellant, and \$500 and interest by appellee. Appellant paid the \$500 and interest due from him to appellee, with the understanding that the

remaining \$500 and interest would be supplied by appellee, and the whole balance due the investment company paid. When appellant placed this \$500 and interest in the hands of appellee, he was then entitled to a clear title from appellee to one lot and a half. He got title to one lot. By the default of appellee, the half of the lot to which he was entitled has been swept away, while his defaulting co-purchaser retains in his hands the \$500 and interest, which would have secured to appellant his land if it had been properly applied. Appellee now proposes to make amends for his default by saying to appellant, "The lot for which we agreed to pay \$1,000, and for which you paid me your half, was in fact only worth \$15; and therefore I will keep your \$500, and not pay for the lot, and return you \$7.50, the real value of one-half the lot." The statement of the proposition demonstrates its weakness, and shows how unreasonable and fallacious such a contention is. It was the obligation and duty of appellee, who occupied a relation of trust with respect to this transaction, to make appellant a clear title to his interest in the lots; and having failed, by reason of his own default, to do so, he must return to appellant the \$500 and interest which was placed in his hands to pay for the land that appellant has failed to get.

The appellee being indebted to appellant, as we have seen, in the sum of \$500 and interest, the only remaining question is whether or not that sum has been secured by the bond of indemnity and deed of trust upon the undivided half interest of Mary A. Crozier in the lot, the sale of which is sought in this suit.

A casual reading of the bond is sufficient to show that the \$500 and interest due to appellant is secured thereby in express terms.

After setting forth the purchase of the lots, the payments made by each, including the \$500 and interest paid by appellant in discharge of his half of the last deferred installment of purchase money, and acknowledging the default of appellee with respect to that sum, the bond proceeds as follows: "To indemnify and save harmless the said H. C. Price from any and all loss of every kind and description which he may sustain on account of the failure of the said T. W. Crozier to pay to the Exchange Building & Investment Company the amount paid to him by H. C. Price, and the failure of the said T. W. Crozier to pay that portion of the last deferred payment which was due by him on the due day of the same." The bond refers to but one transaction; that is the purchase from the investment company of lots Nos. 19, 20, and 21. It recognizes the obligation of appellee to make good to appellant the \$500 and interest in question, and declares a trust in his favor, the purpose of which is a restoration of that sum in the event the lots are sold by the investment company. It follows from what has

been said that the appellant, H. C. Price, is entitled to recover, under and by virtue of the bond of indemnity, and deed of trust given to secure the same, the sum of \$500, with interest from the date of its payment to appellee, as the measure of damage he has sustained by reason of the default of the appellee in failing to pay off the last deferred installment of purchase money due to the Exchange Building & Investment Company.

For these reasons, the decree complained of must be reversed, and the cause remanded to the circuit court, to be there proceeded with in conformity with the views expressed in this opinion.

BUCHANAN, J., absent. KEITH, P., dissenting as to the liability of Mrs. Crozier.

(101 Va. 662)

**BRISTOL BELT LINE RY. CO. v. BULLOCK ELECTRIC MFG. CO.**

(Supreme Court of Appeals of Virginia. June 25, 1903.)

**CONTRACT OF SALE—BREACH—DAMAGES—LOSS OF PROFITS—CERTAINTY.**

1. On the issue as to the amount of profits lost by defendant, an electric railway company, by reason of plaintiff's delay in furnishing certain machinery purchased for it, resulting in a suspension of traffic by defendant for several weeks, defendant showed the number of fares received by it on five consecutive days immediately preceding the suspension, and on eight consecutive days following the resumption of operations. It also showed its bill for fuel, and an estimate of the cost of the skilled labor employed. No other of the running expenses were shown. *Held*, that the amount of profits lost was not proven with sufficient certainty to warrant a recovery.

Error to Corporation Court of Bristol.

Action by the Bullock Electric Manufacturing Company against the Bristol Belt Line Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Curtin & Haynes, Roberts & Roberts, and J. H. Winston, for plaintiff in error. Bullitt, Kelly & Hull, for defendant in error.

KEITH, P. The Bristol Belt Line Railway Company purchased of the Bullock Electric Manufacturing Company a standard Bullock railway generator, and certain other electrical appliances, to be used upon its line of railway in the city of Bristol. The terms of the purchase are stated in a letter from Lozier, district manager of the Bullock Company, to Dulaney, vice president of the Belt Line Company, dated New York, March 2, 1901. After describing the machine which was to be furnished, the letter continues:

"We expect to make shipment of this generator within fifteen days, and will ship it via L. & N. and Southwestern R. R.

"We will deliver the above, f. o. b., Cincinnati, for the sum of one thousand seven hundred and twenty dollars (\$1,720).

"Terms.

"50 per cent. by sight draft attached to B-L.

"Balance by four (4) months' note bearing interest, with acceptable endorsement.

"We wish to thank you for having placed this order with us, and beg to advise you that the same will receive our very best attention. Yours very truly,

"Bullock Electric Mfg. Co.

"Robert T. Lozier, District Manager.

"The above proposition is hereby accepted this day of May 2, 1901.

"B. L. Dulaney, V. P.,

"Bristol Belt Line Ry. Co."

At the foot of the letter head upon which the foregoing was written, the following appears in red ink:

"All contracts subject to strikes and other delays beyond our control."

From causes which need not be mentioned, there was considerable delay in shipping the machinery ordered, and it was not actually put on board the cars until June 13th, and was not received for some days thereafter.

On the 19th of July, 1901, the Bristol Belt Line Company sent a check to the Bullock Electric Manufacturing Company for \$830.13, being one-half the price of the generator, less certain small items of offset which it claimed. On July 26th the Bullock Company acknowledged receipt of this check, and, referring to the items of set-off, asked for an explanation with respect to them. There was more or less correspondence between the two companies until some time in December, when, efforts to reach a satisfactory adjustment of the points of difference between them having failed, the Bullock Electric Manufacturing Company brought an action of assumpsit against the Bristol Belt Line Railway Company in the corporation court of the city of Bristol. Its bill of particulars embraces the price of the generator, \$1,720, and two items for other machinery, the whole account aggregating \$1,788.25, which, credited by \$830.13, leaves a balance of \$958.12 as the balance for which it sued.

To this action the Belt Line Company pleaded non assumpsit and set-off. In its plea of set-off, it states the purchase of the machinery, the part payment of the price by check, and then avers that the plaintiff did not keep its promise and undertaking with the defendant, in this: that the generator and other appliances were not delivered to the defendant on or before the 15th of May, 1901, although the plaintiff was notified of the importance thereof at the time the order was given, and undertook faithfully so to do, but, on the contrary, the generator and appliances were not delivered until long thereafter, and then not as a whole, but in parts, at different times, over a period of several weeks; and the defendant avers that, by reason of the breaches aforesaid of the plain-



tiff, the defendant was unable to operate its plant for several weeks, during a portion of the best season of the year, and was otherwise put to much damage and expense, and that, by reason of the promise aforesaid, it has sustained damage amounting to the sum of \$1,152.85, which is still unpaid and due from the plaintiff to the defendant.

Issues being joined upon the pleas, the whole matter of law and fact was submitted to the court, which gave judgment for the plaintiff for the amount of its claim, subject to certain small payments set forth in its order, but rejecting the principal item of set-off relied on by the defendant. To that judgment the defendant obtained a writ of error.

The sole question is one of fact. The case stands before us as though it had been submitted to the jury without instructions, and a verdict had been rendered upon the evidence. It is our duty, under section 3484 of the Code, to consider the evidence in the case "as on a demurrer to the evidence by the appellant"; and, if we shall be of opinion that the judgment of the circuit court is erroneous, we are required by section 3485 of the Code "to enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered."

The petition of plaintiff in error, after reviewing many authorities upon the subject, deduces the following conclusion from them: "That loss of profits may be recovered as an element of damage for breach of contract where the same are the natural result, in the legal contemplation of the parties, of the breach, and when proved with reasonable certainty; and in estimating damages the law uniformly adopts that mode which is most definite and certain, taking into consideration the peculiar circumstances surrounding each case."

Conceding that the plea of set-off shows a loss of profits, such as may be recovered in accordance with the terms of the law as above stated, it still remains for us to inquire whether the amount of damage has been proved with reasonable certainty.

The Belt Line Company operates an electric railway in the city of Bristol, which contains about 12,000 inhabitants. It purchased machinery to be delivered on the 15th day of May. The delivery was delayed, and by that delay it claims that it suffered damages, which it now seeks to set off against the purchase price of the machinery. The proof offered to maintain this plea is the number of fares received by the road on 5 consecutive days in May, immediately preceding the suspension of traffic, and on eight consecutive days in June, from the 23d to the 30th, inclusive, after its operations had been resumed. During those 13 days the evidence tends to show that the Belt Line Company received in fares \$449.15. We are asked to assume that its gross receipts during the period of suspension would have been an average of

the receipts during the 13 days. This, to start with, is a somewhat uncertain basis for arriving at gross receipts; but, granting that a reasonable certainty may be attained from such data with respect to the gross receipts, how are we to ascertain how much is to be deducted on account of running expenses? The bill for fuel is given, and an estimate of the cost of the skilled labor employed, but profits are not to be derived at by deducting these items from the gross receipts. There are many other charges incident to the operation of an electric railway which must be deducted from gross receipts in order to ascertain the profits in the business, with respect to which the evidence affords us no means of making an estimate. We are not permitted to indulge in conjecture, but it was the duty of the Belt Line Company, which, with respect to the set-off, occupied the attitude of the plaintiff, to fix the amount of recovery by evidence which would show either directly the items of damage which it sustained, or establish facts from which the court could deduce with reasonable certainty the amount of such damages.

We think it highly probable that plaintiff in error sustained damage for which it ought to be compensated, and we regret that the proof is too speculative and conjectural to enable us to fix with a sufficient degree of certainty upon a definite sum as the amount of the damage sustained.

We are of opinion that the judgment of the corporation court must be affirmed.

(101 Va. 619)

#### SOUTHERN EXPRESS CO. v. GOLDBERG.

(Supreme Court of Appeals of Virginia. June 25, 1903.)

#### INTERSTATE COMMERCE—REGULATION OF CHARGES WITHIN STATE.

1. Code 1887, § 1215, in so far as it undertakes to fix the rate of charges to be received within the state by common carriers engaged in interstate commerce, violates the federal Constitution (article 1, § 8, cl. 3), which gives to Congress power to regulate commerce among the several states.

Error to Corporation Court of Radford.

Action by Max Goldberg against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

John R. Johnson, for plaintiff in error. Longley & Jordan, for defendant in error.

HARRISON, J. The Es Camillo Cigar Factory placed in the office of Adams Express Company in the city of Philadelphia, Pa., a package of cigars, weighing 16 pounds, to be shipped to Max Goldberg, at East Radford, Va. Upon this package the charges demanded by the company, amounting to 60 cents, were prepaid by the cigar factory. The Southern Express Company having traffic arrangements with Adams Express Company received the package at Hagerstown, Md., for transportation to its des-

tionation. When the shipment reached the office of the plaintiff in error at East Radford, that company demanded 80 cents as the terms upon which it would be delivered to the consignee. This latter charge was paid under protest by the defendant in error.

It appears that the correct charge, according to the rates of the express company, for transporting the package from Philadelphia to East Radford, was 80 cents, and that the error of charging only 60 cents, and failing to mark the package "Prepaid," occurred in the office of the company at Philadelphia; the waybill calling for the collection of 80 cents at East Radford. The plaintiff in error failing to refund the excessive charge within 10 days after demand was made therefor, this action was brought, in the name of the commonwealth, at the relation of the defendant in error, to recover of the plaintiff in error the penalty prescribed by statute in such cases.

Section 1215 of the Code of 1887 provides that express companies may charge \$1.50 for every dollar charged by the railroad company, whose lines it may be using, for transporting like articles by the regular freight trains of such railroad companies, except that for carrying packages weighing less than 5 pounds the rate of compensation shall not exceed 25 cents for any distance within the state, and for packages weighing more than 5 and less than 50 pounds the rate of compensation shall not exceed 50 cents for all distances within the state.

Section 1219 provides that whenever an express company shall receive any article at a place without the state to be transported to a place within the state, or shall receive such article at a place within the state to be carried beyond its limits, the amount of compensation demanded by such company shall be regarded as a uniform rate of charge per pound, and per package per mile for and throughout the whole distance within and without the limits of the state, for which such article was so transported, unless it should otherwise appear by sufficient evidence.

Section 1220, as amended by an act of the General Assembly approved December 20, 1897 (Acts 1897-98, p. 12, c. 14), provides that for any violation of these sections such company shall forfeit not less than \$100—one half for the use of the informer, and the other half for the use of the commonwealth—provided, however, that if the company shall within 10 days after demand, at the place where paid, return the excess over the proper charge to the party paying the same, then the penalty or forfeiture provided for shall not be enforced.

The contention on behalf of the Southern Express Company is that section 1215 is in conflict with article 1, cl. 3, of section 8 of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and

among the several states, and with the Indian tribes."

It has long been established by the Supreme Court of the United States, to whose decisions we must look in determining questions of this character, that as to all subjects of commerce which are national in their character, admitting of only one uniform system or plan of regulation, the power of Congress to regulate commerce among the states is not only supreme, but exclusive, and that its failure to act is not to be interpreted as licensing the states to act. The silence of Congress is held to be an emphatic assertion that the subject shall be left free from any restrictions, exactions, or burdens. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *The State Freight Tax Case*, 15 Wall. 232, 21 L. Ed. 146; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Wabash & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Lelsy & Co. v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

The state has the power to protect her own citizens from extortionate rates charged by one of her own corporations, so long as the commerce is carried on entirely within her own territorial limits. It is also an established principle that commerce between the states can be legitimately affected by state laws in that large class of cases involving the police power of the state, such as laws for the security of the lives, limbs, health, and comfort of persons, and the protection of property, or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, pilotage, and other commercial facilities. For authorities on this branch of the subject, it is only necessary to refer to those already cited.

It cannot be successfully questioned that the transportation of goods over the railroads by an express company from Philadelphia, in the state of Pennsylvania, to East Radford, in the state of Virginia, is interstate commerce.

In *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347, it is said: "It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure uniformity against discriminating state legislation."

And in *Gloucester Ferry Co. v. Pennsylvania*, supra, it is said that "it needs no ar-

gument to show that commerce between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."

In the case of *Wabash & P. Ry. Co. v. Illinois*, 118 U. S., 7 Sup. Ct., 30 L. Ed., already cited, the Supreme Court had under review an act of the Illinois Legislature which provided that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating charges, collections, or receipts, whether made directly or by means of rebate, or other shift or evasion, shall be deemed and taken against any such railroad corporation as prima facie evidence of unjust discrimination, prohibited by the provisions of the act. The statute further provided a penalty of not less than \$5,000 for the offense, and also that the party aggrieved shall have a right to recover three times the amount of damages sustained, with costs and attorney's fees. The allegation was that the railroad company had, in violation of this statute, been guilty of an unjust discrimination in its rates of charges of compensation for the transportation of certain freight from Peoria, in the state of Illinois, to New York City. Mr. Justice Miller delivered an able opinion in the case, reviewing the authorities, and holding that the act was in violation of the commerce clause of the Constitution and invalid. In discussing the subject, the learned justice said that, "whatever may be the instrumentalities by which the transportation from one state to another may be effected, it is but one voyage—as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois Legislature, so much as the charge for transportation; and, in the language just cited [*Hall v. De Cuir*, supra], if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. It was \* \* \* to meet just such a case that the commerce clause of the Constitution was adopted." It is further said that "it cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints

which the states might choose to impose upon it, that the commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook v. Pennsylvania*, 97 U. S. 574, 24 L. Ed. 1015; *Brown v. Maryland*, 12 Wheat. 446, 6 L. Ed. 678. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce. \* \* \* We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the states is a valid law."

Counsel for the defendant in error make a calculation to show that the overcharge for that portion of the distance within the state of Virginia was 37½ cents, and that it is only this overcharge within the state of Virginia, and the failure to refund that part of the overcharge, that is the issue in this case. In support of this proposition, *People v. Wabash*, etc., 104 Ill. 476, is cited. This is the case which was reversed by the Supreme Court (118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244), and from which we have already quoted so fully. The Supreme Court of Illinois, conceding that the contract of shipment in that case was in itself a unit, and that the pay received by the railroad company was the compensation for the entire transportation from the point of departure in the state of Illinois to the city of New York, held that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the state, it is binding and effectual as to so much of the transportation as was within the limits of the state of Illinois. Mr. Justice Miller, in dealing with that question, says: "It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the state, and so much more to commerce in other states." It is then held, as already seen, that it was interstate commerce, and that the charge made for the whole distance could not, therefore, be apportioned in the manner suggested.

The case of *Stewart v. Coner* (Ga.) 28 S. E. 461, 62 Am. St. Rep. 353, relied on by defendant in error, could not be regarded as authority, even if it maintained a contrary view to that taken by the Supreme Court of the United States. It is, however, easily distinguished from the case at bar. In the Georgia case the statute imposed a penalty upon any common carrier who should demand and receive for goods shipped from within or without the state a charge over and beyond the proper or contract rate of freight, whereas the Virginia statute under consideration undertakes to prescribe and determine the rates that the common carrier shall charge, and to impose a penalty for its violation.

Every statute is presumed to be constitutional, and the courts will not declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained. In the light of the authorities we have cited, it seems clear, and we are constrained to hold, that section 1215 of the Code of 1887, in so far as it undertakes to fix and prescribe the rate of charges to be received by common carriers engaged in interstate commerce, is in conflict with the commerce clause of the United States Constitution (article 1, § 8, cl. 3), and therefore void; that the plaintiff in error, being a common carrier engaged, as we have held, in commerce between the states, is not bound by the rates prescribed by section 1215 of the Code of 1887, and therefore not liable to the penalty imposed by section 1220 as amended.

For these reasons the judgment must be reversed and the verdict set aside, and this court will enter such judgment as the lower court ought to have entered, sustaining the demurrer to the declaration, and dismissing the same, with costs.

(101 Va. 613)

**UNION ASSUR. SOC. OF LONDON, ENGLAND, v. NALLS.**

(Supreme Court of Appeals of Virginia. June 18, 1903.)

**INSURANCE—UNCONDITIONAL OWNERSHIP—MORTGAGE.**

1. The existence of a mortgage does not violate the condition of a policy that the interest of the insured in the property shall be "unconditional and sole ownership."

2. Where an insurance company elects to issue a policy of insurance against loss by fire without any application, or without any representation in regard to the title to the property, it cannot complain, after loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed.

Error to Corporation Court of Roanoke.

Action by C. M. Nalls against the Union Assurance Society of London, England. Judgment for plaintiff. Defendant brings error. Affirmed.

¶ 1. See Insurance, vol. 23, Cent. Dig. § 612.

Watts, Robertson & Robertson, for plaintiff in error. Scott & Staples and Cooke & Glasgow, for defendant in error.

WHITTLE, J. This is an action of assumpsit on a policy issued by the plaintiff in error, insuring the machinery and stock in the canning factory of the defendant in error, situated in the city of Roanoke, against loss by fire, to the amount of \$5,000.

The jury found a verdict for the plaintiff for \$4,084.86, with interest. Whereupon the defendant moved the court to set aside the verdict, and for a new trial, upon the ground that the verdict was contrary to the law and the evidence, and that the court, by its instructions, had misdirected the jury as to the law. The motion was overruled, and judgment rendered upon the verdict, which judgment is now here for review.

The plaintiff in error denies liability on two grounds: First, because the interest of the insured in the property covered by the policy was other than an unconditional and sole ownership; and, second, because the subject of insurance was personal property, and, at the time of the issuance of the policy, was incumbered by a chattel mortgage.

The conditions of the policy upon which these defenses are based are as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be personal property, and be or become encumbered by chattel mortgage."

Both contentions rest upon the fact that at the time the policy was taken out there was a deed of trust or chattel mortgage on the property covered thereby.

The insurance was effected through the medium of the Century Banking & Deposit Company, a company conducting a regular insurance agency in the city of Roanoke, which received the premium and delivered the policy.

It is insisted that in placing this particular risk the company acted in the capacity of insurance brokers, and not as the agent of the insurance company; and the secretary and treasurer of the Century Banking & Deposit Company and the general agent of the insurance company at Richmond both testified to that effect. Nevertheless the fact remains that the insured sought and obtained the insurance from that company, and was not advised of any limitations on their powers as representatives of the insurance company. As, however, the case will have to be disposed of on other grounds, it is unnecessary to decide what relation the intermediary bore to the contracting parties. See, on that subject, *Queen Ins. Co. of America v. Union Bank & Trust Co.*, 111 Fed. 697, 49 C. C. A. 555; 2 Beach on Ins. § 1826.

The policy was issued without the usual printed or written application, and there was

no representation made, or required to be made, by the insured, either as to the character of his title or interest in the property, or as to the existence of any deed of trust or chattel mortgage thereon.

As observed, the only representative of the insurance company known to the insured, or with whom he came in contact or had any dealings in respect to the insurance, was the Century Banking & Deposit Company, which company was fully informed of the state of his title, and had actual knowledge of the deed of trust on the property, before and at the time of the payment of the premium and delivery of the policy. There was no evidence tending to show a fraudulent concealment of the incumbrance, nor is there any suggestion of bad faith on the part of the insured.

On the 26th of January, 1901, a fire occurred, which occasioned a total loss of the property; and the appraisers fixed the proportion of the loss to be borne by the plaintiff in error at \$4,084.86, the amount of the verdict. That amount is conceded to be the true measure of the insurance company's responsibility, if liable at all.

Considering the grounds of defense relied on, in the order stated, it would seem clear that the first contention interposes no bar to a recovery. Indeed, the authorities are practically unanimous to the effect that an incumbrance is not an estate in or title to property, within the meaning of the provision that, if the interest of the insured be other than an unconditional or sole ownership, the policy shall be void. To the contrary, an incumbrance constitutes a mere lien upon property, which may be discharged at any time by payment of the sum for which the lien attaches.

In the case of *Morotock Insurance Company v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846, this court, in construing the effect of the existence of an incumbrance, in a policy containing identically the same conditions, and upon essentially the same facts, as exist in this case, said:

"It was next claimed that the existence of the mortgage violated the condition of the policy that the interest of the insured in the property shall be 'unconditional and sole ownership.' This condition did not have reference to the legal title, but to the interest of the insured in the property, and was not a warranty against liens and incumbrances. The interest of the insured in the property was, and continued to be, unconditional and sole ownership, notwithstanding the mortgage they had given upon it." *Woody v. Old Dom. Ins. Co.*, 31 Grat. 362, 31 Am. Rep. 732; *Clay F. & M. Ins. Co. v. Beck*, 43 Md. 358; *Carson v. Jersey City Fire Ins. Co.*, 39 Am. Rep. 584; *Quarrier v. Ins. Co.*, 10 W. Va. 507.

In respect to the second contention, the case of *Morotock Insurance Company v. Rodefer*, supra, is equally conclusive. That

case holds that where an insurance company elects to issue a policy of insurance against loss by fire without any application, or without any representation in regard to the title to the property to be insured, it cannot complain, after loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed. In that case, as in this, there was a condition in the policy, "If the subject of insurance be personal property," the policy shall be void if the property "be or become encumbered by a chattel mortgage." Yet the court said: "There is nothing in the policy which required a disclosure by the insured of the liens on the property, except the disclosure of any chattel mortgage, where personal property was the subject of insurance; and, if the company neglected to make the proper inquiry, it cannot now be permitted, after loss has happened, to defeat a recovery because the insured did not voluntarily disclose the existence of the said mortgage. If an insurance company elects to issue its policy without an application, or any representation in regard to the title to the property upon which the insurance is effected, the company cannot complain, after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed." *West R. Mut. Ins. Co. v. Sheets*, 26 Grat. 854; *Manhattan Fire Ins. Co. v. Well & Uhlman*, 28 Grat. 389, 26 Am. Rep. 364; *Wood on Fire Insurance*, §§ 151, 162; *Gilmore's Notes on Smith's Mer. Law*, 293.

In *Wood on Fire Insurance*, § 162, the doctrine is stated thus: "When a policy is issued on a verbal application, without any representation in reference thereto, all information relative to the risk, except such as is unusual and extraordinary, is waived, and the policy is valid, even though it contain a clause or stipulation that the insured covenants that the representations given in the application for insurance contain a just, full, and true exposition of all facts and circumstances in respect to the condition, situation, value, and risk of the property insured; and, although the policy professes to be made upon the faith or representations made by the insured, yet it is valid, even though no representations whatever were made in reference to the risk, and the lack thereof is not a matter of defense. The insurer cannot charge the assured with laches induced by its own conduct."

The reasonableness and fairness of the doctrine must commend it to the judicial mind.

It is said that persons applying for insurance are usually not aware of the necessity of making disclosures, the importance of which underwriters have learned by long experience, or what disclosures are necessary. Insurance companies, on the other hand, cannot only protect themselves by making inquiries in regard to such matters as they con-

sider material; but, as is well known, their habit is to do so.

It is also a matter of common knowledge that insurance companies are provided with blank forms of application for insurance, and fair dealing demands that they shall use these forms, and apprise the insured of the subjects upon which they desire information, before they will be allowed to visit upon him the consequences of silence induced by their own conduct.

The practical operation of a contrary rule would be to convert these salutary contracts of indemnity into pitfalls for the unwary, and to deny protection in many instances where the insured had acted in good faith, and was consciously guilty of no dereliction.

The authorities cited are conclusive of the case in both aspects, and render a consideration of other questions relied on and argued by counsel unnecessary.

The judgment is plainly right, and it must be affirmed.

(101 Va. 667)

**NORFOLK & W. RY. CO. v. CROMER'S ADM'X.**

(Supreme Court of Appeals of Virginia. June 25, 1903.)

**SERVANT—INJURIES—LIABILITY—FELLOW SERVANTS—NEGLIGENCE.**

1. A railroad company would not be liable for the escape of cars from a siding to the main track, and a resulting collision with a passenger train, in which the fireman of the train was killed, if the escape of the cars was due, not to any insufficiency in their brakes, but to the brakes being tampered with.

2. The railroad company, as the law stood on January 8, 1900, would not be liable if the escape of the cars was due to their being displaced and sent adrift by contact with shifting cars; this being the negligence of fellow servants.

3. Courts cannot dictate to railway companies a choice between methods of operation, all of which are shown to be reasonably adequate for the purposes intended to be subserved.

4. Evidence considered, and *held* to show that the death of the fireman on a passenger train in a collision of the train with freight cars which had escaped from a siding was due to the negligence of the engineer of the train, in which the fireman participated.

Error to Circuit Court of City of Roanoke.

Action by Cromer's administratrix against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Watts, Robertson & Robertson, for appellant. Hoge & Hoge and Scott & Staples, for appellee.

WHITTLE, J. This is the sequel to the case of Cromer's administratrix against the Norfolk & Western Railway Company, reported in 99 Va. 763, 40 S. E. 54. At the first trial there was a verdict and judgment for the plaintiff, which judgment, on writ of error to this court, was reversed, and the case remanded for a new trial.

At the second trial the plaintiff again prevailed, and recovered the judgment now under review.

The instructions given the jury conformed to the opinion of this court on the first appeal; and the error now assigned is the refusal of the trial court to set aside the second verdict on the ground that it was contrary to the law and the evidence.

In essentials, the evidence on both trials was the same.

It appears that on Monday, January 8, 1900, a west-bound passenger train, on which plaintiff's intestate, Cromer, was fireman, arrived at Pulaski behind time, and, while running at a high rate of speed, collided with some freight cars, which had escaped from a siding, upon which they were stored, to the main track, and Cromer was killed.

The siding in question extends in a westerly direction from the place of accident, by the Pulaski Iron Furnace, to another point on the main line. It further appears that on Saturday, before the accident, 12 cars loaded with ore and coke for the furnace were stored on the siding, with brakes fastened and in safe condition.

As was said by this court on the first appeal: "The following occurrence is of interest as tending to show the sufficiency of the brakes to control those cars. On Saturday preceding the accident, the employes of the company charged with that duty were putting cars in upon the siding, some of which were loaded with coke, when they came in contact with cars laden with ore standing towards the east end of the siding. The coke cars, which were being pushed, and the ore cars, which were at rest, did not couple, and the latter were put in motion by the jar. A brakeman sprang from the car upon which he was standing, overtook the ore cars, seven in number, which were moving off, applied brakes sufficient to stop them, and then at least two more brakes, out of abundant caution.

"It would seem that brakes which were sufficient to stop cars when in motion would be ample to hold them when at rest."

Just how these cars were set in motion on the evening of the accident is wholly a matter of conjecture.

The plaintiff introduced the yard engineer, who stored the cars on the siding, and he propounds two theories on the subject, namely, that the brakes had been either tampered with, or that the cars were started by the impact of 22 or 23 loaded cars which were brought on the siding from the west by the employes of the company. In support of the latter theory, it appears that a few moments prior to the accident, after the yard engineer had left the siding, and while he was in the switch office, he heard these shifting cars come in contact with the stationary cars. The reasonable inference, therefore, would seem to be that the latter were set in motion as a result of that im-

fact. And that inference is strengthened by the incident of Saturday, referred to in the opinion of the court.

So far as the liability of the company is concerned, however, it is immaterial which theory is adopted. If the brakes, which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position, were tampered with, the company would, of course, not be responsible; and, if the cars were displaced and sent adrift by contact with the shifting cars, it was due to the negligence of fellow servants of the deceased, for whose negligence the company was not liable under the then existing law. *Norfolk & Western Ry. Co. v. Nuckols' Adm'r*, 91 Va. 193, 21 S. E. 342. Therefore upon neither theory has actionable negligence been brought home to the company.

It likewise appears that six months prior to the accident there was a derailing switch on the siding near its eastern terminus, the presence of which, it is insisted, would have prevented the accident, and the removal of which constitutes negligence on the part of the company.

The same contention was urged at the first trial and before this court on appeal. With respect to it the court said:

"In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction, that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailing switch to prevent the moving of cars from the siding to the main track.

"It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly-discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

These observations are as applicable to the evidence upon the second trial as they were to that on the first trial, and are conclusive in regard to the present contention.

Courts and juries cannot dictate to railway companies a choice between methods, all of which are shown to be reasonably adequate for the purposes intended to be subserved. Thus to subject them to the varying and uncertain opinions of juries in questions of policy, and to substitute the discretion of the latter for their discretion, would be wholly impracticable, and would prove alike disastrous to the companies and the public. *Tuttle v. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.

In order to hold a master liable for injuries sustained by a servant while engaged in his employment, the burden rests upon the

servant to prove affirmatively the negligence of the master, or a state of facts which warrants an inference of negligence, and that such negligence was the proximate cause of the injury. To justify a recovery in such a case, the evidence must show "more than a probability of a negligent act." The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries, based upon no sure grounds of inference. *C. & O. Ry. Co. v. Sparrow's Adm'r*, 98 Va. 640, 37 S. E. 302.

Again, it is to the proximate cause, and not to the remote cause, that courts must look in determining the rights and liabilities in this class of cases.

It was urged in argument that this is a case of concurring negligence. But that doctrine cannot be invoked under the evidence in this record. It was held on the former appeal that concurring negligence of a master and servant, in order to render the master liable, must be simultaneous, operative, and effectual at the time of the accident, and must not stand in the relation of remote and proximate cause to the event, for, if they so stand, and the servant can, by the exercise of ordinary care, avoid the effect of the master's negligence, there is no liability on the master.

It is believed, however, that a brief consideration of the circumstances immediately attending the accident will conclusively show that it was proximately due to the negligence of the engineman in disregarding a plain duty imposed upon him by the rules of the company, negligence in which Cromer participated, to the extent, at least, of not keeping a proper lookout on reaching the yard at Pulaski.

As remarked, the accident occurred within the yard limits, near the eastern junction of the siding with the main track. The profile map introduced in evidence shows a slight descending grade from the summit of the siding, in an easterly direction, to the bottom on the main line near the junction, at which point the ascending grade would stop a loose car within a short distance in the yard, and within the jurisdiction of the yard force.

It likewise appears that a car escaping to the main track would pass through a switch provided with automatic switch signals, which when open display a red light, and when closed a white light (the former signifying danger; the latter, safety); and when, from any cause, these signals are obscured, their absence is a notification of danger.

The eastern limit of the yard is about one-half mile from the scene of the accident, and the intervening track is perfectly straight, and the view unobstructed.

Ordinarily, an accident from collision, under the physical conditions adverted to, would be most unlikely to occur, and the conclusive inference is that the casualty in question would not have happened if the engine-

man and fireman had observed the rules promulgated by the company for their guidance and protection.

These rules require that, "when within the limits of the various yards, all trains must be run with great care, and under the control of the engineman."

"Switching engines will have the right to work within yard limits, upon the time of second and succeeding class trains, and also upon the time of delayed first-class trains, but must clear the track immediately upon their arrival. The main track must be kept clear for first-class trains that are on time. 'First-class' trains means passenger trains, and 'second-class' trains means freight trains."

Rule 164, which is especially applicable to firemen, reads as follows: "When running upon the road they must keep a constant lookout ahead when not engaged in firing, and give notice to the engineman of any signals or indications of danger. If the engineman has to look away from the track in front for any reason, the fireman must maintain the watch until the engineman can resume it. They will not put coal in engines when coming into stations or at such other points as safety requires that they keep a lookout ahead."

That these salutary rules were set at naught by the engineman on the evening of the accident, cannot be denied. He approached the scene of disaster, under existing conditions, at a reckless rate of speed. His train was an hour and a half late, and he therefore knew by the rules that he was not entitled to the right of track, and was likely to encounter obstructions within the precinct of the yard. He also knew that it was his duty to keep a constant lookout ahead, and to run his train with great caution, and keep it under control. So far from running with the care required, and reducing the speed so as to bring the engine under control, the undisputed evidence is that he maintained a speed of at least 30 miles an hour until his train was actually in collision with the drifting cars. Had the rules been obeyed in the particulars referred to, it is inconceivable that the engineman and fireman would both have failed to discover either the freight cars on the track, or the switch signals, or the absence of such signals, all or any of which would have warned them of danger in time to stop a train under control, and thus to have averted the accident.

From the foregoing statement, it plainly appears, that the direct and proximate cause of the accident was the negligence of the engineman, in which the fireman participated, and for their negligence the company is not responsible.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had, not in conflict with the views expressed in this opinion.

(101 Va. 675)

S. N. HONAKER & SONS v. DUFF et al.  
(Supreme Court of Appeals of Virginia. July 2, 1903.)

WILLS—CONSTRUCTION—ESTATE CREATED—SPENDTHRIFT TRUSTS.

1. Where a life estate is given, with the power of disposition by deed or will, the devisee takes the fee; where the gift is for life, with a power of disposition by will added, the devisee takes only a life estate; the intention controlling in each case.

2. Whatever right, legal or equitable, a person sui juris has in property, is liable to his debts, and trusts created to prevent this result cannot be upheld.

3. Testator's will gave certain real estate to his son after the death of testator's wife. Afterwards, the son having become indebted, testator, by codicil, revoked the devise, and gave the same property to a third person; "trustee for [the son], and to be held by said trustee for the use and benefit of [the son] and his family during their lives, and then to be willed by [the son] to whom he may choose, and that said trustee is to hold said property free from all present and future liabilities of said [son] and for benefit of said [son] and his family." The family of the son consisted merely of himself and wife. *Held*, that the entire estate in the realty vested in the son alone.

Appeal from Circuit Court, Washington County.

Suit by S. N. Honaker & Sons against F. C. Duff and others. Decree for defendants. Plaintiffs appeal. Reversed.

Honaker & Hutton, for appellants. J. H. Fulton and L. P. Summers, for appellees.

KEITH, P. The decree appealed from involved the construction of the will of Thomas J. Duff, dated February 11, 1873, the third clause of which is as follows:

"I devise to my son, Francis C. Duff, the plantation on which I now live after the death of my wife, Elizabeth, also the part of the tract I still own, which I purchased from Newton Duff and Stephen B. Duff, executor of Samuel C. Duff, with like limitation and restriction as I have applied to my devise to him in regard to the home place."

After the execution of this will, Francis Duff became indebted, and the testator made a codicil to his will, dated April 19, 1888, which is as follows:

"I hereby revoke and modify the third section of my will and testament as to my son, Francis C. Duff, this far only, that I will the said plantation I now live on, after death, of my wife, and part of plantation I purchased from Newton and Stephen Duff, to Felix Gray, trustee for Francis C. Duff, and to be held by said trustee for the use and benefit of Francis C. Duff and his family during their lives, and then to be willed by said Francis C. Duff to whom he may choose, and that said trustee is to hold said property free from all present and future liabilities of said Francis C. Duff and for benefit of said Francis C. Duff and his family; but in all other respects, the said will is my last will and testament."



It will be seen that by the original will Francis Duff took a remainder in fee after the death of his mother, and we shall now proceed to inquire as to the extent of his interest under the codicil.

His creditors claim that under this codicil Francis Duff takes a fee simple, which they can subject in payment of the debts due to them, while the contention on the other hand is that he has a joint interest with his family in the use of the property mentioned in the codicil, which is not liable to his creditors.

In *May v. Joynes*, 20 Grat. 692, it was held that upon a devise to a wife of "my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate and to convey absolute title to the purchasers; and use the purchase money for investment or any purpose that she pleases; with only this restriction, that whatever remains at her death, after paying any debts she may owe, or any legacies that she may leave, be divided as follows." There are then limitations to his children and grandchildren. The wife takes a fee simple in the real, and an absolute property in the personal, estate; and the limitation over of whatever remains at her death is inconsistent with and repugnant to such fee simple and absolute property in said real and personal estate, and falls for uncertainty."

It is to be regretted that there is no opinion extant in this case, so that we must look to the arguments of counsel, which are fully reported, for the reasons and authorities controlling the court in its decree.

A great number of cases are reviewed, including many of those relied upon in the argument here. It was pressed upon the court that under the language of the will the widow might sell, give, or waste the whole capital, as her absolute property, and no court could interfere to prevent her; that when such an unrestrained power has been given, and an absolute interest has vested in the devisee, there can be no valid limitation over to other persons; and this view was adopted by the court in its decree.

*May v. Joynes* has frequently been cited, and, while sometimes questioned, has never been overruled, and was followed by this court in *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, where the devise was to trustees for the daughter "during her natural life, and should she die and leave no child, in that case the property devised above or what remained of the same I give to my sister." Judge Harrison, delivering the opinion of the court, says:

"It cannot longer be doubted that the law is settled that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee."

In a note upon that case in 1 Va. Law Reg., at page 219, Judge Burks says: "It

cannot be doubted that, though property is devised or bequeathed to one for life, even in the most express terms, yet if, by other terms in the same instrument, it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner, for there can be no better definition of absolute ownership than absolute dominion.

"In such case the expressed life estate is enlarged into an absolute estate by the intention of the testator, deduced from the instrument as a whole. Where, however, an estate for life is given in express terms, the language in other parts of the will relied on to enlarge that into an absolute estate ought to be very clear, indeed, to have that effect."

This subject is fully discussed in a very learned opinion by Judge Green in *Milholten's Adm'r v. Rice*, 13 W. Va. 510, where, after an exhaustive review of the authorities, English and American, it is said: "It is settled that if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure (that is, to consume or spend, sell or give away, at his pleasure), such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a 'life estate,' and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee is given to another person."

In *Rubey v. Barnett* (Mo. Sup.) 49 Am. Dec. 112, it is said: "When an express estate for life is given by will, and a power of disposition is afterwards conferred, the devisee takes but a life estate, with power of disposition; and, if no disposition is made, the reservation will go to the heirs of the devisor. But if there is no previous devise of the life estate, but a simple power of disposition is given, then the devisee takes an absolute estate; and this rule applies to both real and personal estate."

In 4 Kent's Com. 319, the doctrine is stated thus: "A devise of an estate generally or indefinitely, with power of disposition over it, carries a fee. But when the estate is given for life only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed, unless there should be some manifest general intent of the testator, which would be defeated by adhering to this particular intent. And the rule is more flexible when a specific mode of exercising the power is in point."

In 3 Va. Law Reg., at page 65, there is an article by a writer of acknowledged authority, which, after stating that the cases are difficult to reconcile on any other principle than that of giving free play to the testator's intention, says the subject may be thus summarized:

(1) "When an express estate for life is given, and a power of disposition over the

reversion is annexed, the devisee for life will not take an estate in fee, notwithstanding the power to dispose of the inheritance. The express estate for life negatives the intention to give the fee simple, and converts those words into words of mere power, which, standing alone, would have been construed to carry an interest."

(2) "When a life estate is given the devisee, with power of disposition, the devisee is held to take a fee simple, if otherwise the manifest intention of the will would be defeated." This is stated to be by way of exception to the first general rule stated, and, as resting on intention, must depend on the construction of the particular will. "Thus, where the limitation is of a life estate, but there is given full power of disposition over the fee by deed or will, without limitation or restriction as to the time, mode, or purpose of its exercise, the devisee may be held to take, not the mere life estate expressly given, but the fee itself, by implication," which is the doctrine of *May v. Joynes*, supra.

We have quoted freely from this article, not only on account of its intrinsic merit, but because the statement that where there is a limitation of the life estate, with full power of disposition over the fee "by deed or by will," that the devisee may be held to take, not the mere life estate, but the fee by implication, was relied upon in argument by counsel for appellants as authority to show that in this case Francis Duff took an estate in fee.

We have, however, the best authority for the statement that the phrase "by deed or by will" is not to be taken distributively, but as referring to the full power of disposition by both deed and will, as together constituting the full power of disposition over the fee, which, if conferred without limitation or restriction as to time, mode, or purpose of its exercise, would serve to enlarge the life estate expressly given into a fee by implication.

Where an estate is given to a person generally, or indefinitely as contrasted with a gift of life estate, as to A., with power of disposition, it is held to amount to a fee simple. *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747. But even in this case, if a life estate only is plainly intended by the will, a fee simple in land, or an absolute interest in personalty, will not be construed to pass to the first taker, and a limitation over will be good. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322.

The authorities which we have cited, including the valuable monograph from 3 Va. Law Register, supra, clearly establish the distinction between a gift for life, with a power of disposition added, and a gift to one indefinitely, with the power of disposition by deed or will.

In *Burwell's Ex'rs v. Anderson*, 3 Leigh, 356, Judge Tucker says, "that a devise to A., to dispose at his will and pleasure, gives

a fee simple; but a devise to A. for life, and after her decease she to give the same to whom she will, passes but a life estate, with a power. Where such inconsistent life estate is given, the fee does not pass, for the whole matter rests upon intention."

We have seen that by the original will in this case the testator gave his son an estate in fee after the termination of the life estate to his wife, and that, for reasons satisfactory to himself, he revoked that section of his will, and made the codicil under consideration, by which Francis C. Duff is given an express estate for life, with a power of appointment by will, so that, so far from its defeating the manifest intention of the will to hold that the devisee takes a life estate, only, and not a fee simple, it would be in derogation of the apparent intention of the will to enlarge the life estate, which is expressly given, into a fee simple by implication.

Up to this point then, the intention of the testator and the rules of law are in entire harmony, for here there is no gift to the son generally or indefinitely with a full power of disposition over the fee without limitation or restriction as to the time, mode, or purpose of its exercise, but of a life estate with a power of appointment by will.

The next question to be considered is whether the devise of the life estate to a trustee for Francis C. Duff, to be held by said trustee for the use and benefit of Francis Duff and family during their lives, and then to be willed by Francis Duff to whom he may choose, and that the trustee is to hold the property free from all present and future liabilities of said Francis C. Duff and his family, made Francis C. Duff the sole beneficiary, or whether he takes jointly with his family.

Francis Duff has a wife, and no other family, and the question then resolves into this: Does the trustee hold the property devised for the sole benefit of Francis Duff, or for the joint benefit of Francis Duff and his wife during their lives?

We must revert again to the fact that by the original will Francis Duff would have taken what we will call, for brevity's sake, an estate in fee simple, and that the apparent reason for the execution of the codicil was that Francis Duff had become heavily indebted. The purpose of the testator then, clearly, was, by the codicil, to give to his son the beneficial enjoyment of the property devised to him, shielded from the claims of his creditors; but here we have an intent to which the court cannot give effect, because it is contrary to the law of the land.

In *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, this court held that "the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery, and the Ameri-

can cases which follow them, even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner, seem to us to be sustained by the better reason, and in furtherance of a wise public policy. Whatever right, whether legal or equitable, a person *sui juris* has in property, ought to be, and, we think, is, liable for his debts, except so far as is exempt therefrom by statute. Whatever rights of property the *cestui que trust* can demand from his trustees, his creditors ought to have the right to subject to the payment of their debts, unless his rights are so connected or blended with the rights of others that they cannot be subjected without prejudice to the latter's rights."

Whatever right, therefore, Francis Duff takes under this will, may be subjected by his creditors to the payment of his debts, for we think it plain that it bears no similitude to the case of *Nickell v. Handly*, 10 Grat. 336, where there was a gift of property of small value to a trustee for the support of a woman and her five children, and the court held that, under the circumstances of that case, the interest of the mother could not be subjected to her debts; that she and her children were not entitled to have set apart for each of them an equal share of the trust property or its annual products, but it was to be held by the trustee, and the annual products applied to the support of the wife and children according to the necessities of each; that the creditors would only be entitled to the ratable portion of the wife of any surplus of the annual products of the trust subject, after providing for the support of herself and family; and that, as there was no such surplus shown to exist, the bill was properly dismissed.

In the case before us the devise is either for the sole benefit of Francis Duff, or for that of himself and wife, and in the latter event his share could be set apart without injury to the interest of his co-tenant.

There is a numerous class of cases, beginning with *Wallace v. Dold's Ex'rs*, 3 Leigh, 258, which hold that a grant or gift to a woman and her children, or to a trustee for the benefit of herself and children, passes title to the mother, and that the mention of the word "children" in the deed or will merely indicates the motive for the conveyance or gift, without investing them with any interest therein. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

The most recent of these cases is *Tyack v. Berkeley*, 100 Va. 296, 40 S. E. 904, where many of these authorities are reviewed, and the doctrine is reaffirmed.

In *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. 306, it was said, however, that a gift to a wife and children, without more, vests a joint estate in the wife and children in equal portions.

All the cases belonging to the class now under consideration have been of a gift,

grant, or devise for the benefit of wife and children, or daughter and children; but the same rule of construction would apply to a grant or devise to a son and his children, or his son and his family, and the same tests would with propriety be resorted to in order to ascertain, in the case of a will, whether the testator intended by the addition of the words "and family" to a gift to his son to embrace the family as joint objects, with the son, of his bounty.

It will be observed that the gift is to the trustee for Francis Duff, and to be held by such trustee for the use and benefit of Francis Duff and his family during their lives, and then to be willed by Francis Duff to whom he may choose. To what does this power of appointment attach? The language of the will vests the property in the trustee, and Francis Duff is clothed with the power to dispose by will of the whole of it. The will of Francis Duff must speak at his death, and, if he may then will the entire estate held by the trustee, what becomes of the interest of his family? The trustee is directed to hold said property free from all present and future liabilities of Francis Duff. He is directed to hold not merely the interest as trustee of Francis Duff, but the whole of the property which passes to him under this devise. If the testator had not supposed that it vested for the benefit of Francis C. Duff, where would be the propriety in declaring that it should be held free from his liabilities? The interest of his wife, if any, could not be subjected to his debts, save by her voluntary act; and the language of the will, expressly exempting, not the interest of Francis C. Duff, but the whole of the estate which passed to the trustee, free from liability for his debts, would seem to be a circumstance pointing to the intent of the testator to make Francis C. Duff the sole object of his bounty, far more persuasive than the circumstances relied upon in *Wallace v. Dold's Ex'rs* and *Nye v. Lovitt*, supra, in *Stinson v. Day*, 1 Rob. 435, in *Leake v. Benson*, 29 Grat. 153, in *Bain v. Buff's Adm'r*, 76 Va. 371, in *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478, and in *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252, as vesting the entire estate in the wife or daughter, to the exclusion of her children or family.

When we reflect that Francis C. Duff was the son of the testator; that his family consisted of himself and his wife; that there were no children, who, as being the grandchildren of the testator, might with strong reason have been deemed the direct objects of his bounty; when we observe that the gift is to a trustee "for Francis C. Duff," his name being followed by a comma; then the words, to be held by "said trustee" (that is to say, the trustee for Francis C. Duff) for the use of Francis C. Duff and his family during their lives; that Francis is given the power to dispose of the whole of it by will to whom he may choose; that it is shielded

from liability for the debts of Francis C. Duff; that the language employed for that purpose applies not to any share or part of it, not to the interest in it of Francis C. Duff, but to the whole of it, which would have been not only unnecessary, but is misleading, if he was but a joint tenant for life with his wife; that if the wife, on the other hand, was to be deemed jointly interested in the whole estate, her share was left in a form in which it could be subjected to her debts, thus presenting the unusual situation of property being given to a man and a woman jointly, with immunity from the claims of creditors with respect to the interest of the man, while the bounty to the woman was left at the mercy of her improvidence and his importunity—when all these circumstances are considered, we are forced to the conclusion that the son was the sole object of the testator's bounty. His idea doubtless was that the devise to the son, free from the demands of his creditors, secured a support to him for life, and that, if his wife survived, the son would provide for her by his will in execution of the power of appointment with which he was clothed. Had the devise been to "Felix Gray, in trust for Francis C. Duff and his family," without more, the case would have been controlled by that line of decisions of which *Fitzpatrick v. Fitzpatrick*, supra, is the most recent example, and the wife of Francis would have taken a joint estate with him; but, looking to the situation of the testator and the son, we are satisfied that the son was the sole object of the testator's bounty.

It follows that the decree must be reversed, and the cause remanded to the circuit court, to be proceeded with in accordance with the views expressed in this opinion.

(101 Va. 537)

ALLISON et al. v. ALLISON'S EX'RS et al.  
(Supreme Court of Appeals of Virginia. June 11, 1903.)

WILLS—CONSTRUCTION—REMAINDERS—PRE-  
TERMITTED CHILDREN—BILL TO  
CONSTRUE WILL—COSTS.

1. Where the parties who will take cannot be ascertained until the happening of the event, the remainder is contingent.

2. Words used in a will should be given their ordinary and usual signification, but, where technical words are used they are presumed to be used technically, and words of a definite legal signification are understood as used in their definite legal sense, unless the contrary appears on the face of the instrument.

3. The word "heir," when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import.

4. Upon a devise to one for life, and at his death to the heirs of the testator, the heirs are to be ascertained as of the death of the testator, and not as of the date of the termination of the life estate.

5. Where there is a contingent remainder in fee simple, with an alternative remainder limited as a substitute, the latter is necessarily contingent.

6. Upon a limitation of real property to "heirs," the right heir, only, will take; upon a

limitation of personal property to "heirs," the word will be construed as "distributees"; upon a limitation of blended property to "heirs at law," the persons answering that description take the whole—if there is nothing to indicate a contrary intention on the part of the testator.

7. Words of survivorship are to be construed as referring to the testator's death, unless a special intent to the contrary appears upon the face of the will; and if, upon a fair construction of the whole will, there is a doubt as to the character of the remainder, the courts will hold it to be vested, rather than contingent.

8. The present capacity of taking effect in possession if the possession were to become vacant distinguishes a vested from a contingent remainder.

9. Code 1887, § 2528, providing for pretermitted children, was not intended to produce equality or to diminish the power of the testator, and any provision which affords evidence that the child has not been forgotten is sufficient to prevent the application of the statute; and a vested remainder, carrying with it a vested right of property, answers its demands.

10. Where the executors would inevitably have had to resort to the court for aid in construing the will, they should bear the costs of the litigation between claimants in which that construction is ascertained.

Cardwell, J., dissenting.

Appeal from Chancery Court of Richmond. Bill filed by one Allison against the executors of James W. Allison and others to obtain the construction of decedent's will. Decree rendered, and certain of the parties appeal. Decree amended, and, as amended, affirmed.

Christian & Christian, for appellants. Leake & Carter, Meredith & Cocke, J. Preston Carson, and Samuel A. Anderson, for appellees.

KEITH, P. The bill in this case asks the court to construe the will of James W. Allison made on October 2, 1835, and the codicil thereto dated November 29, 1892, which will and codicil are as follows:

"In case I should not return, this is my will with regard to my property: I give to Warner Moore the property on the dock between the creek and 17th streets, running from the dock to the river, to have and to hold—reserving, however, an annual ground rent free of all taxes and insurance or assessments of six hundred dollars per annum, which he is to pay to my sister, Jane E. Moore, during her life, and after her death to her daughters, Annie W. and Mary Elizabeth, to be divided equally between them so long as they both may live, and at the death of either, the whole amount to be paid to the survivor—at the death of the last one, the ground rent is to expire and cease and Warner Moore or his heirs is to have a fee simple title to the property.

"I give to my sister, Victoria Ellen Carson, ten thousand dollars in cash, to be paid by my executors at any time within two years after they qualify.

"All the residue of my estate, real, personal, and mixed, I give to my executors in trust for the sole and separate use of my daughter, Dora, wife of Thomas L. Moore,

to have and to hold for her benefit during her natural life, free from the control of her said husband, and at her death to be equally divided among her children, should any survive her—if she should die without issue, or if her surviving child or children should die before becoming of age, then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia.

"I nominate and appoint my brother, William H. Allison, and my nephew, Warner Moore, my executors, and request that no bond be required of them.

"Witness my hand and seal this second day of October, 1885.

"James W. Allison. [Seal.]

"With regard to settling up that business at the Plaster and Sumac Mill, it is my desire and will that Warner Moore should pay to my estate ten per cent. per annum for all the money I have advanced and expended in the purchase of the land and putting up the buildings left to Moore, and the cash given him from time to time. That is to say, I want ten per cent. per annum in the shape of a rental and interest, on the whole amount expended and furnished by me in the property and for the business—this for each year since the commencement of the business, on the amount at that time expended and advanced.

"And besides this rental I want one-fourth of the net profits of the business after deducting the aforesaid rental or interest. The bequest to Warner Moore is upon the condition that the business is settled up as here directed, otherwise it is to be void.

"Witness my hand and seal this second day of October, 1885.

"James W. Allison. [Seal.]"

"New York, Nov. 29, 1892.

"To provide against my sudden death causing injustice to my dear wife, Minnie Clemens Allison, I hereby direct my executor, or executors, to invest one hundred thousand dollars in good income paying real estate or in some safe stocks or bonds, preferably real estate, to be held by my said executor and my brother-in-law, Clemens Jones, as joint trustees for her sole and separate use, and benefit during her natural life, and at her death to go to her child or children, if there should be any by me—and if there should be no child or children by me, then to go to my legal heirs. I intend this legacy of one hundred thousand dollars for life to be in addition to the sum of fifty thousand dollars settled upon my said wife, Minnie Clemens Allison, by an ante-nuptial agreement between her as Minnie Clemens Jones and myself, executed at Fairfield, Conn., on or about December 10, 1890.

"As to the remainder of my estate, I wish it to be distributed as directed in a certain letter of testamentary directions written by me to my brother, Wm. H. Allison, from this city on the eve of my departure for Europe, in company with Calderon Carlisle—in the

fall of the year 1885, as nearly as I can fix the date—and I appoint my said brother and any one else named as executor in that letter as my executor or executors, and direct that no bond be required of him or them.

"In confirming the directions given in the letter herein referred to, I desire only such changes to be made as will equitably and practically carry out its intentions in case of the death of any beneficiary therein named making a change necessary, and I wish the legal heirs of any such beneficiary to receive such beneficiaries share.

"James W. Allison.

"Witness my hand and seal the day and year above written.

"James W. Allison. [Seal.]"

When the paper of 1885 was written the testator was a widower with one child, the appellee Mrs. Dora Moore. On December 4, 1890, in contemplation of marriage with the appellant Mrs. Minnie C. Allison, he settled upon her, in lieu of her dower and distributive share in his estate, the sum of \$50,000. On December 10, 1890, the second marriage was consummated; and on June 10, 1894, James W. Allison, the infant appellant, was born of this marriage. On March 25, 1898, the testator died, leaving a large estate, real and personal, and surviving him his widow, his daughter, Mrs. Dora Moore, his infant son, his brother, William H. Allison, his sister Mrs. E. V. Carson, and the descendants of two deceased sisters.

The first error assigned to the decree of the chancery court of the city of Richmond is that "its construction of the residuary clause of the will amounts merely to a declaration of future rights, and not necessary to any present relief to which any party is entitled; and upon the further ground that the persons who may be interested in such decision cannot be brought before the court, may not be in being, and would not be concluded by a decision at this time." The chancery court, however, being of opinion that it was proper to hear and determine all questions arising upon the pleadings, overruled this objection.

This assignment of error was waived at the hearing, and is only mentioned in order that the opinion may show what disposition was made of it.

The next question which we shall consider is as to the nature of the limitation of the residuary estate contained in the testamentary paper of October 2, 1885, after the death of Mrs. Dora Moore.

After making certain bequests, the testator gives the residue of his estate, real, personal, and mixed, to executors in trust "for the sole and separate use of my daughter, Dora, wife of Thomas L. Moore, to have and to hold for her benefit during her natural life, free from the control of her said husband, and at her death to be equally divided among her children, should any survive her—if she should die without issue, or if her surviving child or children should die before

becoming of age, then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia."

The bequest for life of the entire residuum of his estate to his daughter, which is at her death to be equally divided among her children, etc., creates a contingent remainder in such children, for, until the death of the daughter, it cannot be ascertained which of her children will survive her, and attain the age of 21 years. See *Howbert v. Cawthorn*, 100 Va. —, 42 S. E. 683, and authorities there cited.

The testator, having thus indicated the direction in which he preferred that his estate should go, then gives expression to his wishes with respect to the property in the event that his daughter should die, and leave no children to survive her and attain the age of 21 years. In that event he declares that he is content that the law shall take its course, and the property bequeathed for the benefit of his daughter be "divided among my heirs at law according to the laws of the state of Virginia." Did the testator intend that this ultimate bequest should be to his heirs at law living at his death, or those who answer that description at the death of the life tenant?

Counsel have, with zeal and discrimination, presented arguments and collated authorities upon each side of this interesting question. We are spared the labor of searching out authority, and only find it necessary to consider and weigh the cases which the assiduity of counsel have supplied.

The object in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used, for the object of construction is not to ascertain the presumed or supposed, but the expressed, intention of the testator; that is, the meaning which the words of the will, correctly interpreted, convey. *Wootton v. Redd's Ex'r*, 12 Grat. 206; *Hatcher v. Hatcher*, 80 Va. 171; *Waring v. Bosher's Adm'r*, 91 Va. 286, 21 S. E. 464.

In construing wills, the words used should be given their ordinary and usual signification; but, where technical words are used, they are presumed to be used technically, and words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Waring v. Waring*, 96 Va. 641, 32 S. E. 150.

"Like all other legal terms, the word 'heir,' when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy." 2 *Jarman on Wills* (Ed. 1881) 585.

With these rules of construction to guide us, we will now consider some of the cases bearing upon this subject.

Language similar to that in the will before us has been the subject of judicial construction in a great number of English cases.

In *Holloway v. Holloway*, 5 Vesey, 399, the bequest was to the daughter of the testator for life, and after her decease for such child or children as she shall leave at her decease, in such shares as she should think proper; and in case she shall die, leaving no child (which was the event), then £1,000 to her executors, and the remaining £4,000 in trust for such person or persons "as shall be my heir or heirs at law." It was held that the legacy vested in A. and the other two daughters of the testator, being his coheirs at law and next of kin at his death; the court holding that words must be understood in their legal sense, unless by the context or express words plainly appearing that it was otherwise intended. It will be observed that A., the life tenant, shared with her sisters in the ultimate remainder in her capacity as one of the heirs at law of the testator.

In *Lasbury v. Newport*, 9 Bevan, 376, a testator gave his residuary estate to his daughter for life, with remainder to her children, and in default of children to his next of kin. Held, that the class of next of kin was to be ascertained at the testator's death; following *Holloway v. Holloway*, *supra*, and distinguishing it from *Briden v. Hewlett*, 2 Mill & Keen, 90.

In *Urquhart v. Urquhart*, 13 Simons, 613, the testator directed one half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her, after his wife's death, but if she died first, without marrying or leaving issue, then that the trustee should accumulate the interest of the residue so far as it was not directed to be paid to his wife, and that on her death one half of the capital should be divided amongst his nearest of kin, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his death. She died a spinster, before her mother. At the mother's death the testator's sister was his nearest of kin.

Held, that by "my nearest of kin" the testator meant his nearest of kin at his own death, and not at the death of his wife, and consequently that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue.

It will be observed with respect to this case that the daughter was the life tenant of one-half of the residuum which ultimately passed to her representative, she being the next of kin to the testator at or before his death.

In *Nicholson v. Wilson*, 14 Simons, 549, the testator bequeathed a certain sum in trust to his daughter for life, and after her death to such of his other children as should be living

at her death, equally, if more than one, "and if but one child shall be then living, then unto such only child; and if all my children shall be then dead, then I give and bequeath the same unto my personal representative or representatives, and do direct my said trustees and the survivor of them, his executors and administrators, to transfer the same accordingly." At the testator's death his daughter S. and the other children named in the will were his next of kin. S. survived all other children. On S.'s death, M., who was testator's only grandchild, was testator's sole next of kin, and as such she claimed the whole fund.

Held, that the life tenant, S., and testator's other children, as his next of kin at his death, took the fund, instead of its going to M., as testator's sole next of kin at S.'s death. The court said that "though the next of kin of the testator at his decease, and the objects of the gifts, happened to be the same individuals, yet the question must be considered independently of the events that had happened."

In *Ware v. Roland*, 15 Simons, 587, the testator bequeathed a fund in trust for his wife and daughter for their lives, successively, with remainder in trust for the children of his daughter, and, if at her death she should leave no child living, in trust to sell the fund and pay A. and B. £500 each. If they should be alive at that time, and the remainder "to and among his heirs at law, share and share alike." The daughter was the testator's heir at his death. She died unmarried, and it was held that her personal representative was entitled to the fund, as part of her assets.

The bequest here was of a fund in trust for the wife and daughter, but neither that fact, nor that the daughter was the tenant for life, prevented her from taking the ultimate remainder as the testator's heir.

In *Gorbell v. Davison*, 18 Bevan, 556, there was a bequest to A. for life, with remainder to B. for life, and after their death to their next of kin, but, if no claimant should appear within twelve months after their death, then to charities. A. and B. were sole next of kin at the testator's death. Held, first, that the next of kin were to be ascertained at the testator's death; and, secondly, that A. and B. were not excluded from taking under the ultimate gift to the next of kin.

In *Bullock v. Downes*, 9 H. L. Cas. 1, the testator, in 1860, after bequest to different members of his family, gave the residue to three persons in trust to pay the dividends to his son for life, and after the son's decease to any widow of his an annuity of £600 for life, and the residue to his son's children, and, in case there should not be any child of the son, "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the statute of distributions of intestates' effects have become, and would

then have been entitled thereto, in case I had died intestate." At the testator's death he left four daughters and a son. The son married, enjoyed the dividends of the residue during life, and died without ever having had a child.

Held, that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them, that the persons entitled were to be ascertained at the death of the testator, that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that on the death of the son without issue the residue became divisible into five shares, of which his personal representative took one, and his sisters the other four.

No case could be of higher authority than this, and it was followed as late as 1897, in *Patten v. Sparks*, a syllabus of which is given in 15 Mews. Eng. Digest, at page 933.

We find, therefore, the law finally established in Great Britain by a line of decisions running from *Doe v. Lawson*, 3 East, 278, decided in 1803, to the case last cited, in 1897. See, also, *Doe v. Maxey*, 12 East, 589; *Smith v. Smith*, 35 Eng. Ch. 317; *Boydell v. Gollightly*, 37 Eng. Ch. 327; *Wrightson v. Macauley*, 14 Mee. & Wel. 214; *Seiffert v. Badham*, 9 Bev. 370; *Murphy v. Donegan*, 3 Jones & La. T. 539; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 523.

There have been, it is true, from time to time, decisions which are not in harmony with this current of authority. We shall not undertake to reconcile them, or to offer any opinion as to the sufficiency of the peculiar circumstances by which they have been discriminated from the cases we have quoted. There can be no doubt that the established law of England is in harmony with the principles enunciated in *Bullock v. Downes*. This is conceded by 2 Redfield, 92, note 104; and *Jarman on Wills* (6th Am. Ed.) p. 986, expresses the opinion "that at the present day it is not probable that such decisions will be made as those in *Briden v. Hewlett* and *Butler v. Bushnell*," which are among the cases to which we refer in general terms as being out of harmony with the established rule in England.

Coming now to the American authorities, we find that the Supreme Court of Illinois, construing a will by which the testator devised his estate to executors in trust, and after making provision for his widow, and some charitable bequests, directed that the remainder of his estate, real and personal, should be so managed and disposed of that one-half of the income thereof should be paid to his daughter during her life, with remainder to her children, should she have any, and, in case of her death without issue, her share should go to and descend to his heirs at law, and gave his son the balance of his

estate, the income thereof until he should attain the age of 30 years, and then the whole of his share. The son and daughter both died after the probate of the will, without issue, the son dying first. It was held that the heirs at law who were to take the share of the daughter after her death without issue were the son and daughter of the testator who were living at the time of his death, in the absence of anything in the will to show a contrary intention. *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254.

In *Buzby's Appeal*, 61 Pa. 111, the testator devised to his son "for life and from and immediately after his decease, then for the use and behoof of all and every child and children of said son that shall then be living and the lawful issue of such as shall be deceased, and for want of such child or children or lawful issue, then in trust for the use and behoof of my right heirs forever." The son died unmarried and without issue. Held, that he took an estate for life, and that the remainder in fee to the children and issue of those deceased was contingent. Held, also, that the heirs of the testator who were living at his death took under the last limitation.

In that case the court refers to the rule as laid down by *Redfield on Wills*, who says: "The devise or bequest of property to the testator's heirs at law means those who were such at the time of his decease, unless a contrary intent is obvious. But where there are intervening estates, and the remainder is contingent, it will be construed as having reference to those who shall sustain the relation of heirs at the time the estate vests in possession." In support of this doctrine, *Redfield* cites a number of Massachusetts cases, and among them *Abbott v. Bradstreet*, 3 Allen, 587, and *Sears v. Russell*, 8 Gray, 86. The Pennsylvania court observes that "the general rule is recognized in *Sears v. Russell*, and strictly followed in *Abbott v. Bradstreet*, and neither of them suggests any such modification of the rule as that stated by Mr. *Redfield*," and concludes as follows: "The limitation to the heirs must be construed to mean those who are such at the testator's death unless a different intent clearly appears. Whether the remainder be regarded as contingent or vested, the heirs of the testator who were living at his death are entitled to it under the limitation."

The English and Massachusetts cases to which we have referred were examined, and the conclusion reached that the heirs should be ascertained at the testator's death.

In *Abbott v. Bradstreet*, 3 Allen, 587, a bequest of the remainder after a life estate to the heirs at law of the testator was construed as referring to those who were such at the time of his decease, unless a different intent was plainly manifested; and that such intent was not to be inferred from the fact that those to whom the life estate was

given were among his heirs at law, or that a bequest was given to another heir at law "in full of any share she may be entitled to out of my estate." Judge *Hoar* delivered the opinion of the court. He reviews a number of English decisions, and reaches the conclusion that the doctrine announced in *Holloway v. Holloway*, supra, may now be considered as the law of England, and says that the English cases to the contrary are recognized as exceptional, and resting upon special circumstances indicative of intention.

In *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660, the testator, by his will, gave the income of a trust fund to his wife until his death or marriage, and, in either event, to his son and daughter; the principal, if the wife survives them and their issue, if any, to go on her death as she may direct by will, or, in default of a will, "then to my heirs at law." The bequest over is to the heirs of the testator at the time of his death.

Judge *Holmes* delivers in that case a brief opinion, in which he states the law, and the reason for it, in terse but yet comprehensive terms: "The general rule is settled, that, in case of an ultimate limitation like that of the fund in question to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. \* \* \* *Abbott v. Bradstreet*, 3 Allen, 587. The reasons for this rule are that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course."

In *Rotch v. Rotch*, 173 Mass., at page 125, 53 N. E. 268, the testator, by his will, directed that there be deposited a sum of money for each of his three daughters, the income to be paid to each for life, and upon the decease of each the deposit to be paid over to her children then living, and, in default of any lawful issue then living of such daughter, to be paid over "to my heirs at law as part of the residue of my estate, in the manner hereinafter directed concerning the same." He made a similar provision for each of his two sons; the fund, in default of issue, to be paid over "to my heirs at law, as hereinafter provided." The testator also directed that the residue of his estate be divided into so many equal shares that there might be one share set aside for "each of my children then living"; giving one share to each of his sons absolutely, and one share for each of his daughters, in trust, to pay the income to her during life, and on her decease to convey the trust property to her issue, and in default of issue to convey the same "to my heirs at law, to hold the same to them, their heirs, executors, administrators and assigns forever." E., one of the daughters, died after the testator's death, unmarried and without issue, leaving a will,



under which C. was the executrix and residuary legatee. Before the death of E. the interest of her deceased brother had been sold to her and to the three other surviving children of the original testator, in equal shares. Held, that those persons took the remainders given to the testator's "heirs at law" who were his heirs at his decease; that C., as executrix and residuary legatee, and aside from the purchase of the share of the deceased son, was entitled to receive a one-fifth part of the fund invested for E., and no more; that the share of the residue held in trust for E. by the trustee before her death was to be divided into four equal shares for the benefit of her surviving brother and two sisters and C.; and that the shares of the two sisters, as well as those of the brother and C., were to go to them absolutely, free of trusts.

In the course of its opinion the court said: "The slightest reflection would show a testator that, if he wished that, of such of his children as might be living at his death, none should have power over the trust property unless they were living when the particular estates fell in, he must do more than provide simply that the remainders should go to his heirs at law, whom he expected, or at least hoped, would be all his five children. Nor do we see anything in the general scheme of the will or in its other provisions which shows us that, in the clauses which we are to construe, the testator meant by the words 'to my heirs at law' his heirs to be determined as of any other time than as of the time of his own death."

This case would seem to be sufficient to establish the law of Massachusetts, but appellees place great reliance on *Heard v. Read*, which is reported in 169 Mass. 216, 47 N. E. 778. In that case the testator gave his daughter the residue of his estate, including the reversion in the dwelling house to trustees to pay a net income to the daughter for life, and, "at and after the decease of my said daughter, I give the said trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation. If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. H. and his heirs in fee forever, and the other part shall be divided among my heirs at law as though I died intestate."

Considering all the provisions of the will, a majority of the court were of opinion that the testator had in mind the heirs at law living at the time of the daughter's decease, when the one-half interest was to be divided among his heirs at law. How many of the judges dissented, or who they were, does not appear. The case cannot be reconciled with

other decisions of the same court which precede and follow it.

We come now to consider the Virginia authorities bearing upon this subject. In the case of *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387, the testator, dying in 1834, by his will limited an estate in fee to his daughter, Mrs. W., for her life, with remainder to her issue in fee, and in default of issue to his own heirs. At the time of testator's death, Mrs. W. was his sole heir. In 1857 she sold and conveyed the estate. In 1884 she died without ever having had issue, and in ejectment by S. and others, who were testator's heirs living at Mrs. W.'s death, against her grantees, to recover the estate, it was held that her grantees acquired perfect title by her conveyance.

In that case the court, in the course of its opinions, applying the law in force at the death of the testator, held that the rule in *Shelley's Case* controlled, by virtue of which Mrs. W. took an estate tail, converted by our statute into a fee simple. "But that fee-simple estate was determinable by her death without issue then living, with a limitation over in that case to the heirs of the testator, William Boush." This estate tail, thus enlarged by statute into a fee simple, having determined by the death of Mrs. Walke without issue living at her death, it became necessary to ascertain in which of the heirs of the testator the title vested under the terms of the will—the heirs living at the death of the testator in 1834, or those living at the death of the life tenant in 1884. Upon this point, says the court: "She [Mrs. Walke] was the only child and heir living at the date of the testator's will, and at his death she was to him the nearest and dearest, and was unquestionably the chief object of his affection and bounty. The testator therefore limited the estate, first, to her and her husband for life, and to the survivor for life; and, secondly, to her issue. But if she had no issue, then it would seem that he naturally would, lastly, prefer her—his only child and right heir—to others not so near in blood and affection, and give the estate to her absolutely, without limitation or restriction, to do with as she pleased. Such would be the natural conclusion, in the absence of anything in the will to the contrary, if we were driven to the ties of blood as they are known in the common experience of men, and were not confined to the will itself, to be read and interpreted in the light of well-settled legal principles." Discussing the will, the court saw nothing in the language used by the testator inconsistent with this natural inclination of a father to send his property along with his affection for his daughter and only child.

In that case the limitation was to the testator's heirs, and it was argued, therefore, that he intended a plurality of persons, and, as he had only one heir living at the time of

his death, he must have referred to some other period for the ascertainment of his heirs; but the court was of opinion that there was nothing favorable to the plaintiffs in error in the testator's use of the plural word "heirs," and that its use could not exclude the idea that the testatorial intent was to limit the estate to the daughter, who was the sole "heir," for where there is a gift to the heir (in the singular), and there is a plurality of persons conjointly answering to the description "heir," all are held to be entitled, and the converse is held to be true. 2 Lord Raymond, 829.

A number of English cases upon both sides of this question, some of which we have considered, are discussed in the opinion of the court, the Virginia cases up to the date of that decision are referred to, and the conclusion was reached that in England the rule which requires the heirs to be ascertained at the death of the testator, and not at the death of the life tenant, unless plainly controlled by the language of the instrument under construction, is fully settled in England, and that, while there had been no decisions in Virginia on the precise question at that time, the principle had been recognized and applied in analogous cases; citing *Hansford v. Elliott*, 9 Leigh, 79; *Catlett v. Marshall*, 10 Leigh, 79; *Martin v. Kirby*, 11 Grat. 67; *Brent v. Washington's Adm'r*, 18 Grat. 526; and *Corbin v. Mills' Ex'rs*, 19 Grat. 472.

Quite a number of decisions by this court since the case of *Stokes v. Van Wyck*, supra, have been cited. We have examined them, and can find nothing which militates against the current of opinion as established by the English cases, by those from Illinois, Pennsylvania, and Massachusetts, and with the rule applied in *Stokes v. Van Wyck*.

It is not contended that in any of the later cases the precise point here under consideration was adjudged, and a discussion of the more or less analogous principles which they illustrate would throw no such light upon the case before us as would justify an expansion of this opinion.

Ever mindful of the rule that the intention of the testator must prevail, that that intention is to be gathered from the language used, and that only technical words are to receive technical construction, and Lord Coke's maxim "to judge as near as may be according to the rules of law," we can find nothing in the language of the testator which controls the rule of construction established by the overwhelming weight of authority in England and this country.

Having reached the conclusion that the heirs are to be ascertained as of the death of the testator, it remains for us to determine the nature of the interest which they take under this clause.

Is the ultimate remainder to the heirs vested or contingent? We have already said that the limitation after the termination of the life estate to Mrs. Moore "to her children,

should any survive her, if she should die without issue, or if her surviving children should die before coming of age," created a contingent remainder in such children—a contingent remainder in fee. It follows that "no after limitation dependent upon it can be a vested one." Wash. on Real Property, vol. 2 (3d Ed.) p. 535. That author, at page 534, says: "Notwithstanding a remainder limited after a remainder in fee would be void, yet two remainders may be so limited, though each a fee, as to be good, provided this is so done that only one is to take effect; the one being a substitute for, and not subsequent to, the other. The consequence is that, if the first takes effect and becomes vested, the other at once becomes void. Such limitation is said to be of a fee with a double aspect."

*Minor's Inst.*, vol. 2, p. 418, is to the same effect: "Where the intervening contingent remainder is less than a fee simple, the remainder limited afterwards will be vested or contingent according to the terms of the limitation. There is no necessity, in the nature of things, that it should be contingent. *Fearne's Rem.* 223 et seq.

"Where there is a contingent limitation in fee simple absolute, no estate limited afterwards can be vested." *Fearne's Rem.* 225, 229-30."

"It is possible, however, even at common law, to limit two concurrent fees, by way of remainder, as substitutes or alternatives, one for the other; the latter to take effect in case the prior one should fail to vest in interest." *Minor's Inst.*, vol. 2, p. 394.

The law as thus stated by eminent text-writers is abundantly fortified by adjudged cases to which they refer.

We are therefore of opinion, with respect to the residuary clause, that it creates a life estate in Mrs. Dora Moore, a contingent fee in her child or children, and, upon a failure of these intervening estates, the ultimate remainder, which is up to that time contingent, will vest in those who were the heirs at law of the testator at his death.

Mrs. Minnie C. Allison, widow of testator, claims that she is entitled to share in the distribution of her husband's estate among "his heirs at law according to the laws of the state of Virginia."

The decree of the chancery court was adverse to her claim, and in her petition for appeal her counsel lays down, as propositions settled by the authorities, first, that, upon a limitation of real property to "heirs," the right heir, only, will take; secondly, that, upon a limitation of personal property alone to "heirs," the word "heirs" will be construed as "distributees," and the personalty will, under such a limitation, pass to those entitled under the statute of distributions.

From those principles, counsel deduce the conclusion that, where there is a blended gift of realty and personalty in one clause to heirs, the word "heirs" will be construed as

distributively, and will mean right heirs, so far as realty is concerned, and will mean distributees, with respect to the personality; that this is in accordance with the ancient rule of construction, *reddendo singula singulis*. In other words, the word "heirs" will be construed distributively, according to the nature of the two kinds of property; right heirs taking the realty, and distributees taking the personality.

The two principal propositions correctly state the law, but we cannot assent to the corollary deduced from them. The property which passes ultimately to the heirs at law of the testator is the residuum of his estate—real, personal, and mixed. At the date when the will in which this clause appears was written, the testator was a widower. He was again married, years after the execution of this will; and his widow could not, therefore, have been within the contemplation of the testator when it was written. The codicil which bears date November 29, 1892, was made, as it declares upon its face, in order that his sudden death might cause no injustice to his wife. He therefore directed his executors to invest \$100,000 in good, income-paying real estate, or in safe stocks or bonds, to be held by his executors and brother-in-law as joint trustees for her sole use during her life, and at her death to go to her child or children, and, if there should be no child or children of the marriage, then to his legal heirs. As to the remainder of his estate, he declares that he wishes it to be distributed as directed in accordance with a "certain letter of testamentary directions written by me to my brother William H. Allison on the eve of my departure for Europe," which is the will bearing date October 2, 1885, and adds: "In confirming the directions given in the letter herein referred to I desire only such changes to be made as will equitably and practically carry out its intentions in case of the death of any beneficiary named therein making a change necessary." The will, of course, speaks as of the death of the testator; but in construing it we are permitted to place ourselves as near, as may be, in the situation of the testator. We must look to the principal will, which bears date October 2, 1885, to the codicil of November 29, 1892, and, in the light of the facts disclosed in the record bearing upon those dates, give effect to the language in which the testator has clothed his will. Looking to his environment in 1885, it is impossible that he could have foreseen his second marriage, and his death, leaving a widow to survive him; and, as we have already said, he could not have contemplated her participation in the residuum of his personality as one of his distributees. If the will had been silent upon the subject, the inference would have been that, as he made no change in the will of 1885, it was to be modified by that of 1892 only so far as the first was inconsistent with the last expression of his will. This necessary conclusion, however,

is fortified by the express direction which he gives that only such changes are to be made as will carry out his intention as declared in the first will in case of the death of any beneficiary therein named. A resort, therefore, to the circumstances surrounding testator at the date of either will or at his death, gives no encouragement to the widow's claim to share in the distribution of the residuum as one of the distributees under the law.

The text-books and adjudged cases upon the subject seem, also, to be adverse to her contention.

In *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 523, the testator devised and bequeathed his real and personal estate to three persons, E., C., and R., in succession, and to their sons, successively, in tail male, "and for default of such issue I give and devise the same to my own right heirs forever." At date of testator's death, R., last tenant for life, was testator's heir at law, while McD. was testator's sole next of kin. McD. then died, when her personal representative filed a bill against R., claiming the whole of testator's personal estate for McD., decd., as testator's sole next of kin, while R. claimed that, should he die without a son, the whole of testator's personal estate would belong absolutely to him, as heir at law.

Held that, on the face of the will, it was the intention of the testator to make the two funds (i. e., real and personal) a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated.

The Lord Chancellor, in his opinion, says: "One class of this property he [R.] does not take in the character of right heir, but, being the right heir, he takes it as a gift under this will. It is perfectly clear that, if the personal property is given to him expressly, he will take it. The words are not used in two senses, but they are used in one sense, to carry both properties according to the intention. When the law, either by its own force, or in pursuance of the intention of the testator, to be collected from the will, carries the property, under those words, to the same person, there are not two senses put upon the same words, but the right heir takes both properties; whereas only one of those properties would necessarily devolve upon him; both would not, unless the testator had so expressly directed. \* \* \*

"As far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to be uniform—to give to the words the sense which the testator has impressed upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as persona designata. It is impossible to lay down any other rule of construction. Then we come to the mixed cases. I quite agree

that as to them the argument is still stronger against the appellant [testator's next of kin], for if the law is settled when you can collect the intention, as regards personal estate, the argument that it is so must, a fortiori, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate there can be no doubt or question but that the person who is described as heir is intended to take in that character. You therefore at once, in speaking of heir, impress upon the gift, or upon him who is to take it, his own proper character—that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labor under in the more naked case of personal property, and, having found that the testator meant what he has expressed as regards that portion which is real property, you may more readily infer the same intention as regards other portions of the same gift depending upon the same words, and you therefore allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone. The authorities here again are perfectly conclusive as far as they go. There is nothing on the other side."

*Gwynne v. Muddock*, 14 Vesey, 488, referring to the rule of *reddendo singula singulis*, says that "the testator could not mean that the next of kin should take the personal estate, for he blends all the real and personal estate together, and, after the death of A., directs that his nearest heir at law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the court to say who shall enjoy both. It would be contrary to the intention to divide them, and it would be contrary to the words to give the whole to the next of kin. Therefore the court has no alternative but to adhere to the words of the will, and permit the person who answers to the description of heir at law to enjoy the whole." *Boydell v. Gollightly*, supra; *Ware v. Rowland*, supra.

The rule established in *De Beauvoir v. De Beauvoir*, supra, was followed in *Haslewood v. Greene*, 28 Bevan, 1, and in *Smith v. Butcher*, 10 Ch. Div. 113.

Our attention has been called to a number of American cases upon this subject. Among them, *Clarke v. Cordis*, 4 Allen, 466, merits particular attention. The testator devised and bequeathed the residue of his real and personal estate in trust for the benefit of his four sons for life, and, on the death of all his sons, then said real and personal property to be conveyed and assigned to the "legal heirs of my said four sons respectively in equal proportions by right of representation, and their respective heirs, executors, administrators and assigns forever."

Held, that the word "heirs," if there is nothing in the will to show that the testa-

tor intended otherwise, will be construed according to its common-law interpretation, and will not include those who would be entitled to a share of the personal estate under the statute of distribution.

In the course of the opinion, the judge, after stating that the property which passed under the devise to the heirs of his sons embraced both real and personal estate, says: "Both species of property are to be held and enjoyed together by the same persons. They cannot be divided so as to vest the personal property in one class of persons and the real estate in another. It is therefore necessary to adhere to the words of the will, and to permit those persons who are technically described as legal heirs to take the whole." *Heard v. Read*, supra.

Among the text-writers, 2 Jarman on Wills, 610, after construing many cases in which the word "heirs" has been construed to mean next of kin, adds: "It need not be pointed out that in all the foregoing cases special grounds were assigned for departing from the proper sense of the word 'heirs'; and they will not be understood to warrant the general position that the word 'heirs,' in relation to personal estate, imports next of kin, especially if real estate be combined with personality in the same gift."

2 Williams' Exors. 970, is to the same effect: "But when the word 'heir' is used, not to denote succession or substitution, but to describe a legatee, and there is no context to explain it otherwise, it would seem that there is no room to depart from the natural or ordinary sense of the word 'heir.' \* \* \* A fortiori, the heir, properly and technically speaking, may take personal property bequeathed to him by that description when the intention of the testator in his favor appears upon the construction of the whole will, as where it is blended in the gift with real estate."

1 Roper on Legacies is still more to the point: "It being always a question of intention as to the meaning of the testator in the use of the word 'heirs,' if it appear that the intent was for the heir, properly and technically such, to take the personal estate, there can be no objection to his title. An instance of that intention may occur when a testator blends his real and personal estate together, and, after giving the fund to a person for life, directs that his next heir at law shall afterwards succeed to it. In this case, the intention that both estates should be enjoyed together is apparent, and to divide them by giving the one to the next of kin would be contrary to the words; consequently a court of equity has no alternative but to adhere to the description in the will, and to permit the person answering that description, viz., the heir at law, to enjoy the whole."

So in 4 Kent's Com. 537: "But if real and personal estate be devised, after a life estate, to the heirs at law, both the next of kin and the heir at law cannot take, if it appears

both descriptions of property were to go together; and then the heir will take the whole."

And in 2 Redfield on Wills: "But where real and personal estate is blended in the same bequest, there seems an inconsistency in giving the word 'heir' or 'heirs' a different import with reference to the different subject-matters combined in the same general disposition. This difficulty is referred to in some of the earlier cases. But the question was thoroughly reviewed, and all the cases bearing on this point considered, in the case of *De Beauvoir v. De Beauvoir*, and the rule fully established that in all such cases the word 'heir' or 'heirs' must receive its natural and ordinary import and construction."

We are aware that in some of the states a different rule has been established, but, in the absence of decisions of this court upon the subject, we are content to accept the law as declared by the English Court of Chancery, the Supreme Court of Massachusetts, and the eminent text-writers from whom we have quoted.

We are therefore of opinion that, as the residuary clause of the will blends real and personal estate and gives it to the heirs at law of the testator, the persons answering that description should enjoy the whole, there being nothing to indicate a contrary intention on the part of the testator.

By the codicil of November 29, 1892, the testator bequeathed to his wife for life \$100,000, "at her death to go to her child or children if there should be any by me, and if there should be no child or children by me, then to go to my legal heirs."

Some time prior to the testator's death there was born to him a son, James W. Allison, Jr., and our next inquiry shall be whether he took a vested or contingent remainder after his mother's death in the legacy of \$100,000.

Still keeping in mind the rules of construction already mentioned, we invoke one other, which may be considered as fully established by this court.

Words of survivorship are to be construed as referring to the testator's death rather than to that of the life tenant, unless a special intent to the contrary appears upon the face of the will; and that if, upon a fair construction of the whole will, there is a doubt as to the character of the remainder, the courts will hold it to be vested rather than contingent, in order that the estate or interest may vest at the earliest moment consistent with the terms of the instrument to be construed. *Hansford v. Elliott*, 9 Leigh, 79; *Martin v. Kirby*, 11 Grat. 67; *Cooper v. Hepburn*, 15 Grat. 551; *Stone v. Lewis*, 84 Va. 474, 5 S. E. 282; *Neilson v. Brett*, 99 Va. 673, 40 S. E. 32; *Chapman v. Chapman*, 90 Va. 410, 18 S. E. 913.

In *Gish v. Moomaw*, 89 Va. 345, 15 S. E. 868, the principle is thus stated at page 371, 89 Va., and page 876, 15 S. E.: "Words

of survivorship refer to the death of the testator, unless there be something in the context of the will to demonstrate an intention to make them refer to the death of the life tenant."

In *McComb v. McComb*, 96 Va. 779, 32 S. E. 453, it is said: "The settled rule of interpretation in this state is that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting be clearly indicated by the will."

In *Waring v. Waring*, 96 Va. 641, 32 S. E. 150, a devise to a son "during his natural life, and at his death to his children," was held to create a vested remainder in each of the children which was unaffected by a subsequent clause of the will devising the estate over in the event of the death of the son without lineal descendants living at his death, the son having left such descendants.

"The present capacity to take effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne's Remainder*, 215; *Crews' Adm'r v. Hatcher*, 91 Va. 381, 21 S. E. 811.

"It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues." *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. 538.

In the will before us a life estate is given to Mrs. Allison, "and at her death to go to her child or children if there should be any by me." At the death of the testator this bequest at once vested in the trustees for her benefit during her natural life. James W. Allison, Jr., her child, was then in existence, and at her death, at any moment of time, the remainderman stood ready to go into possession and enjoyment of the legacy. There was never any uncertainty as to the remainderman's right of enjoyment; there was an uncertainty as to his actual enjoyment of it, but there has been in the son, from the moment of his birth, a capacity to enter at once upon the enjoyment of the remainder immediately upon the determination of the precedent life estate.

We have found the rule no better stated than in *Moore v. Lyons*, 25 Wend. 119: "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is in esse and ascertained,

provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is in esse and ascertained, be immediately converted into a vested remainder."

Fitting the rule as here announced to the will before us, it is plain that the remainder is limited to take effect in possession immediately upon the death of Mrs. Allison, an event which must unavoidably happen by the efflux of time. The remainderman is in being and ascertained, and nothing but his own death before the determination of the particular estate will prevent the remainder from vesting in possession in him.

There is nothing in the case of *Howbert v. Cawthorn*, 42 S. E. 683, 100 Va. —, at variance with the authorities we have cited. In that case there was a devise by the testator for the use of his wife, with remainder in fee simple to his children living at her death, and the descendants of such as might be dead, and, if there should be no children or descendants living at the death of the wife, then to certain persons named. Held, that the remainderman who would take after the termination of the life estate could not be ascertained until the death of the life tenant, and therefore a child had no vested interest during the lifetime of the mother, but only a contingent remainder.

The court was of opinion that the limitation was to the children who survive the life tenant, which, of course, could not be ascertained until her death.

The distinction between *Howbert v. Cawthorn* and the case under consideration will plainly appear by reference to a quotation from *Washburn on Real Property* (3d Ed.) § 1, pars. 17, 18, top pages 507, 510:

"The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. By capacity, as thus applied, is not meant simply that there is a person in esse, interested in the estate, who has a natural capacity to take and hold the estate, but that there is, further, no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A. for life, remainder to B., B. has a capacity to take this at any moment when A. may die. But if it had been to A. for life, remainder to B. after the death of J. S., and J. S. is still alive, B.

can have no capacity to take until J. S. dies. When J. S. dies, if A. is still living, the remainder becomes vested, but not before."

In *Howbert v. Cawthorn* the children who were to take were in being, but the possession could only vest in them in the event of their surviving their mother, an event which could not be ascertained until the mother's death. There was no time during the existence of the life estate when there was any person in being with capacity to take the estate in possession, should the possession become vacant. Only those children were clothed with the capacity of enjoying the remainder in possession who survived the wife, which could not be ascertained until the death of the wife. Here then was an intervening circumstance, in the nature of a condition precedent, which was to happen before the children could take in that case.

In this case the period of survivorship has been fixed at the death of the testator, and not that of the life tenant. If the language of the will had been as it is inadvertently stated to be in the brief of one of the learned counsel, if the testator had made the bequest to his widow for life, and then to go to her child or children, "should there be any by me at her death," the argument in favor of survivorship at the death of the life tenant would have been much more persuasive; but what the testator did say is very different. He gives the life estate to his widow for her natural life, "and at her death to go to her child or children if there should be any by me." The condition is obviously annexed to the actual enjoyment of the gift, and not to the right of enjoyment. *Williamson v. Field*, supra.

We are of opinion that James W. Allison, Jr., took a vested remainder in the bequest of \$100,000 to trustees for the benefit of Mrs. Allison for life, with remainder to her child or children.

At the date of the will and codicil, Mrs. Dora Moore was the only child of the testator. After making the codicil of November 29, 1892, there was born to him a son, James W. Allison, Jr., who claims to be a pretermitted child, and invokes for his protection section 2528 of the Code of 1887, which is in part as follows:

"If a will be made when a testator has a child living, and a child be born afterwards, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate."

We have before us a will made when the testator had a child living. There was a child born to him afterwards, which child was not provided for by any settlement, nor expressly excluded by the will, and we are left to inquire whether he was "provided for" or "only pretermitted."

We have seen that James W. Allison, Jr., as one of the heirs of the testator living at his death, takes a contingent remainder in one-half of the residuum of the estate after the death of the life tenant, Mrs. Moore. We have seen that he takes a vested remainder in the legacy to trustees for the benefit of his mother for life, and at her death with remainder to her child. Do these remainders constitute such a provision for the after-born child as is contemplated by section 2528 of the Code of 1887?

"A vested estate gives a certain and fixed right of present or future enjoyment; that is, an interest clothed with a present legal and existing right of alienation."

"An interest when vested, and whether it entitles the owner to the possession now or at a future period, is fixed and present; so that the right of ownership over the land or other subject of property, to the extent of the estate, may be aliened." 1 Preston, Est. 65.

"A vested remainder is as truly a present fixed property or ownership as is an estate in possession." 3 Pom. Eq. § 1236.

In *Jackson's Adm'r v. Sublett*, 10 B. Mon. 467, it is said: "The person entitled to a vested remainder has an immediate, fixed right of future enjoyment, that is, an estate in present, though it can only take effect in possession and pendency of the profits at a future period."

In *Poor v. Considine*, 6 Wall. 458, 18 L. Ed. 869: "A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro."

It is needless to cumulate authorities upon this subject. The existence of the present right, as distinguished from its future enjoyment, is an inherent, an essential quality of all vested remainders.

We shall not attempt to estimate the present value of the remainders, one vested and the other contingent.

The statute does not require the testator to make provision for the child by placing him upon a footing of equality with other children or objects of his bounty, and the provision need not be adequate to his maintenance, education, and support. The section under consideration imposes no limitation upon the power of the parent; it merely declares how he shall exercise the unquestioned right to dispose of his property by will as he sees fit. This plainly appears from the language of the statute, for the testator may exclude the after-born child from all participation and enjoyment of any part of his property, but the intention to do so must be expressed. To pretermitt is to pass by, to omit, to disregard. If the intention to exclude appears upon the face of the will, the child has not been omitted or passed by. If the child has been provided for by the will, the value of the provision is not the subject of inquiry by the court, for, however inadequate the provision may be, it would yet be true that the child was not pretermitted, had not been omitted, pass-

ed by, or disregarded. Such seems to be the plain language of our statute.

Decisions from other states construing statutes peculiar to their own jurisdiction give us but little aid.

In *Hockensmith v. Slusher*, 26 Mo. 237, the court, construing the statute concerning pretermitted children, says that its object is "to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten. The statute extends only to a case of entire omission, and the mention of a child, without a legacy or other provision for him, is sufficient to cut him off from a distributive share of the estate; and whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator, and was not forgotten or unintentionally omitted. Thus it has been decided that by the mention of a daughter, though dead at the time of making the will, it will be inferred that her children are not forgotten. The mention of grandchildren will exclude the parent. Naming a son-in-law is sufficient to show that the daughter was brought to the recollection of the testator, and naming two grandchildren will indicate that their brothers and sisters not named were intentionally omitted." *McCourtney v. Mathes*, 47 Mo. 538.

In *re Minot*, 164 Mass. 38, 41 N. E. 63, it was held: "There is no omission to provide by will for children, if there should be any living at the testator's death, within the meaning of Pub. St. 1882, c. 127, § 21, if, after a bequest to his wife, whom he knew to be pregnant at the time of making the will, he gave the whole of the rest of his property to a trustee to pay the whole income to the wife during her life, and the reversion to those who, at the time of her death, would be her heirs at law by blood."

In *Meares v. Meares' Ex'rs*, 26 N. C. 192, the court uses the following language: "The statute only provides for the case where the parent dies without having made provision for the child; which means, without making any provision. For the act does not mean to judge between the parent and child as to the adequacy of the provision he may choose to make, but only to supply his accidental omission to make one."

In *Stevens v. Shippen*, 28 N. J. Eq. 535, construing a similar statute, it is said: "The Legislature surely did not intend to compel a testator to admit an after-born child to an equal share of his property with his other children, under all, if not provided for by what is technically known as a settlement; for it permits him absolutely to disinherit such child, though the child be not provided for by settlement. \* \* \*

"If the testator is, under the act, at liberty, as he undoubtedly is, to disinherit his children born after making his will, he is, of course, at liberty to make an unequal division of his property by will between his children born before making his will and those born afterwards."

The case of *Estate of Callaghan*, 119 Cal. 541, 51 Pac. 860, 39 L. R. A. 689, is a remarkable one. The Civil Code in that state provides (section 1307): "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section."

After disposing of the great bulk of her estate, the testatrix says: "I own six acres of land, more or less, in Alameda, Alameda county, California. Said land I give, devise and bequeath to Bertha and Josephine, the two children of Sherwood Callaghan, to be held and enjoyed by them during their lives, and the life of the survivor of them, and in case of their death, leaving issue, then to such issue, share and share alike, according to representation. But, in case the said Bertha and Josephine die without issue, then said property shall revert to my son, Daniel Callaghan, and my daughter, Mary Bailey, share and share alike." No other mention was made of the grandchildren, Bertha and Josephine. Upon the trial, evidence was offered to show that the testatrix did not own any land in Alameda county at the time the will was made, or thereafter up to the time of her death, and that the estate did not own or claim to own any land in said county; that the testatrix once owned 25 acres in Alameda county, but had sold and conveyed the same to one Hawley before the making of the will, and had never owned or claimed to own any land in said county other than that sold to Hawley; and that said grandchildren had never received any portion of the estate of the testatrix in her lifetime by way of advancement. This evidence was objected to and excluded, and the case was taken to the Supreme Court, which said:

"The words, 'omit to provide,' as used in said section, mean simply an omission to make provision in the will, and has no reference to the pecuniary value of such provision. It is apparent that the Code provision in question expresses no intent to in any way limit the disposing power of the testator, or compel him to provide for any child, for it clearly provides how the testator may decline to give anything to any such relative. This being so, what is the object of the provision? Nearly all the states have provisions substantially the same as that here under consideration, and, as such a provision is not intended as a limitation of the power of a person to dispose of his property by will, it

has been uniformly held that the provision applies only to a case where a child or descendant is unknown or forgotten, or for some reason unintentionally overlooked. "The object of this statute was to guard the testator against the effect of a mistake in providing for some of his children, to the exclusion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were forgotten."

"In the case of *Payne*, 18 Cal. 291, the exact provision as it now stands in the Code was under review, and Field, C. J., speaking for the court, said: 'The children are mentioned three times in a codicil, showing that they were in the mind of the testator at the time, and not overlooked in the disposition of his property. And the only object of the statute is to protect the children against omission or oversight, which not unfrequently arises from sickness, old age, or other infirmity, or peculiar circumstances under which the will was executed. When, however, the children are present in the mind of the testator, and the fact that they were by him is conclusive evidence of this, the statute affords no protection if provision is not made for them.'"

In that case a bequest of property which existed merely in the imagination of the testatrix was sufficient to show that the grandchildren, who were the nominal beneficiaries of this unreal bounty, were not forgotten, but were in the mind of the testatrix, and therefore not "only pretermitted."

The Wisconsin statute reads as follows: "When any child shall be born after the making of the parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision shall be made for such child." Rev. St. 1898, § 2283.

The will under consideration in the case of *Verrinder v. Winter*, 98 Wis. 287, 73 N. W. 1007, contained this provision: "I hereby bequeath to my wife, Margaret Winter, two-thirds of my estate while she remains my widow, if not, one half to go to her heir, and the other third to go to my brother, David Winter."

The will was made in extremis. The testator left no child then born to him, but left his wife pregnant—of which fact he was aware. The court held that the words "her heir" referred to "her unborn child" with absolute certainty; that the remainder to "her heir" was contingent, depending upon the widow's possible marriage. After stating that the authorities were somewhat at variance as to whether a "contingent remainder" was a provision, the court declares:



But we do not find it necessary to decide the point in this case, because, as we view the case, the result in either event is the same.

"It is clear that the testator referred to the child in his will, and gave it a contingent remainder in one-third of his estate. It also seems clear that he intended to give the child just what the terms of the will give it. Now, if such a contingent remainder be a 'provision' for the child, within the meaning of the statute, then the first contingency above named has happened, and the will must prevail; and if, on the other hand, such a remainder is not a 'provision,' then the will shows the intention of the testator not to make a 'provision' for the child, within the meaning of the statute, and the will must likewise prevail. The word 'provision' must have the same construction when used in the two parts of the same section, and, giving it that construction, we see no logical escape from the conclusion above stated."

In *re Donjes' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885, the court says: "Considering our own statute untrammelled by the varying decisions of other courts, it must be borne in mind that the legislative purpose was not to restrict the parent, nor to dictate to him what provision he should make. It is not to control his intention, but to provide for after-born children in the not improbable event of forgetfulness or oversight of the parent, upon the very presumption, indeed, that if he thought of them he would have intended that they should have some share in his estate, and that share the law would then fix. The power of the testator to decide whether anything, and, if so, how much, and in what form, should be given to after-born children, is as uncontrolled as if there was no statute on the subject. And if it be apparent that he was not forgetful, that he had the after-born child in mind, and satisfied the statute by making for it some provision, we do not conceive it the purpose of the statute nor the province of the court to say that such will shall not govern, but that he not only must make some provision, as the statute requires, but must make provision adequate, in the opinion of the court, or provision in any particular form. Such holding seems to us to import into the statute words and purpose not necessarily there, and would infringe upon the freedom of will in disposing of property and regulating estates. It is not apparent why it should not be as much in the power of the testator to place a child, born after the making of his will, in a state of dependency on the mother, as it confessedly is to do so with the child in existence at the time the will was made. The perils to the child in each case are the same, and the reasons justifying, or failing to justify, interference by the Legislature with the parent's wishes on the subject, do not vary in one case from the other. Independently of our view as to the suffi-

ciency of this devise, still, we having decided that a devise is made, the same conclusion must be reached upon the same reasoning applied in *Verrinder v. Winter*, namely, that it appears from the will that such, and no other, donation was intended, and, if that is not a provision, none was intended."

The authorities are certainly not harmonious upon this subject. We might have placed the opposite construction upon our statute and found decisions to support such a conclusion. Without the aid of any authority, but relying only upon established rules of construction to ascertain the meaning of our statute, we would be constrained to hold that any provision which afforded evidence that the child had not been forgotten was sufficient to prevent the application of the statute; that the statute did not intend to produce equality, or to diminish the power of the testator, but merely to regulate its exercise; and that a vested remainder carrying with it a vested right of property, though postponing its actual enjoyment, answered the demands of the statute.

We are of opinion that James W. Allison, Jr., was not pretermitted by his father's will:

Upon the whole case we are of opinion that the decree of the chancery court of the City of Richmond is erroneous in holding that the ultimate remainder to the heirs of the testator vested at his death, and that in this respect the decree appealed from should be amended, and, as amended, affirmed.

We are also of opinion, in view of the novelty and difficulty of the questions presented for decision in this record, and that it would have been eventually necessary for the executors to ask the aid of the courts in construing the will of their testator, that the costs should be paid out of the estate in their hands to be administered.

CARDWELL, J. I dissent from so much of the opinion of the court in this case as holds that Mrs. Moore and James W. Allison, Jr., who take the ultimate remainder in the residuum of their father's estate, take a contingent and not a vested interest therein, and will briefly state my views, and cite the authorities upon which I mainly rely.

As an original proposition, I would never give my assent to the application of a rule of construction to the will in this case which requires that the words "my heirs at law according to the laws of the state of Virginia," as used by the testator, James W. Allison, deceased, in disposing of the ultimate remainder in the residuum of his estate, are to be taken as referring to his heirs, etc., to be ascertained as of the period of his own death, and not at the death of his daughter, Mrs. Moore, who is to enjoy the whole of this residuum during her life. The application of this purely technical rule of construction has doubtless worked a hardship in many cases, overturning the apparent intent

of the testator, and I have the gravest apprehensions that this is the result in this instance; but the opinion of the court seems clearly to demonstrate that the doctrine of stare decisis fixes the rule upon us, and that under it the conclusion reached as to who are to take the ultimate remainder in the residuum of the testator's estate upon the death of his daughter, Mrs. Moore, without issue, who attain the age of 21 years, is inevitable.

Having reached the conclusion that the heirs of the testator who were to take the ultimate remainder are to be determined as of the death of the testator, the learned judge below, in my opinion, was plainly right in holding that those heirs, Mrs. Moore and James W. Allison, Jr., each take a vested remainder in fee in an undivided one-half of the residuum of their father's estate, subject to be divested only upon the happening of the events referred to in the intervening limitation to the children of Mrs. Moore, viz., the dying of Mrs. Moore leaving issue surviving her who attain the age of 21 years.

There has been no moment of time since the death of the testator when the heirs in whom the ultimate remainders vest were not in being and ascertained, and therefore every requisite of a vested remainder is found to exist.

A remainder is none the less vested because it is liable to be divested. *Lantz v. Massie's Ex'x*, 99 Va. 709, 40 S. E. 50, and authorities there cited. I refer also to the authorities cited in that part of the opinion of the court which deals with the bequest to trustees for the benefit of Mrs. Allison for life, with remainder to her son, James W. Allison, Jr., relying especially on *Howbert v. Cawthorn*, 100 Va. —, 42 S. E. 683; *Moore v. Lyons*, 25 Wend. 119.

(101 Va. 699)

#### MARTIN v. COLUMBIAN PAPER CO.

(Supreme Court of Appeals of Virginia. July 2, 1903.)

#### DESCENT AND DISTRIBUTION — RIGHTS OF HEIRS — CLAIMS OF CREDITORS — RES JUDICATA.

1. Where the property is insufficient to pay the debts of the ancestor, the heirs take only in subordination of the rights of creditors.

2. A final decision in a suit constitutes a bar to any other suit between the same parties or their privies involving the same subject-matter.

Appeal from Circuit Court of City of Bristol.

Action by Daniel Martin against the Columbian Paper Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Juo. E. Burson and H. W. Sutherland, for appellant. H. G. Peters, for appellee.

WHITTLE, J. In the year 1870 Christopher Martin died intestate, leaving a widow

and six children. He owned no personal estate, but was seised and possessed of  $1\frac{1}{2}$  acres of land, situate within the corporate limits of the city of Bristol. A creditor of the decedent, having obtained a judgment against the estate, filed a bill in equity against the administrator and widow and heirs to sell the lot in question for the payment of debts. Subject to the widow's dower, which was assigned, the land was sold, the sale confirmed, and the title conveyed to the purchaser. After several intermediate sales and conveyances, the property was purchased by the present owner, the Columbian Paper Company.

In August, 1900, appellant, Daniel Martin, one of the heirs of Christopher Martin, deceased, who, by oversight, was not made a party to the creditors' bill, brought suit against the surviving heirs and the various purchasers of the lot, in which he sought to have the several deeds to the same declared void, and the cloud which they cast upon his title removed, and the land partitioned among the heirs of Christopher Martin.

At the hearing the bill was dismissed, but without prejudice to any rights that plaintiff might have to sue at law. Thereupon Martin applied to this court for an appeal from that decree, which was refused.

In April, 1902, he filed a second bill, to which appellee was made a party, and in which he again asserts title to an undivided one-fifth interest in the lot, and prayed that the same, if practicable, might be partitioned in kind, and, if not, that the whole might be sold, and the proceeds divided.

To that bill the defendant filed a plea of res judicata, and to a decree sustaining the plea and dismissing the bill this appeal was allowed.

It appeared in the first suit for partition that Daniel Martin was an adult at the date of the institution of the creditors' suit; that the sale of the lot was confirmed in October, 1879, and that the suit to vacate that decree was not brought until August, 1900, nearly 21 years thereafter; and he assigns no sufficient reason for the long delay in the assertion of his rights.

It, moreover, appears, in April, 1877, when the land was sold, that the debts against the estate of Christopher Martin, deceased, amounted to \$178.40, and that the land sold for only \$95, of which sum \$63.75 were consumed in costs, leaving only \$31.25 to be applied to the payment of debts.

There was no suggestion that the sale was not a fair one, or that the lot brought an inadequate price. It thus appears that the property was insufficient to pay the ancestor's debts, and the heirs, of course, could only take in subordination to the rights of creditors. Upon that state of facts this court was of opinion that there was no error to the prejudice of Daniel Martin in the decree dismissing the bill, and denied an appeal.

The two suits were between the same par-

¶ 1. See *Descent and Distribution*, vol. 14, Cent. Dig. § 457.

ties, or their privies; they involve the same subject-matter, and have a common object, namely, to partition the land in controversy.

Upon familiar principles, therefore, the decree complained of, which sustained the plea of *res judicata*, and dismissed the bill in the present cause, is without error, and must be affirmed.

(101 Va. 709)

**PEERY v. ELLIOTT et al.**

(Supreme Court of Appeals of Virginia. July 2, 1903.)

**EQUITY—MULTIPLICITY OF SUITS—STATUTE OF FRAUDS—PART PERFORMANCE—DEEDS—PROPERTY CONVEYED—PRESUMPTIONS—BURDEN OF PROOF—PAROL EVIDENCE—MARSHALING ASSETS.**

1. Equity will not sanction the bringing of a number of suits to enforce liens against the real estate of a debtor, and thus unnecessarily harass and oppress him.

2. A parol agreement for the sale of land, where the vendee has been put in possession and has built permanent and costly improvements, will be enforced.

3. Prior to the legislative enactments changing the rule, open, notorious, and peaceable possession of property was notice to all the world of the rights of the party enjoying such possession.

4. Where there is nothing on the face of a deed to indicate that it embraces or was intended to embrace land, the beneficial interest in which and the possession of which the grantor has previously parted with, the presumption is that it was not intended to be embraced in the deed.

5. Where the description of the subject-matter of a deed is too vague and uncertain to be self-explanatory, the burden rests upon those claiming under it to show to what it truly applies.

6. Evidence aliunde is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter.

7. The doctrine of marshaling securities is a rule of equity founded in natural justice. For the principle to be applicable, both sources of payment must belong to a common debtor.

Appeal from Circuit Court, Bland County.

Suit by A. E. Peery, administrator of Elias Foglesong, against W. G. Elliott and others. Decree in favor of Elliott, and Peery appeals. Affirmed.

S. W. Williams, for appellant. W. J. Henson, for appellees.

WHITTLE, J. The controversy involved in this appeal is a branch of a litigation embracing seven separate suits in equity, all having the common object of subjecting the real estate of T. G. Hudson and Isaac Hudson to the satisfaction of liens.

A practice which thus harasses debtors by a multiplicity of suits, and subjects them to unnecessary cost, is oppressive, and ought not to be sanctioned by a court of equity.

Among the liens involved in that litigation is a deed of trust, bearing date April 25, 1835, from T. G. Hudson, conveying real estate, to secure a liability to Elias Foglesong, whose administrator is the appellant here.

The sole question for decision is whether or not that deed constitutes a lien on one-sixteenth of an acre of land, the property of appellee, W. G. Elliott.

It appears that T. G. Hudson and his father, Isaac Hudson, owned adjoining tracts of land in Bland county. In the year 1879, W. G. Elliott purchased from the former a small lot for a mill site, and at the same time purchased from Isaac Hudson and wife one-third of an acre of land, with certain water rights in the adjoining land for the use of the mill.

While the agreement in respect to these sales was in parol, Elliott was at once placed in possession of the property, and immediately commenced the erection of a flouring mill on the lot purchased from T. G. Hudson, and a dwelling house and other improvements on the other lot. On January 5, 1880, Elliott received a conveyance to the lot on which the mill is located; and on July 28, 1885, the one-third of an acre and the water rights were likewise conveyed to him.

It thus appears that the deed of trust was executed more than five years after the parol agreement referred to, and after Elliott had been placed in the open, notorious, and peaceable possession of the property, and had built permanent and costly improvements thereon, and, as shall be seen presently, after Foglesong had notice of the sale. So that, if the property were embraced in the deed of trust, the case would be controlled by the doctrine of *Withers v. Carter*, 4 Grat. 407, 50 Am. Dec. 78; *Floyd v. Hardin*, 28 Grat. 401; *Hicks v. Riddick*, 28 Grat. 418; *Long v. Hagerstown Agr., etc., Co.*, 30 Grat. 685; *Chapman v. Chapman's Trustee*, 92 Va. 537, 24 S. E. 225, 53 Am. St. Rep. 823.

It likewise appears that the deed of trust is general in its terms, and does not describe the land conveyed by courses and distances, and that there is nothing on the face of the deed to indicate that it embraces, or was intended to embrace, the mill tract, or any part of it. As the grantor, T. G. Hudson, had years before parted with the possession and all beneficial interest therein to a purchaser who had erected a valuable flouring mill on the property, the presumption is that it was not intended to be embraced in the deed of trust. At all events, where the description of the subject-matter of a deed is too vague and uncertain to be self-explanatory, the burden rests upon those claiming under it to show to what it truly applies.

"Evidence aliunde is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter." *Reusens v. Lawson*, 91 Va. 226, 235, 21 S. E. 347.

In this case no evidence was adduced for that purpose, and, although Foglesong twice gave his deposition in the cause, he made no claim that the Elliott mill property was included in his trust deed, and no denial that

he had actual notice of the prior sale. On the contrary, the evidence on behalf of appellee shows conclusively that only one-sixteenth of an acre of the land in controversy (the part on which the mill house stands) was ever owned by T. G. Hudson, that Foglesong had actual notice of the fact that it had been previously sold, and that he never asserted any claim to a lien thereon. In the answer of T. G. Hudson to an amended bill, to which Foglesong was a party, the following language occurs: "As to Elias Foglesong's deed of trust, this trust deed only properly embraces the land owned by respondent at the time of the execution thereof, and does not, and was never intended to, convey or embrace the Elliott mill property." That answer was prepared by the trustee in the deed, as counsel for Hudson, was sworn to by the latter, and to it no replication was filed by Foglesong. This is therefore an admission of record, to which the grantor, the trustee, and the cestui que trust are all committed, that the demand of Foglesong's administrator is groundless.

Exception was taken to the competency of the commissioner who took the account of liens and assets in the cause, on the ground that he had been examined as a witness, and the action of the court in overruling that exception is assigned as error.

His deposition had been taken before the account was referred to him, and appellant's counsel, with knowledge of that fact, raised no objection to his competency until it was ascertained that his findings were adverse to appellant's present contention. The exception, under these circumstances, was properly overruled.

The point was made at bar, although not in the petition for appeal, that, while the deed of trust may not have been a lien on the mill property, some of the judgments which were satisfied out of the proceeds of sale of the land included in the deed of trust constituted liens on both properties, and that, under the doctrine of marshaling securities, the trust-deed creditor is entitled to subject the mill property to the extent to which the property affected by his lien contributed to the discharge of prior judgments.

Without entering upon an extended discussion of the doctrine of marshaling securities, it is sufficient to say that it is a rule of equity, founded in natural justice, and will never be so applied as to operate an injustice to a party against whom it is invoked. For the principle to be applicable, both sources of payment must belong to a common debtor. *Russell v. Randolph*, 26 Grat. 717; *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781.

As was said by this court in *Lee v. Swenson*, 76 Va. 173: "One thing is very clear—that securities will never be marshaled to the injury of those persons over whom the party claiming the benefit of the principle has no superior equity."

The doctrine obviously has no application under the facts of this case.

The decree complained of, by which it was adjudged that the trust deed in question is not a lien on the property of appellee, is plainly right, and must be affirmed.

(101 Va. 714)

#### GOLD v. PAYNTER.

(Supreme Court of Appeals of Virginia. July 2, 1903.)

#### CORPORATIONS — STOCKHOLDERS — ASSESSMENTS — LIMITATIONS — DECREE — PETITION TO REHEAR — INJUNCTION.

1. As between a corporation and its stockholders, and as between creditors and the stockholders, the statute of limitations commences to run from the time when each assessment becomes due and payable under the calls made by the company.

2. If the contract of a stockholder in a corporation be not in writing, whether he be an original subscriber to the stock or an assignee, under section 2920 of Code of 1887, actions upon the contract to recover assessments are barred within three years.

3. The mere filing of a petition to rehear a decree by which a receiver of a corporation is directed to sue certain stockholders does not suspend its operation.

4. Enjoining the receiver of a corporation from prosecuting his suit against certain stockholders does not prevent him from instituting actions against others, as directed by a decree of court.

Keith, P., dissenting.

Error to Circuit Court, Roanoke County.

Proceeding by one Gold, receiver, against one Paynter. Judgment in favor of defendant. Plaintiff brings error. Affirmed.

Marshall McCormick and Barton & Boyd, for plaintiff in error. A. A. Phlegar and A. B. Pugh, for defendant in error.

BUCHANAN, J. The plaintiff in error instituted this proceeding by motion against the defendant to recover a judgment for an assessment against him as a stockholder in the Berryville Land & Improvement Company. The defendant filed two pleas of the statute of limitations: One that the cause of action accrued more than three years, and the other that it accrued more than five years, before the proceeding was commenced. To these pleas the plaintiff filed special replications, in which he set out the proceedings had in a creditors' suit brought by George A. Ricamore against the Berryville Land & Improvement Company, in which the plaintiff had been appointed receiver of the court and directed to collect the assessment sued for.

A brief statement of the proceedings had in that cause will be found in the opinion of the court in *Shickel v. The Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

The defendant demurred to the replication, his demurrer was sustained, and judgment rendered in his favor. To that judgment this writ was awarded.

The first question to be determined is when the statute of limitations commenced to run.

The plaintiff's contention is that the demand sued for was the amount of an assessment made by the court in the creditors' suit, and that the statute did not commence to run until it was payable under the decree of the court. The defendant, on the contrary, insists that it was an assessment upon his stock made by the directors of the company on June 10, 1891, and which became payable on the 20th of that month, and that the statute commenced to run from the last-mentioned date.

It appears from the proceedings had in the creditors' suit that a report was made which set forth the several amounts alleged to be due from the various stockholders upon calls made by the land company whilst it was a going concern. That report was confirmed by the decree of January 8, 1893, in which it was declared:

"(6) That the assessments of 40 per cent. on the stock of the Berryville Land & Improvement Company heretofore made by said company to discharge its indebtedness be, and the same are hereby, ratified.

"(7) That the court adopts as its own the calls or assessments of 40 per cent. heretofore made by said Berryville Land & Improvement Company on its stockholders, and does hereby make said assessments of 40 per cent. on all of said stockholders.

"(8) That all of the said stockholders, or their assignees, within 30 days from the rising of this court, shall pay to the receiver of the court in this cause the following amounts namely: \* \* \* 'F. V. N. Paynter [defendant in error] the sum of \$690.81, with interest on \$500.00, part thereof from Jan. 1st, 1897.' \* \* \* However, should said stockholders not pay said amount due by them, no execution is to be issued against them under this decree.

"(9) Should said stockholders refuse or fail to pay said amount due by them respectively as aforesaid within said 30 days, the said receiver is instructed to institute suits at law against said stockholders or their assignees who may be delinquent, and who are reported to be solvent in said Com'r Ward's report, and said receiver is authorized to collect from said stockholders, who are reported insolvent in said report, by compromise or otherwise, subject to the approval of the court, but said receiver is instructed not to institute any suit against delinquent stockholders who are reported insolvent in said report without the further order of the court."

The court made no new or additional assessment upon the stockholders. None was necessary if the balances due from the stockholders on the calls made by the company could be collected. The only effect of the court's decree was to direct the stockholders to pay the sums ascertained to be due from them to the receiver of the court, and, if they or any of them failed to pay within the 30

days named, then, against such as were solvent and in default, the receiver was directed to institute actions at law.

The general rule is that the statute of limitations begins to run from the time when each assessment becomes payable, and this follows necessarily from the language of section 2920 of the Code of 1887, which provides that the action shall be brought within the designated number of years "next after the right to bring the same shall have first accrued." *Minor's Inst.* p. 580; *Wood on Limitations*, §§ 149, 150; 1 *Cook on Stockholders* (3d Ed.) 195.

As between the company and its stockholders, there can be no question that the statute commenced to run from the time when the several assessments which made up the amount due from each stockholder became due and payable under the calls made by the company. *Code 1887*, § 1127; 1 *Minor's Inst.* 580.

But it is insisted that, whilst this is true as between the corporation and its stockholders, it is not the rule as between the creditors and the stockholders.

The authorities are in conflict upon this question, some of them holding that the creditors of the corporation will be barred by the statutes from proceeding against the stockholders for unpaid subscriptions whenever the company itself would be barred; others holding that as long as any part of the capital stock of a corporation remains unpaid in a stockholder's hands he is a trustee for the corporate creditors until their claims are satisfied, and that the statute of limitations does not run as to the creditors except from the time of the dissolution of the corporation, or from the time the creditors claim becomes due and payable or a judgment thereon has been recovered, or a call has been made by the court in a creditors' suit. See 2 *Thompson on Corporations*, §§ 2003-2009, 2028; 3 *Thomp. Corp.* § 3779; 1 *Cook on Stockholders*, § 195; *Beach on Private Corporations*; note to *Thompson v. Reno Savings Bank*, 3 *Am. St. Rep.* 827-829, and cases cited; *Scovill v. Thayer*, 105 *U. S.* 143, 28 *L. Ed.* 988; *Glenn, Trustee, v. Marbury*, 145 *U. S.* 499, 12 *Sup. Ct.* 914, 36 *L. Ed.* 790; *Swearinger v. Dairy Co.*, 198 *Pa.* 68, 75, 47 *Atl.* 941, 53 *L. R. A.* 471; *Glenn, Trustee, v. Williams*, 60 *Md.* 93; *Lane's Appeal*, 105 *Pa.* 69, 70, 51 *Am. Rep.* 166; *Glenn v. Semple*, 80 *Ala.* 159, 60 *Am. Rep.* 92; *Stilphen v. Ware*, 45 *Cal.* 110; *South Carolina Manfg. Co. v. The Bank, etc.*, 6 *Rich. Eq.* 227, 234, 235; *First Natl. Bank v. Greene*, 64 *Iowa*, 445, 17 *N. W.* 86, 20 *N. W.* 754; *Thompson v. Reno Savings Bank (Nev.)* 7 *Pac.* 870, 3 *Am. St. Rep.* 881; *Christensen v. Quintard*, 36 *Hun.* 334.

We have no decision upon this precise question, though the opinion in *Lewis' Adm'r v. Glenn, Trustee*, 84 *Va.* 947, 967, 968, 6 *S. E.* 866, seems to indicate that the court thought the statute would run upon an as-

assessment from the time it became due and payable, whether made by the company or by the court.

After the creditors' suit in *Ricamore v. The Land Company* was brought, and before the decree was entered directing the receiver to collect the assessment sued for, the Legislature provided, by an act approved December 22, 1897 (Acts 1897-98, pp. 16, 17, c. 20, § 2), that in all cases where it is necessary to resort to a court of equity for the purpose of settling and winding up the affairs of insolvent corporations, or to make assessments on unpaid stock subscriptions, the court shall direct the receiver or other representative of the creditors to sue at law when necessary to recover such call or assessment, and that such actions shall be governed in all respects by the provisions of that act; and that "all pleas, defences, and evidence which would be admissible if the company were solvent shall be equally admissible and shall have the same effect in law in any action brought after the insolvency of such company, except where the defence relied upon is an agreement on the part of the corporation not to assess the face value of the stock subscribed, and such agreement was unknown to the creditor at the date of his contract."

The object of that statute, as we construe it, was to enable a stockholder sued by a receiver of the court, or other representative of the creditors, under the provisions of that act, to make the same defenses, including the plea of the statute of limitations, to such action, as if the corporation itself were the plaintiff suing for the demand, except that he cannot set up as a defense an agreement on the part of the company not to assess the face value of the stock subscribed, and when such agreement was unknown to the creditor at the date of his contract.

The question under consideration being an open one in this state when that act was passed, this court, even if the act did not apply to this case, ought to adopt that view of the question which is in accord with the rule established by the Legislature upon the subject, and hold that the statute of limitations commenced to run upon the assessment sued for when it became due and payable under the company's call.

The next question is whether the three or five years' statute of limitations applies to the plaintiff's demand.

The replication avers that the defendant acquired his stock in the land company by transfer from D. B. Strouse, who subscribed for the same and other shares, in writing, not under seal, and that the certificates for the shares of stock held by the defendant were issued to him by the land company, on the written order of Strouse, before any assessment was made thereon, and that no certificate therefor was issued to Strouse.

It is not averred that the defendant entered into any contract in writing to pay the

assessments made on the stock transferred to him by Strouse, and for which a certificate was issued him by the company.

Section 1130 of the Code of 1887 provides that "on assignment the assignee and assignor shall be severally liable for any installments which have accrued or which may thereafter accrue, and may be proceeded against in the manner before provided." The original subscriber at common law is liable for all installments of, or assessments on, his stock subscription, agreeably to his contract, implied from his accepting and holding the certificate of stock, even though it be not express. "And so," says Prof. Minor, "where the assignee of the stock has come into privity with the company by having stock transferred to him on the company's books, a promise to pay the remaining installments is as much implied against him as it was against his assignor, and he is liable accordingly." 1 Min. Inst. 585. He is not bound by the contract which his assignor made with the company, but by his own contract and the statutes, which declare the extent of his liability. If his contract be not in writing, it comes within that class of contracts which section 2920 of the Code of 1887 declares must be sued on within three years next after the right to bring the same shall have first accrued. This was so held in the case of *Liberty Savings Bank v. Otter View Land Co.*, 96 Va. 352, 31 S. E. 511, in an action against an original holder of stock, and must be equally true in an action against his assignee who is sued upon a contract not in writing. The cause of action against the defendant first accrued on the 20th day of June, 1891, the day when the fourth call made by the company became due and payable. The statute ran from that time until March 11, 1893, at least, when the creditors' suit was instituted against the land company, though the stockholders were not made parties to it until some time afterwards. Section 2 of an act approved December 22, 1897, supra, provides that where chancery suits are pending at the time of the passage of that act, in which it is sought to recover unpaid stock subscriptions, the statute of limitations shall not run, as to any alleged subscription, during the time which shall have elapsed between the institution of such suit and one month after an order shall have been entered authorizing a common-law action, as provided for by that act, for the recovery of such subscription. The order or decree in the creditors' suit directing actions at law to be brought was entered January 8, 1898, but it gave the stockholders 30 days in which to pay, so that actions at law could not be instituted until after that time had elapsed. By the terms of that decree it was suspended for 120 days upon the execution of the usual suspending bond.

On January 3, 1899, Reed and McCormick, stockholders decreed against, filed a petition for a rehearing of that decree, accompanied

by a prayer for an injunction restraining the receiver from prosecuting his action at law instituted against them under the decree of the court. The injunction was granted on that day. Later, a similar petition was filed by T. J. Shickel, another stockholder. It is insisted that the filing of these petitions which sought to review and set aside the decree of January 8, 1898, went to the merits of the whole case, and the injunction granted, restraining the receiver in prosecuting his action at law against Reed and McCormick, suspended the receiver's powers under the decree of January 8, 1898, and stopped the running of the statute of limitations.

The mere filing of a petition to rehear the decree did not suspend its operation, and enjoining the receiver from prosecuting his action against Reed and McCormick did not prevent him from instituting actions against the other stockholders as directed by the decree.

On May 9, 1899, the court passed upon the petitions to rehear, modified the decree of January 8, 1898, by rejecting a debt which had been allowed, denied further relief, dissolved the injunction, and dismissed the petitions. Subsequently, Reed and McCormick and Shickel obtained an appeal and supersedeas to this court from the decree of May 9, 1899, and the former decrees in the creditors' suit, and on the 7th day of February, 1900, the supersedeas bond was given, and the decree of January 8, 1898, suspended. On the 17th of January, 1901, the decrees appealed from were affirmed by this court. On the 9th day of June, 1901, the proceeding in this case was instituted.

The statute of limitations was running, according to the view we take of the case, from June 20, 1891, to March 11, 1893; from July 8, 1898, to February 7, 1900; and from January 17, 1901, to June 8, 1901—aggregating more than three years before this proceeding was instituted.

We are of opinion, therefore, that there is no error in the judgment complained of, and that it should be affirmed.

KEITH, P. I cannot concur in the opinion of the court.

The contention of the plaintiff in error that the statute of limitations did not begin to run until the assessment was payable under the decree of the court, in my judgment, is right, and should prevail, and that, as a consequence, three years have not elapsed before the institution of this suit.

(101 Va. 833)

#### LITTON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 25, 1903.)

HOMICIDE—GRAND JURY—TRIAL JURY—EVIDENCE—HARMLESS ERROR—ORDER OF INTRODUCTION—VIEWING PREMISES—INSTRUCTIONS.

1. It is within the discretion of the court to impanel a regular or special grand jury to serve at any term.

2. It cannot be presumed that the court allowed to be put upon a trial jury jurors not found to be free from exception, where it appears from the record that a sufficient number of jurors had been found to be free from exception, and were in court.

3. Where a homicide has been committed by shooting, evidence in regard to certain shells found in a gun at the house of the prisoner after the homicide, which had been previously loaded with shot similar to those which entered the body of the deceased, is admissible to show intent, deliberation, preparation, and malice.

4. A judgment will not be reversed because of the admission of improper evidence, where the verdict clearly shows that no weight was given to it by the jury.

5. In a prosecution for homicide, it was not error to allow the prisoner to be asked on cross-examination: "What were you going to do? Were you going to shoot J. [deceased], whether you saw the pistol or not?"—he not having claimed his exemption, or suggested that his answer would criminate him.

6. Where a homicide has been proven, the burden is on the accused to extenuate, justify, or excuse his act, and the commonwealth may offer in rebuttal evidence of its version of facts shown by the accused.

7. Under Code, § 3167, which provides that "the jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such a view is necessary to a just decision," the court may, in its discretion, permit the jury to visit and view the premises where it is alleged a crime has been committed.

8. Where the instructions given, when read as a whole, set forth the whole case correctly and fairly, it is not error to refuse other instructions.

#### Appeal from Washington County Court.

Moses W. Litton was convicted of voluntary manslaughter, and brings error. Affirmed.

Hutton & Honaker, White & Penn, Daniel Trigg, and Walter H. Robertson, for appellant. William A. Anderson, Atty. Gen., and J. C. Wysor, for the Commonwealth.

CARDWELL, J. This is a writ of error to a judgment of the county court of Washington county, sentencing Moses W. Litton to confinement in the penitentiary for a term of five years for the killing of John Collings.

It appears that there was bad feeling between the prisoner and the Collings family, caused by the alleged depredation of the fowls of Collings on the lands of the prisoner; that the lands of the prisoner were near those of J. K. Collings, father of the deceased, being separated by a lane which ran near the barn of J. K. Collings; that on the 18th day of July, 1902, John Collings, the deceased, had been hauling hay, and had come to his father's barn, and, accompanied by his mother and sister (the latter carrying a Winchester rifle), went out to the adjoining meadow of the prisoner, where he was at work, to get a chicken which the prisoner had injured or killed; and that there the deceased and the prisoner had a difficulty, in which the deceased

¶ 7. See Criminal Law, vol. 14, Cent. Dig. § 1516; Homicide, vol. 24, Cent. Dig. § 555.

ed felled the prisoner to the ground by a severe blow upon his right cheek with a fork handle which he had brought with him, and then returned to his own home, near by. The commonwealth's evidence is to the effect that the prisoner was facing the deceased, with a stick in his hand, acting as though he intended to use it, when the deceased struck him on the side of his face, mashing his cheek bone and felling him to the ground, while the evidence of the prisoner, is to the effect that he was in a stooping position, picking up weeds, with his back to the deceased, when he received the blow.

This difficulty occurred between 3 and 4 o'clock in the evening of July 18, 1902. About 7 o'clock the same evening, after his wound had been dressed, the prisoner came out upon his front porch, taking a seat, with his double-barreled shotgun beside him, and upon hearing a wagon approaching along the public road in front of his house, and supposing the deceased was on the wagon, the prisoner took a position in the corner of his yard, near the yard fence running parallel with the public road, and next to the approaching wagon, with his gun in his hand, and when the deceased, upon a load of hay, and driving the team, with the lines in the left hand, and a whip in the right, was about opposite him, the prisoner raised his gun and fired, the load taking effect in the elbow of deceased's left arm, whereupon the deceased undertook to shoot at the prisoner with a pistol he had been carrying in his pocket or on the wagon; the discharge of the pistol and the second shot from prisoner's gun being simultaneous; the second shot from the gun taking effect in deceased's left side, over the heart. After the deceased was thus shot he continued to fire his pistol until its five chambers were emptied, but, as he was in a dying condition, the shots went wide of the prisoner. The prisoner then ran back to his house, about 45 yards away, got his Winchester rifle, came out again to the yard, and warned Smith, who was on the wagon, holding the deceased, to get out of the way; but, upon being told by Smith not to shoot—"You have already killed him"—the prisoner did not fire his rifle, and went back into his house. The deceased had then expired.

The first error assigned relates to the impaneling of the grand jury which found the indictment against the prisoner. Prior to the August term, 1902, of the county court, at which the prisoner was indicted, the judge of the court had, in accordance with the statute, furnished the clerk with a list of 48 persons to serve as grand jurors for a year, and the clerk had issued a venire facias for 12 of the persons on that list to serve at the August term, 1902; but in the meantime the General Assembly passed the act of July 28, 1902, amending section 3976 of the Code, prescribing who are qualified persons to serve as grand jurors, how they are to be selected, etc. The judge of the county court, deeming

it expedient to do so, on the 1st day of the August term, 1902, quashed the writ of venire facias for the grand jurors to serve at that term, and furnished the clerk with another list of 48 persons to serve as grand jurors for one year, beginning with and including that term, in accordance with the act of July 28, 1902; and from that list the clerk, as ordered by the judge, issued a writ of venire facias for 12 of said jurors to attend the day the writ was issued, to serve as grand jurors at the August term of the court, then begun. Thereupon all of the 12 grand jurors so summoned appeared in court, were duly sworn and examined according to law, and 11 of them were found to be free from exception, who were sworn a jury of inquest according to law, and thereafter, on the following day, presented the indictment upon which the prisoner was tried and convicted.

The contention made for the prisoner is that the court erred (1) in quashing the venire facias issued by the clerk on the 13th of August, 1902; and (2) in not impaneling a special grand jury, under the provisions of section 3978 of the Code, which are as follows: "A special grand jury may be ordered at any time by a county, corporation, or hustings court, or the judge thereof in vacation, the jurors to be summoned from a list furnished by the judge; and where a grand jury, regular or special, has been discharged, the court, during the same term, may impanel another grand jury, which may be a special grand jury."

Section 3977 of the Code, as amended by the act of February 25, 1890 (Acts 1889-90, p. 91, c. 115), provides that a regular grand jury shall consist of not less than 9 nor more than 12 persons, and a special grand jury of not less than 6 nor more than 9 persons; and clearly it was within the discretion of the judge of the county court of Washington county at its August term, 1902, to impanel a regular or a special grand jury to serve at that term. Having impaneled a regular grand jury, consisting of not less than 9 nor more than 12 persons, to wit, 11, selected from a list of 48 persons to serve as grand jurors for one year, beginning with that term, there is nothing whatever in the proceedings to vitiate the indictment found against the prisoner. *Shinn's Case*, 32 Grat. 907.

It appears that several lists and writs of venire facias were issued before a panel of 16 persons, free from exception, was obtained. from which the jury that tried the prisoner was selected. To each of the writs of venire facias the prisoner excepted, without assigning any grounds therefor, the exceptions were overruled, and this is assigned as error.

Several grounds are stated in the argument here, upon which we are asked to hold that the county court erred in summoning and selecting the jurors who tried the prisoner, among which, and the only ones that we deem it necessary to consider, are (1) that the record does not affirmatively show



that the original list furnished by the judge contained the names of 16 persons; and (2) that the jurors making up the panel from which the jury that tried the prisoner were selected were the jurors who upon their examination by the court were found free from exception.

The bill of exceptions upon which the assignment of error is founded sets out at length all the proceedings in the summoning, selecting, and impaneling the jury, setting forth that after the prisoner was led to the bar of the court, and issue joined upon his plea of not guilty, the sheriff returned the list furnished by the judge of the court, and the *venire facias* issued by the clerk thereof, which showed that all the persons named therein had been summoned; that they were solemnly called, and 14 of them (names given) appeared in open court; that other lists were furnished by the judge, and writs of *venire facias* issued by order of the court thereon, directing that the persons named be summoned, which was done, and the 2 persons so summoned appeared in open court, making, with the 14 already in court, 16; that thereupon, the jurors so selected and summoned all appeared in open court (naming them), who were duly sworn and examined according to law, and 8 were found to be free from exception; that another list was furnished by the judge, and a *venire facias*, No. 4, was ordered by him, and issued, as provided by law, to complete the panel of said *venire*, returnable that day; that some time thereafter the sheriff made return of same, which showed said persons had been summoned (naming them), and they appeared in open court, and were duly sworn and examined, and but 3 of them found free from exception; and that similar proceedings were taken until a sufficient number of persons free from exception were obtained to complete the panel, and from this panel the prisoner, by counsel, struck 4, and the remaining 12 were selected to constitute the jury for his trial (naming the 12).

In the first place, it is to be observed that the record shows that the judge furnished the list required by law; that the *venire facias* was issued by the court; that the sheriff's return showed that all the persons named on the list and writ had been summoned, and they were called, but 14 answered. It is unreasonable to suppose that if only 14 persons, who answered, and whose names were on the list furnished by the judge, were the only names on it, language would have been used, as is done in the bill of exceptions, showing clearly that more than 14 persons were on the list and summoned. We think that it clearly appears that the lists were furnished by the judge, and that the writs of *venire facias* were duly issued, all in accordance with the requirements of the statute relative to summoning and selecting juries in felony cases. In other words, we are of opinion that it is

a proper inference to be drawn from all that does appear in the record that all things have been properly done in the summoning and selecting of the jury in this case (Gilligan's Case, 99 Va. 816, 37 S. E. 962), and find nothing in the Barnes' Case, 92 Va. 794, 23 S. E. 784, cited by prisoner's counsel, opposed to this view.

What we have just said applies with equal force to the contention that the record fails to show that the jurors composing the panel of 16 persons from which the jurors who tried the prisoner were selected were the jurors who, upon their examination by the court, were found to be free from exception, and will only add that the record plainly shows that the jurors selected were all on one or the other of the lists furnished by the judge, and the writs of *venire facias* issued upon them, and that 16 of them were found to be free from exception. Therefore, to sustain the contention of counsel, we would have to presume that the court allowed to be put upon the jury the jurors not found to be free from exception, in the face of the fact that a sufficient number had been found to be free from exception and were in court. Such an error cannot be presumed. Gilligan's Case, *supra*; Dove's Case, 82 Va. 306.

The court is further of opinion that the county court did not err in admitting the testimony of George Rodgers and P. J. Davenport in regard to certain shells found in a gun at the house of the prisoner several hours after the homicide. The homicide had been clearly proven, and there was direct evidence on the part of the commonwealth as to the character of the shot found in the body of the deceased; and it was entirely proper for the commonwealth to show intent, deliberation, preparation, and malice on the part of the prisoner, by proof that he had in his possession shells fitting the gun he used, and which had been loaded previously to the homicide with similar shot to those which entered the body of the deceased. Moreover, the court, after a part of the argument of counsel had been heard, instructed the jury that, if they had any doubt as to the connection of the prisoner with the two shells produced in evidence by the commonwealth, they should discard the two shells and the evidence directly connected with them from their consideration; and the verdict of the jury, finding the prisoner guilty of voluntary manslaughter, showing, as we think, conclusively, that this evidence in no way affected the jury in their deliberations, it is impossible, even if it were conceded that it was inadmissible, that this evidence could have had any effect prejudicial to the prisoner. It was clearly admissible, as we have said, to show deliberation, preparation, and malice; and the court having, in clear and unmistakable terms, instructed the jury to disregard it if they had reasonable doubt that the prisoner was connected with the two shells produced, there

was no ground left upon which he could complain of its introduction.

While it is a general rule that the judgment must be reversed where illegal or improper evidence has been allowed to go to the jury, the rule is wholly inapplicable to a case like this, where the evidence complained of was admissible; where the court, out of abundant caution, gave the instruction above mentioned; and where the verdict clearly shows that no weight was given to the evidence objected to by the jury. *Porterfield's Case*, 91 Va. 803, 22 S. E. 352.

The court is further of opinion that the county court did not err in allowing the question: "What were you going to do? Were you going to shoot John, whether you saw the pistol or not?"—to be asked the prisoner on his cross-examination.

"A party, when examined as a witness, may be asked as to his own motives and intention, when these are material." *Jackson's Case*, 96 Va. 111, 30 S. E. 452; *Thompson on Trials*, § 642, and note on page 525.

In this case the prisoner, when asked the question above mentioned, neither claimed his exemption, nor suggested that his answer to the question would criminate or tend to criminate him. On the contrary, he answered voluntarily, and his answer was in fact in his own favor, and certainly not to his prejudice.

The court is further of opinion that the court did not err in admitting in rebuttal the evidence introduced on behalf of the commonwealth as to the occurrence in the meadow several hours before the homicide. The commonwealth not only has the right to conduct its case as its representative may see fit, within reasonable limits, but to rest its case when the homicide is proven. Then the burden is on the prisoner to extenuate, justify, or excuse his act; and, the prisoner having put in evidence the occurrence in the meadow, it was entirely regular and permissible for the commonwealth to introduce, in rebuttal or reply, evidence to show its version of that occurrence. Therefore there was no error in permitting this to be done.

After all the evidence had been introduced, but before the case had been submitted to the jury, and before the instructions were given by the court, the attorney for the commonwealth moved the court for a view on the part of the jury of the grounds where the homicide was committed—stating that he deemed it necessary for a proper understanding of the cause—to which motion the prisoner objected, the objection was overruled, and the jury ordered to be taken to the grounds by the officers of the court; and this ruling of the court is assigned as error.

It is not suggested that every safeguard was not thrown around this proceeding, or that the jury was not in proper legal custody, or that evidence was taken on the view, or that the conduct of the jury was not free from exception; nor does it appear that the

prisoner and his counsel were not present, or were denied that right. Therefore the only contention made in this connection is that it was error to order the view over the objection of the prisoner.

There is conflict of authority whether the court may, at common law, in its discretion, permit the jury to visit and view the premises where it is alleged a crime was committed, not for the purpose of furnishing evidence upon which a verdict is to be founded, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court. 9 *Amer. & Eng. Enc. L.* 725; 22 *Enc. Pl. & Pr.* 1038, and authorities cited. But in our opinion, the matter is controlled in this state by statute.

Section 3187 of the Code is: "The jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such a view is necessary to a just decision."  
\* \* \*

In order to give to this statute a correct interpretation, we deem it necessary to trace its history. It was doubtless taken from 6 *Geo. IV*, c. 50, § 23.

In 2 *Tidd's Pr.* 796 (*Amer. Notes*), it is said: "In a criminal case, there could formerly have been no view, without consent. But now, by St. 6 *Geo. IV*, c. 50, 'where in any case, either civil or criminal, or on any penal statute, depending in any of the courts at Westminster, or in the counties palatine, or great sessions in Wales, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case, such court, or any judge thereof in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if such court or judge so think fit, the party applying for the view to deposit in the hands of the undersheriff a sum of money to be named in the rule for the payment of the expenses of the view,' " etc.

This statute was enacted the sixth year of the reign of George IV, and it was at that time an open question in this country whether a view could be allowed in a criminal case in the absence of a statute authorizing it; some of the courts holding that it could not, and others taking the opposite view.

In *Robinson's Practice* (Old Ed.) pp. 178, 179, the subject is briefly discussed, and some of the decided cases are given, in which the view was denied and allowed, but the author expresses no opinion on the subject.

When the Legislature, in 1849, came to codify our statutes, it ingrafted, as section

10 of chapter 162, Code 1849, under the heading of "Juries Generally," the following: "Sec. 10. The jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision: provided the party making the motion shall advance a sum sufficient to defray the expenses of the jury, and the officers who attend them in taking the view; which expenses shall be afterwards taxed like other legal costs."

It will be readily observed that this statute is substantially the same as the act of Geo. IV, *supra*, the principal difference being in the omission of the words "either civil or criminal." It will be observed, also, that when this statute was enacted it became section 10 of the chapter entitled "Juries Generally," and that other sections of the chapter apply, beyond dispute, to criminal cases, so that the argument to be deduced from its collocation is wholly in favor of its operation in criminal as well as civil cases. In the compilation of our statutes into what is called the "Code of 1860," the statute just quoted appears under the same heading and in identically the same words, as section 39, c. 162. It so appears in the compilation known as the "Code of 1873," as section 37, c. 158; and, when the revision of our statutes was made in 1887, no change whatever was made in the statute, except to place it under the head of "Juries in Civil Cases," instead of under the former heading. While the collocation or classification of a statute in the Code is to be considered in determining the legislative intent in its enactment, it is not sufficient of itself to warrant the conclusion that the placing of a statute under the head of "Juries in Civil Cases," theretofore applicable to both civil and criminal cases, repeals it as to the latter, and confines its operation to the former. Nor do we attach any importance to the omission of the words "either civil or criminal" when the statute of 6 Geo. IV, *supra*, was ingrafted into the Code of 1849. When the statute says "in any case," it includes the only two classes of cases we have, viz., civil and criminal; and doubtless it was in the legislative mind that, having used the words "in any case," the words "either civil or criminal" would be mere surplusage.

If the words "in any case" are to be construed as not applying both to civil and criminal cases, which class is to be excluded? Would it not be as grave an evasion of the province of the Legislature to say, by judicial interpretation, civil cases only were in the contemplation of the framers of the statute, as it would be to hold that criminal cases only were within its purview? Is it not safer to do no violence to the language employed, to give to the words used their natural meaning and effect, and to hold that the phrase "any

case" covers all cases to be tried by a jury? There is nothing in the phraseology of the statute that confines its operation either to civil or criminal cases, but both are included, and a view may, in the discretion of the presiding judge, be ordered in either case, whether there be objection on the part of either party or not; and it is a matter of common knowledge that it has been the practice in this state for a great while to permit the jury to view the premises or locality where the crime is alleged to have been committed, though we cannot recall that such has been the practice in cases in which the accused objected.

We are also of opinion that the mere preservation of the provision contained in the original English statute from which our statute (now section 3167 of the Code) was taken, relative to the costs of a view, nor the fact that the Legislature, by act of January 18, 1888 (Acts 1887-88, p. 18, c. 15), amending section 4048 of the Code, declared that section 3167 "shall apply to jurors and juries in all cases, criminal as well as civil," justifies the conclusion that section 3167 was theretofore applicable to civil cases only. With reference to the first proposition, we deem it only necessary to say that, in the enforcement of the provision in the statute touching costs, the courts are controlled by it and other statutes in force in this state, in *pari materia*; and, with reference to the second proposition, that, in our view, the amendment of section 4048 of the Code was wholly unnecessary to make section 3167 applicable to criminal cases.

Whether or not the act of January 18, 1888, amending section 4048 of the Code, is repugnant to section 15 of article 5 of the Constitution of this state, we do not deem it necessary to express an opinion.

Instruction No. 1 given for the commonwealth told the jury that, if they believed from the evidence that the prisoner shot and killed the deceased, then they should presume him guilty of murder in the second degree, and the burden of proof was upon him to reduce the offense to manslaughter or killing in self-defense, and the burden was upon the commonwealth to elevate the offense to murder in the first degree. And after argument had been made, in part, for the commonwealth and the prisoner, the court, *ex mero motu*, withdrew that instruction, and gave another in lieu thereof, as follows: "The court instructs the jury that when the commonwealth has proven that the accused has committed a homicide, and it does not appear from the circumstances given in evidence by the commonwealth that the killing was of a lower degree than murder in the second degree or in self-defense, that then it is a *prima facie* murder in the second degree, and that the burden is cast upon the accused to prove that it was below murder in the second degree or in self-defense; and, if the commonwealth seeks to elevate the of-

fense to murder in the first degree, the burden is upon it to do so. Yet when the evidence is all in, then, if the evidence both for the commonwealth and the accused leave a reasonable doubt as to the guilt of the accused, the jury must find the prisoner not guilty." This is also assigned as error. The court is wholly unable to see any merit in this assignment. Both instruction No. 1 and the instruction given in lieu of it propound a proposition of law over and over again sanctioned and approved by this court.

The court gave 8 instructions asked for by the commonwealth, 13 out of 14 asked for by the prisoner, and 1 of its own motion in lieu of instruction No. 1 given for the commonwealth, and withdrawn after part of the argument had been heard, as stated.

The instruction No. 9 asked for by the prisoner, and refused, attempted at great length, to set out the case in all of its phases, but failed to do so; and, in some of the phases presented in it, the prisoner was certainly guilty of an offense proper to be punished, yet the instruction concluded with, "they [the jury] shall find the prisoner not guilty." Besides, every proposition of law contained in the instruction, proper to have been given in the case, had been covered by the instructions already given. Where the instructions given for the commonwealth and the prisoner, read as a whole, set forth the whole case correctly and fairly, as was the case here, it is not error to refuse other instructions. *Reed's Case*, 98 Va. 827, 36 S. E. 399; *Willis' Case*, 32 Grat. 929.

The remaining assignment of error is to the refusal of the court below to set aside the verdict and award the prisoner a new trial. Having made a full statement of the case as disclosed by the record, it is needless to review the evidence at length.

We know of no law that justifies the taking of human life in the manner, and under the circumstances narrated in this record, even if the facts and circumstances surrounding the homicide be as the prisoner would have us to believe existed when he took the life of the deceased, John Collings.

Upon the whole case, we are of opinion that it is plainly one in which the verdict of the jury should not be disturbed. Therefore the judgment complained of is affirmed.

BUCHANAN, J. I concur in the result, but not in the opinion of the court. I do not think that section 3167 of the Code of 1887 authorizes a view in criminal cases, as the court holds. The chapter in which it is found in the Code applies solely to juries in civil cases. By the act approved March 18, 1884 (Acts 1883-84, p. 702, c. 523), entitled "An act to revise and digest the Code and statutes of Virginia," it was made the duty of the revisors to collate and revise all the general statutes of the commonwealth. In performing that duty, they were required, among other things, to "arrange all the

statutes under appropriate titles and chapters."

Section 3167 of the Code is found under "Title 46," entitled "Courts and Juries in Civil Cases" (Code, p. 731), and in chapter 152, entitled "Of Juries in Civil Cases" (Code, p. 750). These titles are parts of the Code. This is so, it seems to me, both from the language of the act directing the manner in which the Code should be revised, as well as from the fact that the titles were in the Code when it was reported to and adopted by the Legislature. This view is sustained by Judge Burks, one of the revisers. In his address before the State Bar Association in 1891 (Bar Association Report for that year, p. 110), he says: "It should be observed that the title of contents of sections prefixed to each chapter, and the headings of the revised sections taken from the title, together with the notes and marginal references to adjudged cases, were the work of the revisers, done in course of the publication of the Code after it was adopted. It was authorized by a section of the act directing the publication. That section was taken literally (with change of names) from the act directing the publication of the Code of 1849. It is hardly necessary to say that these titles, headings of sections, notes, and marginal references, prepared after the Code was adopted, and published with it, though authorized as a matter of convenience, constitute no part of the law." His language clearly implies that the titles to the chapters were a part of the Code. Not only did the Legislature think that section 3167 of the Code did not apply to criminal cases, but that was the view of the revisers, also, for in the same address, at page 111, Judge Burks says: "Some errors of the revisers, the result of oversight while under great pressure, were discovered by them after the Code was adopted, and before it went into operation. These, at their instance, were corrected by the Legislature at the session of 1887-88, and the amendments will be found in the acts of that session." The act referred to by Judge Burks was chapter 15 of the Acts of 1887-88, pp. 15-18. By section 4048 of that chapter it is provided that section 3167, together with 11 other sections of the Code (naming them), "shall apply to jurors and juries in all cases criminal as well as civil."

Providing that those sections should apply to criminal as well as civil cases was not, in my opinion, amending them, within the meaning of section 15 of article 5 of the Constitution. It was merely extending their operation to another class of cases, without in any way amending or changing them. This seems to have been the view of the revisers, since the act making them applicable to criminal cases was passed at their instance, and doubtless drawn or approved by them. They would scarcely have drawn or approved an act intended to cor-

rect their own mistakes, and asked the Legislature to pass it, unless they were fully satisfied that it was not in conflict with the Constitution of the state.

That act, and not the Code, in my judgment, authorized the county court to direct the view of which the prisoner complains.

(101 Va. 702)

**BAKER et al. v. WATTS.**

(Supreme Court of Appeals of Virginia. July 2, 1903.)

**DECREE — CONCLUSIVENESS — PETITION FOR REHEARING—AFTER-DISCOVERED EVIDENCE — FRAUDULENT CONVEYANCES — TRANSFER TO WIFE—BURDEN OF PROOF.**

1. Questions settled by a final decree, an appeal from which has been refused, cannot be reopened in the same litigation.

2. Before allowing a petition for rehearing or bill of review to be filed on the ground of after-discovered evidence, the court must be satisfied that the evidence relied on is new, and could not by ordinary diligence have been discovered prior to the date of the decree complained of.

3. In a contest between the creditors of the husband and the wife, the burden of proof is on her to show, by clear and satisfactory evidence, the bona fides of the transaction transferring to her his property.

**Appeal from Circuit Court, Tazewell County.**

Suit by John G. Watts against J. W. Baker and another. From three separate decrees rendered in the suit, defendants appeal. Affirmed.

Fulton & Coulling, for appellants. May, May & Smith, for appellee.

**HARRISON, J.** This appeal is from three decrees of the circuit court of Tazewell county, dated, respectively, September 8, 1899, December 12, 1900, and May 27, 1901.

The court is of opinion that there is no error in the decree of September 8, 1899. This litigation had its origin in a contract between John G. Watts, J. W. Baker, and J. M. Beavers, of the first part, and C. G. Holland, of the second part, whereby the parties of the first part sold to Holland options upon certain coal lands. Two thousand dollars was paid in cash upon condition that, if the title was unsatisfactory to Holland, it was to be refunded. The title did prove unsatisfactory, and Holland, in an action at law, recovered judgment against the parties of the first part for the \$2,000 he had paid them. This judgment in favor of Holland was reviewed by this court, and affirmed. See *Watts v. Holland*, 86 Va. 999, 11 S. E. 1015.

In 1896, John G. Watts, who had been compelled to pay the whole of this judgment, filed his bill in the circuit court of Tazewell county, alleging his payment of the entire judgment; the joint and equal liability of J. W. Baker and J. M. Beavers to share that burden with him; and asking that he be sub-

stituted to all the rights of C. G. Holland, the judgment creditor, and that those equally responsible with him be required to make an equitable contribution toward the satisfaction of their joint liability.

J. W. Baker and J. M. Beavers, who were made parties defendant to this bill, filed a joint and separate answer in which they admit the payment by John G. Watts of the judgment, but deny his right to contribution from them, upon the following grounds: That some time before the sale of the options to Holland, respondents, having secured a number of options upon coal lands, entered into a parol contract or partnership with the complainant, Watts, by which he undertook and agreed to sell the options they then had, and such as they might thereafter secure, to examine and perfect the titles to the lands covered by their options, and that each was to have one-third of the profits, if any, arising from the sales made. Respondents aver that complainant failed to perform his part of the contract by not making reasonable and proper effort to sell the options, and by neglecting to have the titles examined and perfected; that, if complainant had performed his part of the contract, the titles would have been satisfactory to C. G. Holland; and that the negligence and default of complainant occasioned the judgment in favor of Holland asserted in the bill, and prevented the sale to Holland being consummated.

Respondents further aver that complainant, during the continuance of the contract or partnership with them, without their knowledge or consent, formed another partnership of the same kind, which directly antagonized and ruined the prospects and success of their contract or partnership; that complainant and his new partners are now the owners of valuable coal lands, which came into their possession through the labor, options, and information furnished by respondents in pursuance of their contract or partnership; that complainant, by thus using for the benefit of himself and others options and information furnished by respondents, was much more than reimbursed all sums paid to respondents, or used in the business growing out of the contract or partnership between them; that, soon after the refusal of Holland to take the property sold him, the same could have been sold to others at a profit sufficient to refund Holland the \$2,000 cash payment, and to have paid respondents for their time and trouble in securing control of the property; but that, instead of managing the affairs of the partnership so as to make a profit, complainant had used the same for the benefit of himself and others, whereby he made for himself, and occasioned a loss to respondents, of a much greater sum than they are indebted to complainant by contribution or by any other means.

Upon the filing of this answer a motion by the plaintiff for an issue before a jury to assess the damages claimed by the defendants

§ 3. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 802.

as an offset was overruled, and the cause was referred to a commissioner to take the evidence and state the necessary accounts to enable the court to determine the issue made by the bill and answer. On the 9th day of December, 1898, the commissioner filed his report, and with it a mass of evidence, much of which was conflicting, in which he says: "From a careful consideration of all the testimony taken and filed in the cause, your commissioner is of opinion that the complainant, J. G. Watts, is entitled to recover from the defendants the amounts claimed by him in his pleading." On the 8th day of September, 1899, the learned judge of the circuit court, "upon mature consideration," held that the complainant was entitled to be subrogated to the lien of the judgment in the bill mentioned, overruled the exceptions to the commissioner's report, confirmed the same, and gave a decree in favor of the plaintiff against the defendants for the several sums ascertained by the commissioner to be due from each, and gave leave to the plaintiff to amend his bill for the purpose of enforcing his liens. From this decree the defendants applied for an appeal, and, after careful consideration of the record, this court, being of opinion that the decree appealed from was plainly right, refused the appeal.

The decree of September 8, 1899, having settled and determined the issue between the parties as to the right of the appellee to be subrogated to the lien of the Holland judgment against the appellants J. W. Baker and J. M. Beavers to the extent of their liability to him, and this court having affirmed that decree by refusing an appeal therefrom upon the ground that it was plainly right, that question is at rest and cannot be reopened.

The court is further of opinion that there is no error in the decree of December 12, 1900. After an appeal was refused from the decree of September 8, 1899, the appellants J. W. Baker and J. M. Beavers presented their joint and separate petition for a rehearing of the last-named decree upon the ground of after-discovered evidence.

It is an established rule that, before allowing a petition for rehearing or bill of review to be filed on the ground of after-discovered evidence, the court must be satisfied that the evidence relied on is new, and could not by ordinary diligence have been discovered prior to the date of the decree complained of. *Craufurd's Adm'r v. Smith's Ex'r*, 93 Va. 628, 23 S. E. 235, 25 S. E. 657.

A petition to rehear a chancery suit which does not allege the discovery of new and important testimony not known or accessible to the petitioner before the former hearing, and which points out no error upon the face of the former decree, should be dismissed. *Woods v. Early*, 95 Va. 307, 28 S. E. 374.

In the case at bar the petition undertakes to review the evidence upon which the de-

creed of September 8, 1899, is based, and closes with this single allegation with respect to after-discovered evidence: "Your petitioners now here state that the element of profit lacking in the evidence in this cause cannot be supplied, and that, after said cause was submitted to your honor, the complainant, your petitioners are advised, believe, and charge, sold said properties to one T. E. Houston at the rate of \$15 per acre, and that a large part of the purchase price has been paid to the complainant."

There is no allegation in the petition that the evidence suggested by the language quoted was not known, and could not by the exercise of reasonable diligence have been discovered, before the date of the decree sought to be reheard. This was necessary under the authorities, and leave to file the petition was properly denied.

The court is further of opinion that there is no error in the decree of May 27, 1901. That decree is based upon the amended bill and the proceedings thereunder, leave to file which was reserved to the appellee by the decree of September 8, 1899, for the purpose of enabling him to enforce the lien of the Holland judgment to which he had been subrogated. The amended bill alleged that the defendants had, since the date of the Holland judgment, in order to hinder, delay, and defraud the complainant in the enforcement of his lien, made certain alienations of their property, and asked that such alienees be made parties defendant, and the property of the judgment debtors be subjected to the satisfaction of his lien.

There are but two questions arising under these proceedings that we are called upon to notice. The appellant Fannie E. Baker, wife of defendant J. W. Baker, complains of the action of the court in decreeing a sale of five shares of stock in the Tazewell Improvement Company which had been transferred to her by her husband, J. W. Baker, and directing the proceeds of such sale to be applied to the debt of the complainant. Transactions between husband and wife must be fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors; and in a contest between the creditors of the husband and the wife the burden of proof is upon her to show, by clear and satisfactory evidence, the bona fides of the transaction. In all such cases the presumptions are in favor of the creditors, and not in favor of the wife. *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1; *Spence v. Repass*, 94 Va. 716, 27 S. E. 583. In the case at bar, Mrs. Baker has not sustained the burden the law imposes upon her. The evidence does not establish that the five shares of stock were purchased with her means; on the contrary, it appears to have been an assignment to the wife without consideration, and the stock was properly subjected to the husband's debt.

There was no error in the action of the court in decreeing a sale of part of the real estate claimed by the defendant J. W. Baker as a homestead. This assignment of error has not been pressed in argument, and it satisfactorily appears from the evidence that the homestead claim was largely in excess of the value allowed by statute, and that the value of the property remaining in the hands of the defendant is the full measure of his rights as a homestead claimant.

For these reasons, the decrees complained of must be affirmed.

(66 S. C. 326)

**ROBINSON & ALLEN v. HOWELL.**

(Supreme Court of South Carolina. May 25, 1903.)

**JURORS—EXAMINATION.**

1. Under Code 1902, § 2944, providing that the court shall, on motion of either party, examine any person called as a juror, to know whether he is related to either party, it is the duty of the court, on motion of plaintiffs, to ascertain whether any juror was related to either of the parties litigant.

Appeal from Common Pleas Circuit Court of Union County; Buchanan, Judge.

Action by Robinson & Allen against Samuel Howell. From judgment for defendant, plaintiffs appeal. Reversed.

H. L. Scaife, for appellants. V. E. De Pass, for respondent.

JONES, J. This action on a money demand resulted in a verdict and judgment for the defendant. The plaintiffs' appeal therefrom alleges error in failing and refusing to ascertain if any of the jurors were related to either party to the action by blood or marriage. When the jury were impaneled, the plaintiffs' attorneys requested the trial judge to ascertain if any one of the jurors were related to the defendant or the plaintiffs. The "case" states that the trial judge refused, saying he would attend to that, but failed to ask if any of the jurors were related by blood or marriage to either party to the action. This was error. Section 2944, Code 1902, provides as follows: "The court shall, on motion of either party in suit, examine, on oath, any person who is called as a juror therein to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appear to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called." This statute is mandatory, and it was the duty of the court, on motion of plaintiffs, to apply this statutory method of ascertaining whether any juror was related to either of the parties litigant.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(66 S. C. 357)

**STATE ex rel. MILFORD et al. v. BROCK et al.**

(Supreme Court of South Carolina. June 3, 1903.)

**SCHOOL DISTRICT BONDS—VALIDITY—CONSTITUTIONAL LAW—SPECIAL ACT.**

1. A school district, when first established, was designated by the county superintendent of education as "No. 34." By request of the citizens of the district it was afterwards known as "Gantt School District No. 34," and was designated on the tax books, on a levy of a special tax, as "Gantt School District," and in the same manner by the State Superintendent of Education in his reports, and by the General Assembly in authorizing an issue of bonds by special act. Held, that bonds issued thereunder are valid obligations of School District No. 34 and of "Gantt School District."

2. Const. § 34, art. 3, providing that no special law shall be enacted where a general law could be made to apply, does not render invalid an act authorizing a school district to issue bonds to erect a school building.

Petition by J. C. Milford, L. A. Brock, and R. M. Shirley for injunction against M. I. Brock, L. M. Wilson, and B. L. Gassaway, trustees of School District No. 34, to restrain the sale of bonds for erecting a school building. Dismissed.

Tribble & Prince, for petitioners. Bonham & Watkins, for defendants.

POPE, C. J. This is a proceeding in the original jurisdiction of this court on the part of the plaintiffs, as citizens, residents, freeholders, and taxpayers in the town of Honea Path, in the state of South Carolina, against the defendants, as trustees of School District No. 34 of Anderson county, whereby they (the plaintiffs) seek a writ of injunction against the defendants to prevent them from issuing and selling \$8,000 of bonds of the Gantt School District for the purpose of erecting and equipping school building at Honea Path, in said school district. This matter came on to be heard by this court on the 25th May, 1903, on the complaint and answer of the parties hereto and the agreed statement of facts. It will only be necessary to reproduce herein the said statement of facts, which is as follows:

"It is mutually agreed by and between Tribble & Prince, as attorneys for relators, and Bonham & Watkins, as attorneys for respondents, in the above-entitled proceedings, that the following are the facts for the hearing of this matter in the Supreme Court:

"(1) That the relators are citizens, residents, and taxpayers in the town of Honea Path, S. C., which town is embraced within the boundaries of the school district referred to in the petition, and that the respondents above named are the trustees of School District No. 34 for Anderson county, S. C.

"(2) That on the 15th day of May, 1900, on

the petition of the requisite qualified electors residing in the proposed school district, the county board of education for Anderson county, S. C., set off by metes and bounds a special school district within the township of Honea Path; and when so set off it was called 'School District No. 34' for Anderson county, S. C., there already having been previously created 33 school districts in said county.

"(3) That said school district, after it had been created and designated by metes and bounds as 'No. 34' for Anderson county, was by the superintendent of education for said county, at the request of citizens in the territory embraced in said school district, named 'Gantt School District,' and was entered upon the books of the said superintendent of education for Anderson county as 'Gantt School District No. 34.'

"(4) That thereafter, on the vote of the qualified electors within the territory embraced within said special school district, which included the town of Honea Path, S. C., a special tax was levied to supplement the school funds of said school district, and was entered upon the books of the auditor of Anderson county as special tax in 'Gantt School District.'

"(5) That said school district is known and designated on the books of the treasurer of Anderson county as 'Gantt School District.' It is also known and designated in the records of the office of the State Superintendent of Education for South Carolina as 'Gantt School District,' and was so designated in the annual report of said officer for the years 1901 and 1902.

"(6) That the General Assembly of South Carolina by 'An act entitled an act to authorize the trustees of Gantt School District of Anderson county to issue bonds for the purpose of erecting a school building and equipping the same,' approved February 20, 1903, authorized the trustees of 'Gantt School District' of Anderson county to issue and sell coupon bonds of said school district in an amount not exceeding \$8,000, as they may deem necessary, for the purpose of erecting and equipping a school building at Honea Path, in said district, if said trustees shall deem it advisable: provided, that the question of issuing bonds authorized in this section, which was section 1 of said act, shall first be submitted to the qualified voters of said school district at an election to be held to determine whether or not said bonds shall be issued as hereafter provided.

"(7) That the other provisions of said act are substantially correct in paragraphs 6, 7, and 8 of the petition herein.

"(8) That the respondents, who are the trustees of School District No. 34 for Anderson county, which school district is now known and recognized by the school authorities of state and county as 'Gantt School District,' pursuant to the authority vested in them by the aforesaid act of the General As-

sembly of South Carolina, ordered an election to be held on the 7th day of April, 1903, at Honea Path, within said school district, at which election a majority of the qualified voters voting in said election voted for the issuing of coupon bonds for the purpose of building and equipping a schoolhouse at Honea Path, S. C., as authorized by the act aforesaid.

"(9) That after the result of said election had been duly ascertained and declared by the terms of the act aforesaid, the respondents, as trustees of School District No. 34 for Anderson county, commonly known and designated as 'Gantt School District,' issued coupon bonds of said school district in the aggregate sum of \$8,000, which bonds are to run for 35 years, and to bear interest at 5 per cent. per annum, payable annually, and the respondents, as trustees for said school district, negotiated a sale for such bonds, and have not yet transferred them to the prospective purchasers, and have not yet received the purchase price therefor.

"(10) That the special school district in Honea Path township, Anderson County, S. C., which was created by the county board of education for Anderson county, on the 15th day of May, 1900, without a name, was by said board named 'No. 34,' and was thereafter designated by the superintendent of education for Anderson county as 'Gantt School District No. 34.' And it is agreed that there is not in Anderson county any other school district known or designated by the name of 'Gantt.'"

There are two questions presented by the petitioners: (1) Can the school district of "Gantt," named in the act of the Legislature authorizing the trustees of the school district to issue and sell \$8,000 of bonds for the purpose of erecting and equipping a schoolhouse at Honea Path, in Anderson county, S. C., be considered as the name of School District No. 34 of said county of Anderson, S. C.? (2) Does the act of the Legislature, entitled "An act to authorize the trustees of Gantt School District of Anderson county to issue bonds for the purpose of erecting a school building and equipping the same," contravene section 34 of article 3 of the Constitution of this state, adopted in 1895, forbidding the passage of any legislation as special legislation where an act of a general nature could have been passed? We will examine and pass upon these two questions in their order.

1. The agreed statement of facts in this proceeding shows that when the citizens of Honea Path township, on the 15th May, 1900, applied to the school authorities of Anderson county, in this state, for a special school district, such school authorities set by metes and bounds a school district within the township of Honea Path, in said county of Anderson, S. C., embracing the town of Honea Path, in the county of Anderson, S. C., and when so set off it was numbered by such school authorities "School District No. 34."



there being already 33 school districts in said county; that thereafter, at the request of the citizens of Honea Path, the said School District No. 34 was named "Gantt School District" by the county superintendent of education of Anderson county, and was entered upon the books of such county superintendent as "Gantt School District No. 34"; that thereafter, when a special school tax was voted by the citizens of the territory of such school district, such tax was entered upon the books of the auditor for Anderson county as "special tax in Gantt School District"; that such school district is entered upon the books of the treasurer for Anderson county as "Gantt School District," and such is also the case in the records of the office of State Superintendent of Education for the state of South Carolina, and was so named "Gantt School District" in the reports of the State Superintendent of Education to the General Assembly of this state for the years 1901 and 1902, respectively; and that the General Assembly of this state referred to such school district as "Gantt School District," in the act entitled "An act to authorize the trustees of Gantt School District of Anderson county to issue bonds for the purpose of erecting a school building and equipping the same," approved February 20, 1903. Such being the facts admitted, we do not see how there can be any doubt as to the identity of the school district in question, whether it is called "School District No. 34" or "Gantt School District." Hence it cannot avail the petitioners as an objection to the act in question. Even the contracts entered into by School District No. 34 would not be affected by such school district subsequently changing its name to "Gantt School District." See 7 American and English Encyclopedia of Law (2d Ed.) 687; also, Girard v. Philadelphia, 7 Wall. 1, 19 L. Ed. 53. But in the case at bar the school district has not changed its name, but has only adopted an "alias."

2. Is the act in question special legislation? How could the General Assembly have passed a general act by which the Gantt School District could be authorized to issue \$8,000 of bonds to build a schoolhouse and equip the same? We fail to see. An examination of the provisions of the state Constitution clearly shows that the act of our General Assembly here in question is in no wise a contravention of the same.

It is the judgment of this court that the prayer of the petition be refused, and such petition be dismissed.

ing the operation of the sections to named counties, is void, as a special act at variance with Const. art. 3, § 34.

Appeal from Circuit Court, Anderson County; Gage, Judge.

Indictment against W. Q. Hammond for failure to clean out stream after notice. From circuit order reversing judgment of magistrate, plaintiff appeals. Affirmed.

Solicitor Boggs and B. F. Martin, for appellant. Tribble & Prince and Bonham & Watkins, for the State.

POPE, C. J. Proceedings were had in a magistrate's court in Anderson county, in this state, by which the defendant was charged and tried for a misdemeanor, in that the defendant had violated sections 1273 and 1274 of the Revised Statutes of the year 1893, which required that the defendant, as a landowner, should remove during the month of May, 1901, from the Little Beaver Dam creek, running through his land, all trash, trees, rafts, and timber, which duty the defendant neglected to perform.

When the trial began, the defendant objected thereto, first, because he alleged the said sections 1273 and 1274 were not included in the new Code of Laws. This, however, was a mistake, because section 184 of the Criminal Code, adopted in 1902, covers the provisions of sections 1273 and 1274 of the Revised Statutes of 1893.

Then he objected because said sections 1273 and 1274 were unconstitutional. The magistrate overruled this objection, but, on hearing defendant's appeal therefrom, the circuit judge (Judge Gage) sustained the appeal, and ordered the judgment below reversed, and directed that the prosecution be dismissed. No reasons were given by the circuit judge for his judgment, but it is evident that he bottomed his action upon the unconstitutionality of the law hereinbefore referred to. This court has several times during the year, and even before that period of time, held that whenever the Legislature of this state disregarded the terms of the Constitution of 1895, by attempting to pass special instead of general laws, such efforts were nugatory. So, therefore, when the Legislature in 1902 re-enacted the provisions of sections 1273 and 1274 of the Revised Statutes of 1893, and confined the operation of said sections to the counties of Anderson, Chester, Greenville, Oconee, Union, Fairfield, Laurens, Newberry, Abbeville, Pickens, Spartanburg, and York, exempting all the other counties of the state from the operation of such sections 1273 and 1274, such action of the Legislature was null and void, because at variance with the provisions of the Constitution of this state, in section 34 of article 3. It is not necessary to repeat the views so recently announced in the opinion of this court in the case of State v. W. Q. Hammond, 44 S. E. 797, which construed the provisions

(66 S. C. 800)

#### STATE v. HAMMOND.

(Supreme Court of South Carolina. May 18, 1903.)

#### CONSTITUTIONAL LAW—SPECIAL ACT.

1. Rev. St. 1893, §§ 1273, 1274, making it a misdemeanor not to remove at a certain time all trees and rafts from a certain creek, and confin-

of our Constitution as it affected section 1275 of the Revised Statutes of this state adopted in 1893.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

(66 S. C. 362)

**BOYKIN v. SPRINGS et al.**

(Supreme Court of South Carolina. June 5, 1903.)

**DOWER—EVIDENCE OF RIGHT.**

1. An owner of certain realty devised it to his daughter during her natural life, and after her death to the heirs of her body. The devisee, with her husband and certain of her children, covenanted with the owners of certain lands in Alabama to effect an exchange of the lands. The husband of plaintiff went into possession under the contract with the life tenant. Thereafter the court, by its commissioners, conveyed the title to the assignee of the rights of plaintiff's husband. *Held*, that as the agreement of the life tenant, though sufficient to put plaintiff's husband in possession under the plan of effecting an exchange in the land, could not confer an estate of inheritance, and the fee did not pass until the court, by its commissioners, conveyed the same, plaintiff's husband had no such title as would support a claim of dower, as the conveyance was made to the assignee of her husband's rights under the contract.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Kershaw County.

Action by Mary C. Boykin against Leroy Springs and Charles J. Shannon, Jr., for apportionment of dower. From a decree of the circuit court reversing the probate court, defendants appeal. Reversed.

The circuit decree reversing probate court is as follows:

"This cause came before me at the June term, A. D. 1901, of the court for Kershaw county, on an appeal from the probate court of said county. It is a suit for dower, brought by Mary C. Boykin, who is the widow of Edward M. Boykin, late of Kershaw county. The only point passed upon by the probate judge was as to the seisin of Edward M. Boykin, and, as to that, he announced the conclusion 'that Edward M. Boykin was not at any time seised in fee of the lands described in the petition, or any part thereof, and his widow is not entitled to dower in said lands, or any part thereof.' The grounds of appeal served by the plaintiff, demandant in dower, question, in different forms, the correctness of this ruling and decree. Upon the hearing of the appeal there was submitted to me some oral evidence, which had been taken down in writing by the probate judge, and is not denied or contradicted; an instrument entered into between W. W. Lang, Sarah Lang, Serena C. Lang, Mary E. Lang, Sally W. Lang, C. A. Boykin, K. L. Boykin, and Edward M. Boykin, dated August 1, 1846; a conveyance of real estate from C. A. Boykin, K. L. Boykin, J. A. Boykin, and Edward M. Boykin to Thomas Lang, dated January 15, 1849; and

the bill, reports of commissioner, orders of the chancellor in equity for Kershaw district to Thomas Lang, made in pursuance of such orders, in a proceeding instituted in the court of equity for Kershaw district by Wm. W. Lang and wife et al. v. C. A. Boykin et al., in the year 1850. These papers all concern the same real estate, which is that out of which the demandant claims dower. It may be said that the facts in this case are admitted, as they are not disputed, and the questions involved rise upon the proper legal construction of the written instruments offered in evidence. The land in which dower is claimed originally belonged to Duncan McRae, and, in the division of his estate under his will, fell to his daughter Mrs. Sarah Lang, wife of Wm. W. Lang. All the parties to this controversy hold and claim under this common source.

"The question submitted to me under this appeal from the judgment of the probate court is, did Edward M. Boykin, the husband of demandant in dower, have such an estate or interest in fee in the land mentioned in petition as that his widow is entitled to dower therein? Mary C. Boykin, the plaintiff, demandant, was on August 1, 1846, the wife of Edward M. Boykin, and is now his widow. My construction of the instrument in writing entered into between W. W. Lang, Sarah Lang, Serena C. Lang, Mary E. Lang, Sally W. Lang, C. A. Boykin, K. L. Boykin, and Edward M. Boykin on August 1, 1846, is that it passed an estate in fee simple to the said C. A. Boykin, K. L. Boykin, Edward M. Boykin, and John A. Boykin. Apt words are used to pass such an estate, and there is nothing in the instrument showing a contrary intention. The Boykins above named on January 15, 1849, executed to Thomas Lang an absolute deed of conveyance in fee simple of some land, with full covenants of warranty; but there is no renunciation of dower by Mary C. Boykin, the wife of Edward M. Boykin. I should have remarked above that Edward M. Boykin went into possession of the land out of which dower is demanded, under the conveyance of August 1, 1846, and cultivated the land; remaining in possession until the conveyance to Thomas Lang in January, 1849. It would appear that the parties interested came to the conclusion that it was best to apply to the court of equity to confirm what had been done, and validate an exchange of property which had been made, and the bill of W. W. Lang and wife et al. v. C. A. Boykin et al., above referred to, was filed.

"The defendants in this action for dower contend that, because the commissioner in equity was directed to, and did, convey the land to Thomas Lang under these proceedings in equity, the conclusion follows that the Boykins were never seised in fee of the land, and that Thomas Lang, under whom Springs & Shannon claim, derived his title from the commissioner in equity, and not

from the Boykins. But an examination and proper construction of these proceedings in equity will show that the lands were treated and considered therein as having been conveyed in fee by the Langs to the Boykins. The status of Thomas Lang and his right to the lands is based upon the fact that he had derived title from the Boykins. This title of the Boykins is recognized by all parties, and the land is ordered to be conveyed to Thomas Lang as the property of the Boykins. But even if it had been attempted in these proceedings to put a different construction upon the dealings between the Langs and Boykins as to the land, Mary C. Boykin, then the wife of Edward M. Boykin, could not be affected thereby, as she was not a party to the bill in equity. Under the title derived by him from the Boykins, Thomas Lang went into possession of the land in 1849, and he and those holding under him, including Springs & Shannon, the defendants in this proceeding in dower, have held the land ever since.

"My conclusion, therefore, is that Edward M. Boykin, the husband of the plaintiff, demandant in dower, was seised of an estate in fee simple in an undivided interest of one-fourth ( $\frac{1}{4}$ ) in the lands described in the proceedings herein, during his coverture with the plaintiff, demandant, and that she is entitled to dower therein."

This case was argued at the November term, 1902; but, on account of a difference of opinion between the three justices then on the bench, no judgment could be pronounced, and a reargument was ordered during the April term, 1903.

W. M. Shannon, for appellants. B. B. Clarke and J. T. Hay, for respondent.

JONES, J. The plaintiff, as widow of Edward M. Boykin, deceased, instituted proceedings in the court of probate for Kershaw county, demanding dower in certain lands in the possession of the defendants. The probate court denied the claim, holding that demandant's husband was not at any time during coverture seised in fee of the land described, but had only an equity therein. The circuit court, on appeal, reversed the probate court, holding that demandant's husband was seised in fee of the one-fourth interest in said land, and decreed that plaintiff was entitled to dower therein. The decree of the circuit is officially reported herewith.

From this decree the defendants now appeal on exceptions which raise practically but one question—whether demandant's husband was ever, during coverture, seised of such an estate in the land as would entitle plaintiff to dower therein. It appears that the land in question was originally owned by Duncan McRae, who by his will in 1824 devised the same to his daughter Sarah Lang during her natural life, and after her

death to the heirs of her body surviving her. Sarah Lang was the wife of W. W. Lang, and, at the time of the proceedings hereinafter mentioned, had eight children, four of whom were of age, viz., Serena C., Mary E., Sally W., Duncan M., and four who were minors, viz., J. B., William, Kitty B., and Scota McRae. On the 21st day of August, 1846, Sarah Lang, with her husband and the three first named children, entered into a covenant with Edward M. Boykin, demandant's husband, C. A. Boykin, and K. L. Boykin. The Boykins owned certain lands in Alabama, and it was desired by the parties to effect an exchange of lands, so that the Langs should take the Alabama lands, and the Boykins take the South Carolina lands. The covenant was as follows:

"Whereas the undersigned, William W. Lang, is in the use and occupation of a certain real estate situated on the west side of the Wateree river, in the district and state aforesaid (hereinafter more particularly described) which has been devised by the undersigned Sarah Lang, from the last will and testament of her late father Duncan McRae, which is therein limited to the said Sarah Lang during her natural life and from and after her death to the heirs of her body, her surviving, and of those remaindermen, Serena C. Lang, Duncan M. Lang, Mary McRae Lang, and Sally W. Lang, (children of the said William W. Lang and Sarah Lang) are now of full age; and whereas the undersigned, Charlotte A. Boykin, John A. Boykin, Edward M. Boykin, and Kitty L. Boykin, heirs at law of the late John Boykin, are seized and possessed of certain real estate, situated in the state of Alabama, in the counties of Wilcox and Dallas, (hereinafter more particularly described); and whereas the said parties have agreed to exchange the real estate aforesaid. Now therefore know all men by these presents, that in consideration of the premises and covenants and agreement of the parties of the second part hereinafter set forth, the said William W. Lang, Sarah Lang (his wife,) Serena C. Lang, Duncan McRae Lang, Mary McRae Lang, and Sally W. Lang, parties of the first part to those presents, for themselves and in behalf of the other remaindermen (not of age) under the said will of Duncan McRae, deceased, intending to remove to the state of Alabama, have covenanted and agreed, and do hereby covenant and agree, to and with the said Charlotte A. Boykin, John A. Boykin, Edward M. Boykin and Kitty L. Boykin, parties to the second part to these presents, as follows, to wit: The said parties of the first part do hereby grant, bargain, sell and release to the said parties of the second part, their heirs and assigns, all and singular the said premises, first above mentioned, being that plantation or parcel of land situate on the west side of the Wateree river, desig-

nated as No. 2, (two,) in the partition of the land of the late Duncan McRae, among the remaindermen entitled thereto, under and by virtue of his last will and testament, having such form, marks, buttings and boundaries as are represented on a plat of survey, a copy whereof has been executed by Colin McRae, dated December the first, eighteen hundred and forty-three; together with all the interest and shares of the said Sarah Lang in any other parcel of land whatever that may be situated on the west side of the Wateree river to the which present possession of, she may be entitled under the said last will and testament of her father, the late Duncan McRae. And the said parties of the first part do hereby further covenant and agree to and with the said parties of the second part that they will without unnecessary delay seek the aid of the proper court to enable them to convey and assure to the said parties of the second part the fee simple estate, in and to all and singular the said several premises last above mentioned, free from any estate in remainder or other incumbrance. And in consideration of the premises the said parties of the second part do hereby covenant and agree, to, and with the said parties of the first part, that, so soon as they, the said parties of the second part, are assured in the fee simple estate in and to the said last mentioned several premises, they will convey to the said parties of the first part, or any of them, or to any other person for them, either in fee simple or subject to limitations of the will of the late Duncan McRae, as applicable to the said last-mentioned real estate and as a substitute for the same, all and singular the said plantation situated in the state of Ala. and in the counties of Wilcox and Dallas now in the occupation of the said parties of the second part, as a portion of the estate of the late John Boykin, represented by a plat hereunto annexed, marked 'A' consisting of sundry parcels of land situated in range 10 north township 12 & 13 west, bounded on the south by lands of the estate of William C. Clifton, west by lands formerly belonging to Major Betts now belonging to the estate of William C. Clifton, north by lands belonging to Samuel Dennis; east by lands belonging to Mrs. Capehart, containing fifteen hundred acres more or less; together with the dwelling house and the lot conveyed by William C. Clifton to Charlotte A. Boykin adjoining the house tract of the late William C. Clifton; and for the faithful performance of the said several covenants and agreements the said parties of the first part and second part do bind themselves, each to the other, in the sum of fifteen thousand dollars, as stipulated damages, to the payment whereof, they do hereby bind themselves, their heirs, executors, administrators and assigns. And it is hereby further agreed by and between

the parties aforesaid that possession of the premises hereby intended to be conveyed to the respective parties to these presents, shall be placed in possession of each party on or before the first day of January, eighteen hundred and forty-seven.

"Witness our hands and seals this twenty-first day of August, in the year of our Lord, one thousand eight hundred and forty-six. [Signed] W. W. Lang. [L. S.] Sarah Lang. [L. S.] Serena C. Lang. [L. S.] Mary E. Lang. [L. S.] Sally W. Lang. [L. S.] C. A. Boykin. [L. S.] K. L. Boykin. [L. S.] Edw. M. Boykin. [L. S.]"

It appears that Edward M. Boykin went into possession of the land in question in 1847, and on the 15th day of January, 1849, the Boykins, including demandant's husband, executed to Thomas Lang a deed with general covenant of warranty, conveying said land, together with all their right and interest under the said covenant. Subsequently proceedings were instituted in the court of equity to perfect the exchange of lands as covenanted for, and on June 12, 1850, the court, having been satisfied that the heirs of John Boykin, deceased, had transferred their right to Thomas Lang, ordered that he be substituted in the place of the said heirs of John Boykin, deceased, in receiving titles to the land in question, and that the commissioner execute to Thomas Lang a conveyance of said land, to be delivered when the Boykins had executed the deed of the Alabama lands to Sarah Lang and her children, under the same limitations as provided in the will of Duncan McRae. After this the Boykins made the deed to Sarah Lang and her children as provided for, and on December 7, 1850, the court ordered the commissioner to deliver the commissioner's deed to Thomas Lang, as the substitute of the Boykins. The plaintiff was the wife of Edward M. Boykin at the time of the execution of the said covenant to exchange lands, and at the time of the delivery of the commissioner's deed to Lang. Demandant's husband died in November, 1891, and this action was commenced in 1900.

Dower exists in this state as at common law. "Dower at common law is an estate for life to which the wife is entitled, on the death of the husband, in the third part of the legal estates of inheritance in lands and tenements of which the husband was seised in deed or in law, in fee simple or in fee tail, at any time during coverture, and to which any issue which the wife might by any possibility have been heir." 10 Ency. Law (2d Ed.) 125. As stated in *Secrest v. McKenna*, 6 Rich. Eq. 72, "Dower is a legal right, and can attach only on a legal seizure of the husband during coverture." We do not agree with the circuit court that demandant's husband acquired an estate of inheritance in the land in question under the instrument set forth herein. This instrument, construed as a

whole, is not a present grant in fee, but a covenant to grant in fee in exchange of lands, to be consummated when the proper court, whose aid was to be thereafter invoked, would enable the Langs to convey and assure the fee.

It must be noticed that, under the will of Duncan McRae, Sarah Lang was life tenant, and her children were contingent remaindermen, of said lands. *Faber v. Police*, 10 S. C. 376. The covenant was signed by three of these eight remaindermen, of whom four of these not signing were minors. A contingent remainder, technically speaking, is not an estate in lands, but is the possibility of one. If the remaindermen be ascertained, it is a possibility coupled with an interest, and it is devisable, transmissible, and in equity assignable; but, if the remaindermen be not ascertained, such bare possibility is not capable of devise, transmission, or assignment. 20 Ency. Law, 849; *Allston v. Bank*, 2 Hill, Eq. 235; *Roundtree v. Roundtree*, 26 S. C. 451, 2 S. E. 474. A court of equity, however, in a proper case-made, and with the proper parties before it, may convey the fee, disposing of all contingent interests therein; and it was doubtless in view of this that the parties covenanted to convey lands in exchange when enabled to do so by the court. Whatever rights or equities Edward M. Boykin had under the covenant, they did not amount to a seizure of a legal estate of inheritance. His possession of the land in 1847 and 1848 was doubtless under the last clause of the covenant, stipulating that possession of the lands should be given to each party by January 1, 1847; but such possession did not constitute seizure, in the sense of the law of dower. The agreement of the life tenant, Sarah Lang, who had right of possession, was all-sufficient to put the Boykins in possession, pursuant to the proposed plan of effecting an exchange of lands; but, as a life estate is not an estate of inheritance, nothing that the life tenant could do would confer an estate of inheritance. The fee in the land in question did not pass until the court, by its commissioner, conveyed the same in 1850; but, unfortunately for plaintiff's claim, the fee was not conveyed to demandant's husband, but to Thomas Lang, the assignee of the plaintiff's husband's rights and equities under the said covenant. The case of *Secrest v. McKenna*, 6 Rich. Eq. 72, decides that "where one enters under a written contract to receive titles on payment of the purchase money, and, after payment, under a bill for specific performance, to which his creditors are parties, the premises are sold as his property for the payment of his debts, his widow, after his death, will not be entitled to dower therein, he never having had a legal seisin." So in this case the claim of dower cannot be supported, because demandant's husband never had legal seisin.

The judgment of the circuit court is re-

versed, and the judgment of the probate court is affirmed.

GARY, A. J. As I am unable to concur in the conclusions expressed by the majority of the court, I will state briefly the reasons for my dissent. Under my view of the case, it is not necessary to determine whether the interests which the Langs took under the will of their grandfather Duncan McRae were vested or contingent.

On the 15th of January, 1849, E. M. Boykin (husband of the plaintiff), Charlotte A. Boykin, K. L. Boykin, and John A. Boykin, executed a conveyance in the usual form, with a general covenant of warranty, to Thomas Lang, of the land in which dower is claimed. His honor the circuit judge found as a fact (to which finding there was no exception) that "E. M. Boykin went into possession of the land out of which dower is demanded under the conveyance of August 1, 1846, and cultivated the land, remaining in possession until the conveyance to Thomas Lang in January, 1849." The circuit judge also found as a fact (to which finding there was no exception) that, "under the title derived by him from the Boykins, Thomas Lang went into possession of the land in 1849, and he and those holding under him, including Springs and Shannon, the defendants in this proceeding in dower, have held the land ever since." In the case of *Lessly v. Bowie*, 27 S. C. 197, 3 S. E. 200, the court uses this language: "In a sale of lands there is certainly no implied warranty, as there may be in reference to personalty. There is no such thing as a failure of consideration, arising out of a contract implied, or, as it is sometimes expressed, the equitable condition of sale. A purchaser must protect himself, if at all, by covenants in writing, out of which all his rights of defense must come, except, perhaps, in the case of fraud. *Mitchell v. Pinckney*, 18 S. C. 204. This defendant did protect himself by a deed of general warranty, which, since our act of 1795, has been interpreted to embrace all the covenants used in conveyances of land prior to that time, viz., that the vendor is seised in fee, that he has a right to convey, that the vendee shall quietly enjoy, and that free from all incumbrances, and also, it seems, for further assurances. See *Jeter v. Glenn*, 9 Rich. Law. 374." The court also says that an outstanding claim of dower is in the nature of an incumbrance, and is covered and guarded against by the covenant "against incumbrances" embraced in the general warranty. The court also decides that an outstanding paramount title is a breach of another covenant embraced in the warranty, to wit, that the vendor was seised in fee, and that it cannot be made the basis of relief as long as the purchaser remains in the quiet enjoyment of the land.

In 5 Am. & Eng. Ency. Law (1st Ed.) 485.

the rule is thus stated: "If a deed with covenant of warranty is given, conveying only a possibility, when the possibility becomes a vested estate the grantor will be estopped from denying the title of his grantee to the land." In *Craig v. Reeder*, 3 McCord, 411, the court says: "If a man sell land to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had no title at the time he sold." In *Robertson v. Sharpton*, 17 S. C. 592, the proposition stated in *Craig v. Reeder*, supra, is reaffirmed *ipsissimis verbis*. In *Harvey v. Harvey*, 26 S. C. 609, 2 S. E. 3, the court says: "Where parties hold title under another, they cannot deny that such person once had a title, but they can dispute any present title in him." See, also, *Rhett v. Jenkins*, 25 S. C. 458. In *Irvine v. Irvine*, 9 Wall. 817, 19 L. Ed. 800, the court uses this language: "When one makes a deed of land, covenanting that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the grantee, on the principle of estoppel." In *Jenkins v. Collard*, 145 U. S. 560, 12 Sup. Ct. 873, 36 L. Ed. 812, it is said: "Where a grantor having no present estate in the premises made his deed containing the covenants of seisin and general warranty, the same legal effect must be given to such covenants upon future acquired interests as if at the time of warranty the warrantor had had such interests. That warranty estopped the grantor and all persons claiming under him from asserting title to the premises against the grantee or his heirs or assigns, and from conveying it to other parties." In *Washabaugh v. Entriken*, 34 Pa. 74, the court said: "If a person without title sell a tract of land, and subsequently acquire title to an undivided portion of it by devise from the real owner, such title will inure to the benefit of his grantee." To the same effect, see *Clark v. Baker*, 14 Cal. 628, 76 Am. Dec. 449, et seq.

These authorities show that Thomas Lang and those claiming under him are estopped, even as against E. M. Boykin, from interposing the objection that he was not seised in fee, as they have never been disturbed in their possession. For a stronger reason, they are estopped as against the plaintiff, as dower is a favored claim in law. Even conceding that E. M. Boykin was not seised in fee at the time the land was conveyed to Thomas Lang in 1849, nevertheless the fee thereafter was conveyed to him under judicial proceedings at the instance of E. M. Boykin and the other parties in interest. As he entered into possession under the deed of conveyance executed in 1849 by E. M. Boykin and others, and as his grantees have not been disturbed in their possession, they are not in a position to deny that E. M. Boykin was seised in fee, and therefore cannot dispute the claim of dower on that ground.

I therefore think the judgment of the circuit court should be affirmed.

(88 S. C. 342)

ALLEN v. ADAMS, Mayor, et al.  
(Supreme Court of South Carolina. May 27, 1903.)

## TOWNS—SCHOOL-HOUSE BONDS.

1. A town incorporated under Acts 1896 (22 St. at Large, p. 67) has the power, under Code 1902, § 2021, authorizing towns, on petition of a majority of the freeholders, to order a special election to issue bonds to erect or repair school-houses, to issue bonds for the erection of such a schoolhouse within the municipality, though the school be controlled by the usual school authorities.

Petition in the original jurisdiction of the court by J. H. Allen for injunction against the town council of Edgefield, to restrain them from issuing bonds for the erection of a school building. Dismissed.

The amended petition is as follows:

"First. That your petitioner is a citizen of the county of Edgefield, in the said state, and is a resident and taxpayer in the town of Edgefield, situate in said county and state.

"Second. That W. W. Adams is the mayor of the said town of Edgefield, and the following names compose the board of aldermen: J. P. Ouzts, B. J. Crooker, E. H. Folk, C. E. May, M. P. Wells, and J. L. Caughman.

"Third. That your petitioner is informed and avers that the said mayor and aldermen, constituting the town council of the said town of Edgefield, have resolved to issue bonds of the said town in the aggregate in the sum of \$15,000, payable thirty years after the date thereof, with interest at the rate of five per cent. per annum, payable semiannually, for the purpose of building a schoolhouse within the corporate limits of said town.

"Fourth. Your petitioner alleges that the said mayor and aldermen constituting the said town council are without authority of law to issue such bonds, for the reason that the purpose for which said bonds are to be issued is neither a public purpose nor a corporate purpose; that there is no authority of law for the said town council to enjoy or exercise any control over the schools in said town, and the said town council is without authority to incur the expenses incident to the erection of a school building which is to be managed and controlled without the interference or co-operation or supervision of the authorities of the said town. That is to say, your petitioner alleges that the said school building which the said town council proposes to erect by the proceeds of the sale of the bonds mentioned in paragraph 3 thereof is to be erected on a lot of land situate within the corporate limits of the said town of Edgefield, which was conveyed by one Eldred Simkins, Sr., on the 10th day of July, 1825, to Edmund Bacon, Whitfield Brooks, Matthew Mims, John S. Jeter, and Eldred Simkins, trustees of the Edgefield Village Academy, and to their successors in office, with the following limitations expressed in said deed, to wit: 'To have and to hold all and singular the premises before mentioned

unto the said trustees and their successors in office for the express purpose of being used and employed by them as a site for a seat of learning or an academy, to them and their successors and assigns forever.' Your petitioner alleges that he is informed and believes that ever since the execution of said deed, and unto the present time, there has been maintained upon said lot a building for the educational uses of said town by the said board of trustees and their successors in office; that it is said to be believed that the building now on said lot is inadequate to the uses of the town for such educational purposes; and that therefore the said town council proposes to erect a building thereon for said purposes at the cost of about \$15,000, which said sum is to be raised by the issuance and sale of the bonds hereinabove mentioned. Your petitioner alleges that he is informed and believes that the building so to be erected upon said lot is to be managed and controlled by the said board of trustees, and that the said mayor and aldermen, as he is informed and believes, will not have the direction of the management of the said institution; on the contrary, that the said institution of learning is to be managed and controlled by the existing board of trustees, being the successors of the board of trustees mentioned in the said deed of July 10, 1825.

"Fifth. Your petitioner is informed and avers that the said town council claims to possess the power to issue said bonds by authority of the provisions of section 18 of an act of the General Assembly of the said state entitled 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants,' approved the fifth day of March, 1896; but in reference thereto your petitioner avers that the said town of Edgefield has never been incorporated under the provisions of said act, and has never become invested of the privileges, powers, and immunities prescribed thereby.

"Sixth. Your petitioner further alleges that the petition addressed to the said town council, praying that an election might be ordered for the purpose of determining whether or not bonds should be issued for such purpose, was not signed by a majority of the freeholders of said town, as required by law, and that the notice issued by the said town council that an election would be held for the purpose of determining whether or not such bonds should be issued was not published for the time required by law, and that the result of such election did not authorize the issuance of such bonds.

"Seventh. Wherefore your petitioner prays that the said mayor and aldermen may be restrained and perpetually enjoined from signing, sealing, and issuing such bonds in accordance with their resolution so to do, and that the process of this court may forthwith issue, directed to the said mayor and aldermen, requiring them to show cause, on a day

to be appointed, why they should not be restrained and perpetually enjoined from issuing such bonds, and that in the meantime an order may be issued by this honorable court preventing and restraining them from issuing such bonds until the further order of this court; and your petitioner, as in duty bound, will ever pray."

To the rule issued on said petition the following return was filed:

"Now come W. W. Adams, J. P. Ouzts, B. J. Crooker, E. H. Folk, C. E. May, M. P. Wells, and J. L. Caughman, mayor and aldermen, constituting the town council in and for the town of Edgefield, and, for return to the rule to show cause why the prayer of the petition herein should not be granted, respectfully show unto the court:

"First. That they admit the allegations made by and contained in paragraphs 1, 2, and 3 of the petition.

"Second. That they deny the allegation in paragraph 4 of the petition that they 'are without authority of law to issue such bonds, for the reason that the purpose for which said bonds are to be issued is neither of public purpose nor a corporate purpose.' On the contrary, these respondents aver that they are authorized by the law of the state in such case made and provided to issue said bonds. In reference to which these respondents respectfully show unto the court that in and by the provisions of section 2021 of the Code of Laws of South Carolina (1902) it is provided: 'It shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town for the purpose of issuing such bonds, for the purchasing, repairing or improving the city or town hall, or park or grounds thereof, market and guard house, enlarging, extending or establishing electric light plants or other lights, or water works, or sewerage, erecting, repairing or altering school buildings, fire protection purposes, improvement of streets and sidewalks, or any corporate purpose set forth in said petition;' the only proviso in said section being 'that the aggregate bond indebtedness of any city or town shall never exceed eight per cent. of the assessed value of the taxable property therein.' These respondents further show that, in and by section 18 of an act of the General Assembly of said state (22 St. at Large, p. 73) entitled 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants,' it is provided that 'said town council shall have power to borrow money for corporate purposes, and to issue from time to time as occasion may require the bonds of the corporation for the payment of the principal, of which said town shall be at all times responsible'; the proviso in said section being that no such bond debt shall in any instance exceed the limit pre-

scribed in the Constitution of this state, and that no bond debt shall be issued except upon the vote of the citizens of the municipality as provided in the Constitution. These respondents allege, with reference to the said proviso in said section 2021, that the aggregate bonded indebtedness of the said town of Edgefield, including the bonds mentioned in the petition herein, does not equal, much less exceed, eight per cent. of the assessed value of the taxable property therein; and these respondents allege, in reference to the proviso in said section 18, that the bonds which they now propose to issue have been authorized by a vote of the citizens of the municipality as provided in the Constitution. Wherefore, these respondents submit that it is not true, as stated in paragraph 4 of the petition, that they are without authority of law to issue said bonds, and that the statement in said paragraph 'that there is no authority of law for the said town council to enjoy or exercise any control over the schools in said town' is immaterial, if it be true.

"Third. The statement in paragraph 5 of the petition is true, as set forth in the next preceding paragraph hereof, that these respondents claim 'to possess the power to issue said bonds by authority of the provisions of section 18' of the act therein mentioned; but these respondents deny the averment of said paragraph 'that the said town of Edgefield has never been incorporated under the provisions of said act.' In reference to which these respondents allege that in and by section 25 of the said act (22 St. at Large, p. 74), entitled, as aforesaid, 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants,' it is provided 'that any town of more than one thousand and less than five thousand inhabitants already chartered, which is desirous of surrendering its charter and accepting incorporation under this act, or whose charter is about to expire, may be incorporated under this act. The town council of such town may submit the question to a vote of the qualified electors at an election ordered on twenty days' notice. If the election results in favor of surrendering the old charter and accepting a charter under this act, the town council shall certify such result, accompanied by the sworn return of the managers of such election, to the Secretary of State, who shall thereupon issue to said council a certificate of incorporation of said town, with the privilege, powers and immunities, and subject to the limitations prescribed in this act.' In reference to which these respondents allege that on the 24th day of December, 1879, the General Assembly of the said state passed an act entitled 'An act to renew and amend the charter of the town of Edgefield,' in the first section of which act it is provided 'that all persons, citizens of the United States, who now own or may hereafter own dwelling houses in the village of Edgefield, and those who may occupy such

dwelling houses under lease, shall be deemed and are hereby declared a body politic and corporate, and that the said village shall be called and known by the name of Edgefield, and its corporate limits shall extend and form the circumference of a circle whose radius shall be one mile, with the court house thereof for the centre.' 17 St. at Large, p. 175. That being thus chartered under the provisions of said act of 1879, the town council, as authorized by the provisions of section 25 of the said general act of incorporation, heretofore submitted to the qualified electors of said town the question whether or not the said town shall surrender its charter and accept incorporation under said act. That the said election resulted in favor of surrendering the old charter, and accepting a charter under said act; and the town council certified in writing the result to the Secretary of State, together with the sworn return of the managers of said election, and the Secretary of State issued to said town council a certificate of incorporation, which is hereto attached as a part of this return.

"Fourth. These respondents deny each and every allegation in paragraph 6 of the petition, and, in reference thereto, allege that all the steps provided by law, and all the requirements of law relating to the issue of bonds by said town, were carefully and strictly complied with. (1) There was filed with the town council a petition praying that the town council should order a special election 'for the purpose of issuing bonds for \$15,000 for the erection of a public school building in said town,' which petition was signed by 101 of the freeholders within the corporate limits thereof; and these respondents allege that said number constitute more than a majority of the freeholders of said town, for, as appears by the certificate of J. B. Haltiwanger, auditor of said town, hereto annexed, there were at said time only 185 freeholders within the corporate limits of said town. (2) That on the 22d day of July, 1902, on which day said petition was filed, the town council ordered that an election should be held on the 23d day of August, 1902, for the purpose of determining whether or not the prayer of said petition should be granted, and whether or not the said town should issue its bonds for said sum for such purpose, and said notice of election was published in a newspaper published in said town for the full term of thirty days next preceding said election. (3) That said election was held pursuant to said notice, at which election 96 of the qualified electors of said town voted upon said question, each and every one of whom voted in favor of the issuance of said bonds as prayed for in said petition, and the result of said election was duly certified in writing to the said town council, by the managers of said election. That thereupon these respondents, in obedience to the wishes of every citizen of the town who exercised the right to vote upon



said question, resolved to issue said bonds, as stated in paragraph 3 of the petition herein.

"Wherefore your respondents, having full return made to all and singular the matters and things set forth in the petition herein, respectfully submit that the injunction for which the petitioner prays should not be granted, but, on the contrary, that they should be authorized to issue bonds in accordance with their said resolution, and that said bonds shall be declared by this honorable court, when so issued, to be valid obligations of said town."

B. E. Nicholson, for petitioner. Sheppard Bros., for respondents.

JONES, J. The petitioner applies to this court for an injunction to restrain the authorities of the town council of Edgefield from issuing bonds in the sum of \$15,000 for the purpose of erecting a school building within said town. The issue is made upon the facts stated in the petition and amended petition, which are not denied in the return, and upon the facts stated in the return to which petitioner demurred. The petition, as amended, and the return thereto, are officially reported herewith.

The petitioner is a citizen and taxpayer of the town of Edgefield, and the respondents are the mayor and aldermen of said town, constituting its town council. The said town council have resolved to issue bonds of the said town in the sum of \$15,000, payable 30 years after the date hereof, with interest at the rate of 5 per cent. per annum, payable semiannually, for the purpose of building a schoolhouse within the corporate limits of said town. The original charter of the town of Edgefield, renewed and amended by the act of December 24, 1879, was surrendered, and the town became incorporated under the act of March 5, 1896, entitled "An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants." 22 St. at Large, p. 67. And thereby, on the 28th day of February, 1898, the town of Edgefield acquired the privileges, powers, and immunities, and became subject to the limitations, prescribed in said act. Under section 1999 of the Code of 1902, "the city councils and town councils of the cities and towns of the state shall, in addition to the power conferred by their respective charters, have power and authority to make, ordain and establish all such rules, by-laws, regulations and ordinances respecting the roads, streets, markets, police, health and order of said cities and towns, or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns, or for preserving health, peace, order and good government within the same," etc. The act of February 11, 1897 (22 St. at Large, p. 411), entitled "An act to amend section 1 of

an act entitled 'An act to authorize special elections in any incorporate city or town of this state for the purpose of issuing bonds for corporate purposes,' approved March 9, 1896, so as to specify certain corporate purposes [italics ours], and so as to validate certain bonds issued under the said act," provides (section 1) "that it shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town for the purpose of issuing bonds for \* \* \* erecting, repairing or altering school buildings \* \* \* or any corporate purpose set forth in said petition," etc., with a proviso that the aggregate bonded indebtedness shall not exceed 8 per centum of the assessed value of the taxable property therein, which need not be further noticed, as it is admitted by the demurrer to the return that the bonds proposed do not exceed such limit. The foregoing statute now appears as section 2021 of the Code of 1902. It also appears that all the requirements of law relating to the issue of said bonds were strictly complied with, as to petition by requisite number of freeholders, the notice of the election and its due publication, the requisite vote of the qualified electors in favor of the issuance of the bonds, and the due declaration of the result of the election. The only issue in the case is one of law, arising under the fourth allegation of the amended petition, in part as follows: "Fourth. Your petitioner alleges that the said mayor and aldermen, constituting the said town council, are without authority of law to issue bonds, for the reason that the purpose for which said bonds are to be issued is neither a public purpose nor a corporate purpose; that there is no authority of law for the said town council to enjoy or exercise any control over the schools in said town, and the said town council is without authority to incur the expenses incident to the erection of a school building which is to be managed and controlled without the interference or co-operation or supervision of the authorities of the said town."

From the foregoing statement as to the chartered powers of the town of Edgefield, there is no room for doubt that the erection of a school building within the corporate limits is a corporate purpose. It is expressly declared to be a corporate purpose. That being the case, it is needless to inquire whether such is a public purpose; but a very slight consideration of the purposes of a school building within a town, in the discipline and training of the youth of the community, in promoting an intelligent citizenship, in attracting to the town a desirable class of people, who build homes and enter into business in the town, in the tendency to create or enhance taxable property, and other important public considerations, which readily occur to the mind as supporting the erec-

tion of a school building in convenient reach of the community, will demonstrate that such a purpose is a public one, and in a very high degree. But the petition states "that there is no authority of law for the said town council to enjoy or exercise any control over the schools in said town, and the said town council is without authority to incur the expenses incident to the erection of a school building which is to be managed and controlled without the interference or co-operation or supervision of the authorities of the said town." These are but statements of legal conclusions, which do not bind the respondents or the court, even though they do not appear to have been specifically denied in the return. The court judicially knows that such a building within a town would be subject to all proper police regulations of the town, and to that extent the building would be subject to the control and supervision of the municipal authorities, just as other buildings in the town. It is doubtless true that the town council has no control over the schools in said town, for the very satisfactory reason that the Constitution of the state, in article 11, devoted to the subject of education, and the statute laws of the state pursuant thereto, have placed jurisdiction over public schools in other officers, particularly selected for that purpose, and there is nowhere to be found any legislative attempt to confer power over schools in town councils.

It has already been shown that the allegation that the town council is without authority to incur the expenses incident to the erection of a school building is not in conflict with the express grant of such power to the town. But it is further argued that a municipal corporation has no power to issue bonds for the erection of a school building which is to be managed and controlled without the interference or co-operation or supervision of the town authorities; and it is said that, in order to carry out such a purpose, it would be necessary for the town authorities to divest themselves of their corporate powers, and delegate them to others, which would be unlawful. Attention must here be directed to the case as made by the petition, and to the constitutional and statutory provisions on the subject of schools, to which reference has already been made. By these it is manifest that the town council of Edgefield never had any power or control over schools or school buildings, beyond such as properly belong to them under their power of police. Therefore the town council, in issuing the bonds for the purpose named, would not divest themselves of, or delegate to others, any power over schools, for the very simple reason that no power or control over schools was ever conferred on them. It has already been stated that the educational scheme of this state, as embodied in the Constitution and statutes, has wisely placed jurisdiction over schools elsewhere. The issuance

of the bonds pursuant to the statute, whose terms and conditions have been complied with, would in no sense involve a delegation or divesting of corporate powers touching matters of police. It is perfectly competent for the Legislature to prescribe what shall be a corporate purpose, unless some constitutional limitation or prohibition exists. The only corporate purpose prescribed in this connection is "erecting, repairing, or altering school buildings," and the Legislature, even if it had the power, did not see fit to attach to this corporate purpose any such regulations as that the building, when erected, should be managed by the town authorities.

In the case of *Copes v. City of Charleston*, 10 Rich. 491, the court held that the city of Charleston, under a general grant of power to make such regulations as "shall appear to them requisite and necessary for the security, welfare, and convenience of said city," etc., had the power to subscribe to the stock of railroad companies within or without the state, and to tax the inhabitants of the city to pay such subscriptions. In the case of *Brown v. C. & L. R. Co.*, 13 S. C. 290, the court sustained, as constitutional, a subscription by the county of York to the capital stock of a railroad company. Conceding fully that a corporate purpose must be some purpose germane to the general scope of the objects for which the corporation is created, it is difficult to see how subscriptions or donations to the building of a railroad could be germane to the general objects for which towns and counties are created, while the building of a schoolhouse within the town limits would not be germane to any corporate purpose of the town. Would not a school building within the town of Edgefield promote the convenience, welfare, and order of its inhabitants? Are traffic and transportation by a railroad more germane to municipal purpose than the moral and intellectual training of its citizens?

The language used by the court in *Floyd v. Perrin*, 30 S. C. 7, 8 S. E. 14, 2 L. R. A. 242 et seq., does not support a contrary view. That case had under consideration the validity of township bonds in aid of railroads, and the bonds were held invalid for the want of a township corporate purpose to be promoted by their issuance. The point of invalidity was found in the nondescript character of the township corporation, which had not been created for any purpose whatever except the issuance of the bonds. How different is the case before us! The town of Edgefield is a full-fledged municipal corporation, with general power and purpose to do that which shall appear to them necessary and proper for the security, welfare, and convenience of said town, or for preserving health, peace, order, and good government within the same, and, in addition to this, "the erecting, repairing, or altering of school buildings," specifically declared to be a corporate purpose of said town, and it cannot be de-

nied that such a specific corporate purpose is promotive of the general purposes of the town corporation.

For these reasons, the petition should be dismissed, and the temporary restraining order heretofore granted herein should be revoked. The judgment of this court to this effect has already been rendered.

GARY, A. J. I concur in the opinion of Mr. Justice JONES for the following reasons: The allegations of the amended petition, which are not denied, show that the issuance of the bonds is for a public purpose. It is reasonably to be expected that the erection of a schoolhouse will be of benefit to the municipality, and, while the question whether the erection of a schoolhouse by this municipality is a corporate purpose is not free from doubt, nevertheless the constitutionality of the act should be sustained, unless it should clearly appear, beyond all reasonable doubt, that the act contravened the provisions of the Constitution.

(66 S. C. 302)

**BODIE v. CHARLESTON & W. C. RY. CO.**  
(Supreme Court of South Carolina. April 20, 1903.)

**NEW TRIAL—INSUFFICIENT DAMAGES—INJURY TO EMPLOYÉ—EVIDENCE—TRIAL—INSTRUCTIONS—DEFENSES.**

1. A new trial may be granted where the damages are insufficient.

2. In an action by an employé against a railroad for injuries received while loading rails, it is competent to show the usual method of defendants and other roads of doing the work.

3. It is not error for the court to refuse to allow the jury to visit the place of the accident, on their informing him that a view of the place would be of no use.

4. In an action for injuries to an employé, an objection to the admission of evidence, failing to state in what particular the testimony was inadmissible, is too general for consideration.

5. Where defendant requires a further explanation of the principle stated in the instruction, it should prepare a request to that effect.

6. An instruction, in an action for injuries to a servant, that defendant should adopt such appliances as were suitable to the work which it required plaintiff to do, with a reasonable degree of safety, and that it was the duty of the defendant to exercise due care to ascertain whether the appliances were safe and suitable, was proper.

7. If plaintiff was injured by an accident resulting from the concurrent negligence of a fellow servant and of defendant, defendant is liable, as though he was the sole offender.

8. An instruction in an action for injury to servant that the jury cannot find for plaintiff unless the preponderance of the evidence shows negligence of defendant, which was the proximate cause of the injury, was properly modified by making defendant liable whether the alleged injury could have and ought to have been foreseen or not.

9. An instruction undertaking to say what facts would constitute negligence on the part of defendant in an action for personal injuries is properly refused.

10. In an action by a section foreman against a master for personal injuries caused by an at-

tempt to perform work with insufficient hands, such fact is no defense.

11. Where there is evidence to sustain a verdict, a refusal to set it aside will not be disturbed.

Pope, C. J., dissenting.

Appeal from Circuit Court, Greenwood County; McCullough, Special Judge.

Action by Josiah W. Bodie against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant appeals on the following exceptions:

"(1) The defendant excepts to and appeals from the order or judgment of Judge Gary setting aside the verdict rendered on the trial before him and granting a new trial, on the ground that the circuit judge did not have the power to grant such new trial for inadequacy of the amount of the verdict rendered, and it was error of law for him to do so.

"(2) The defendant excepts to the rulings of Honorable Joseph A. McCullough, Presiding Judge, in relation to the introduction of testimony, and alleges error in such rulings as follows: (a) In allowing the plaintiff, Bodie, to testify, against the objection of the defendant, as to what was the usual and customary way of handling and loading rails, and that the manner in which he was handling rails when he was injured was the usual and customary manner; the testimony being as follows: 'Q. What is the usual and ordinary way? Mr. Grier: We object to that, also, as incompetent. (Objection overruled.) A. Just like I was handling them.' The error being that the circuit judge by his ruling allowed testimony as to the usual and customary method of handling rails, upon the question of plaintiff's ordinary care in handling such rails when he was injured. (b) In allowing the witness Bodie to testify that the method he adopted for handling these rails was usual and customary on the C. & W. C. Railroad, as follows: 'Q. What has been the method adopted on the C. & W. C. Railway? Mr. Grier: We object to that as incompetent. (Objection overruled.) Q. What has been the custom adopted there? A. The customary way of loading rails was to load it the way I spoke of just a few minutes ago—both ends at a time. We usually, in loading, loaded in no other way.' The error being in allowing testimony as to the custom of other agents and employés of this defendant in handling rails, upon the question of ordinary care of the plaintiff in handling rails when he was injured. (c) In allowing the witness W. D. Melton to testify what was the customary way of loading rails on a push car of the Central of Georgia Railroad and other roads, the testimony being as follows: 'Q. What road did you work on? A. I worked for the Central of Georgia. Q. Did you work for the C. & W. C.? A. Well, that was part of that road at that time. Q. What is the

¶ 1. See New Trial, vol. 37, Cent. Dig. § 151.

usual and customary way of loading rails on a push car? (We object to that on the ground of incompetency. Objection overruled.) Q. What is the usual and customary way of loading rails on a push car? A. Pick it up and carry it and load it on the car. Q. One end at a time, or altogether? A. I never have picked up one end at a time. I just picked up the whole rail and carried it and loaded it on the car. Q. What is the usual and customary way? Was it ever done any other way? A. Always saw it that way.' The error being in allowing testimony as to the custom on other railroads or on this road in handling rails, upon the question of ordinary care of the plaintiff in handling rails when he was injured. (d) In allowing the witness P. W. Ellenberg to testify as to the usual and customary manner of handling rails, in answer to the following questions, to wit: 'Q. What is the usual and customary manner of handling rail? Do you know how it is done? What is the customary way?' The error being in allowing testimony as to the custom on other roads or on this road in handling rails upon the question of ordinary care of the plaintiff in handling rails when he was injured. (e) In allowing the witness J. B. Ogilvie, on cross-examination, to testify that a larger force of hands would have been safer in this case, because such force would be able to catch and hold up a falling rail if one hand should slip. The error being that there was no such negligence alleged in the complaint, and such testimony was therefore incompetent.

"(3) The presiding judge, Hon. Joseph A. McCullough, erred in not requiring the jury to visit the place of the injury, after having ruled, in defendant's favor, and against the objection of plaintiff, that they should do so, and in allowing the jury to determine this question for themselves. The error being: (a) Having decided that it was necessary to a just decision of the cause for the jury to visit such place, it was error of law for the circuit judge to subsequently allow the jury to determine the question whether they would so view the place, or not, for themselves. (b) Because the record shows that it was necessary to a just decision of this cause for the jury to view the place of injury, and, the circuit judge having so held, it was error of law for him to allow the jury to have any voice in determining this question.

"(4) The presiding judge, Hon. J. A. McCullough, erred in charging the jury as follows: 'If you conclude that defendant did not require the plaintiff to do this extra work, but the plaintiff did so freely, voluntarily, of his own motion, without being required by the defendant so to do, why, then, of course, under the complaint, the plaintiff would not be entitled to recover, because he bases his action upon that theory. If, however, you conclude that the defendant did require the plaintiff to do this extra work, then there immediately followed a duty and

obligation which the law imposes upon the defendant railway company, and that is that the defendant railway company would furnish to the plaintiff suitable, safe and appropriate appliances for the purpose of doing that work.' The error being that his honor assumed as a fact in the case that the work in which the plaintiff was engaged when injured was extra work, when it was one of the issuable facts in the case whether such work was extra, or was a part of and a mere incident to the general work of keeping up roadbed, which had been committed to the plaintiff; thus charging upon the facts, in violation of the provision of the Constitution which prohibits such a charge.

"(5) The presiding judge, Hon. J. A. McCullough, erred in charging the jury as follows: 'That it was the duty of the defendant to adopt and use such machinery, apparatus, appliances, tools, and means as were suitable and proper for the prosecution of the business which it required the plaintiff to do, with a reasonable degree of safety to life and security against injury, and it was the duty of the defendant, and not the plaintiff, to exercise due care and diligence to ascertain whether the appliances furnished were safe and suitable.' The error being: (a) That while in some cases the employé may assume that machinery given him to work with is safe and suitable, and he is not bound to inquire whether it is so or not, such principle does not apply to this case, where the alleged negligence was in failing to furnish a sufficient force of hands, and the inefficiency, if it existed, was patent, and particularly where the plaintiff himself was in control of the instrumentalities given him for his work, and in some measure stood in the position of master with reference thereto. (b) In all cases it is the duty of an employé to exercise due care in and about the work committed to him, and it was error of law for the judge to instruct the jury that it was not the duty of the plaintiff to exercise due care and diligence to ascertain whether the appliances furnished were safe and suitable. (c) The doctrine stated was not applicable to this case, and was error of law, for the further reason that the uncontradicted testimony of the plaintiff showed that he had full knowledge some time before his injury of the alleged insufficiency of the force committed to him.

"(6) The presiding judge, Hon. J. A. McCullough, erred in charging the jury, on the request of plaintiff, as follows: 'That if the jury find that the plaintiff was injured by an accident resulting from the concurrent negligence of a fellow servant and of the defendant, the defendant is liable as though it were the sole offender.' The error being: (a) The charge leaves entirely out of account the question of proximate cause, and instructs the jury, in effect, that plaintiff can recover for an accident resulting from

any previous negligent act of the defendant, remote or proximate, if it concurred with a negligent act of a fellow-servant. (b) The instruction was more erroneous and hurtful to the defendant because the presiding judge elsewhere in his charge instructed the jury that an accident and a negligent act are entirely different, and to be distinguished one from the other. (c) The effect of the charge was to instruct the jury that the defendant would be liable for an accident. (d) It decides all questions against the defendant, and practically instructs the jury to render a verdict in favor of plaintiff, inasmuch as one of the defenses of the railway company was that the cause of the injury was the accidental falling of a fellow-servant.

"(7) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the defendant's third request, as presented, as follows: 'The jury cannot find for the plaintiff unless the preponderance of the evidence shows that the defendants were guilty of negligence as charged in the complaint, and that such negligence was the proximate cause of the injury; and, in order to warrant a finding that the negligence complained of was the proximate cause of the injury alleged, it must appear that the injury was a natural and probable consequence of the alleged negligence, and that it could have been and ought to have been foreseen'—and in modifying the same by striking out the words, 'and that it could have been and ought to have been foreseen.' The error being: (a) The charge, as modified, makes the defendant liable, whether the alleged injury, as the result of the alleged negligence, could have and ought to have been foreseen, or not. (b) The request, as presented, contained a sound proposition of law, and ought to have been charged without modification.

"(8) The presiding judge Hon. J. A. McCullough, erred in refusing the defendant's fourth request, as follows: 'If the jury believe that the cause of the injury was the accidental falling of one of the plaintiff's co-workers, and that this fall was not caused by the negligence of the railway company, then the plaintiff cannot recover. The error being: (a) The request contained a sound proposition of law, and should have been charged as submitted. (b) The modification emasculates the request. (c) The modification makes the defendant liable for consequences of the fall, although not liable for the fall itself, and allows recovery for negligence not alleged in the complaint.

"(9) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the jury, as requested by the defendant, as follows: 'If the jury believe that the force of hands furnished to the plaintiff was sufficient and safe for doing the work in hand in a different way from that which he adopted, then the plaintiff cannot recover, if the

evidence shows that his injury resulted from his use of the force for the work in a more dangerous way, unless the evidence also shows that he was directed or required by his employer to adopt such more hazardous way'—and in modifying the same by inserting therein the word 'negligent.' The error being: (a) The request contained a sound proposition of law, and it was error not to charge it as presented. (b) The defendant was entitled to the instruction that the use of a more hazardous way for doing work, when the plaintiff knew of a safe way, was in itself negligence that would bar a recovery. (c) In instructing the jury that, before plaintiff could be barred for contributory negligence, defendant must show more negligence on the part of plaintiff than the adoption of a method for doing the work known to be dangerous.

"(10) The presiding judge erred in refusing to charge the defendant's seventh request, as follows: 'If the negligence against which the plaintiff complains—if there was any such negligence on the part of the railway company—was long enough before the injury to admit of plaintiff's guarding against it by the use of ordinary care, and he failed to do this, knowing of such negligence of the railway company, there can be no recovery.' The error being: (a) The request contained a sound proposition of law, and it should have been charged as presented. (b) In view of the fact that the negligence complained of occurred long prior to plaintiff's injury, the request contained a sound proposition of law applicable to the case as made, with reference to the question of contributory negligence, and its refusal eliminated that defense in the most material aspect of the defendant's case.

"(11) The presiding judge, Hon. J. A. McCullough, erred in refusing to charge the defendant's eighth request, as follows: 'The courts will not take better care of a man than he takes of himself; hence, if an employé knows that the work in which he is engaged is dangerous, or that the appliances used by him are dangerous or insufficient, and fails to exercise ordinary care and observation to protect himself after such knowledge, he cannot recover; and, if the jury find such conditions to exist here, their verdict should be for the defendant.' The error being: (a) The request contained a sound proposition of law, and should have been charged as presented. (b) In view of the fact that the negligence complained of occurred long prior to the plaintiff's injury, the request contained a sound proposition of law, applicable to the case as made, with reference to the question of contributory negligence, and its refusal eliminated that defense in the most material aspect of the defendant's case. (c) It is the duty of an employé to exercise ordinary care, even when the master has given him defective appliances with which to work, and the refusal of the circuit judge to pre-

sent this charge to the jury ignored this principle, and relieved the plaintiff from the exercise of such ordinary care, if the master had previously been negligent in failing to furnish a sufficient force.

"(12) The presiding judge, Hon. J. A. McCullough, erred in refusing to grant a new trial, because the testimony, taken in its strongest light in favor of the plaintiff, shows that the proximate cause of the injury was not the negligence of the defendant, but the accidental falling of one of the plaintiff's fellow servants, and it was error of law to refuse a new trial on this ground."

Sheppards & Grier and S. J. Simpson, for appellant. Graydon & Giles and Caldwell & Park, for appellee.

#### Statement of Facts.

GARY, A. J. The allegations of the complaint, material to the consideration of the questions raised by the exceptions, are as follows:

"(2) That at the time hereinafter mentioned, and for a long time prior thereto, the plaintiff was employed by the said defendant as section foreman upon section 18 of defendant's said line of railroad, and, as such foreman, was ordered and required, in addition to the other duties imposed upon him, to haul and put in piles upon the side of said railroad, certain steel rails, which had been taken up from said track and cast alongside the same.

"(3) That during the summer of 1899 the said defendant furnished to the plaintiff a force of six section hands to do the ordinary and usual work required on said section, but, prior to giving the special orders to haul and pile the said steel rails, the said defendant had reduced plaintiff's force of hands to three, and had required plaintiff to take the place of a hand, and assist in all such work as required the services of more than three men.

"(4) That when the plaintiff was ordered and required by the defendant to haul and pile the said steel rails, he requested the said defendant to send him more help, protesting that the said steel rails were entirely too heavy (each one of them weighing 600 pounds or more) for the three hands and himself to handle, whereupon the said defendant promised two more men to assist in the said work, in the meantime requiring plaintiff to do and perform the same.

"(5) That it was the defendant's duty to furnish to the plaintiff proper appliances and the help necessary to do and perform the work assigned to him and required of him, and, notwithstanding its said promise, it willfully and negligently and carelessly disregarded its duty to plaintiff, and his request for more help, and failed to furnish to the plaintiff a sufficient force of hands to do the work required of him, and that such negligence of the defendant was the direct cause

of the injury to the plaintiff hereinafter set forth and alleged.

"(6) That on the 15th day of February, 1900, while the plaintiff, in compliance with the orders of the defendant, was trying, with the assistance of his three hands, to carry one of the said steel rails up an embankment for the purpose of loading it on his car and hauling and piling it as aforesaid, one of his said hands was entirely overcome and exhausted by the great weight of the said steel rail, on account of the failure of the defendant to furnish a sufficient force to carry the same, and fell to the ground, thereby causing the whole weight of one end of the steel rail to be thrown on the plaintiff, by which his right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs."

Upon the first trial the jury rendered a verdict in favor of the plaintiff for \$2,400, but on appeal the Supreme Court granted a new trial. 61 S. C. 468, 39 S. E. 715. When the case was tried the second time, the jury found a verdict in favor of the plaintiff for \$1,000, which was set aside by the presiding judge on the ground that, if the plaintiff was entitled to recover any sum at all, the said amount was inadequate. On the third trial the verdict was in favor of the plaintiff for \$3,000. The defendant appealed upon exceptions, which will be reported.

#### Opinion.

First Exception. This exception raises the question whether his honor the circuit judge had the power to grant a new trial for inadequacy in the amount of the verdict. Section 2734 of the Code of Laws provides that "circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law in this state." Section 286 of the Code of Procedure, in subdivision 4, contains the provision that "the judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages, but such motions, if heard upon the minutes, can only be heard upon the same term at which the trial is had." (Italics ours.) While 14 Enc. of Pl. & Pr. 764, does contain the language quoted in the opinion of Mr. Chief Justice POPE, under the head of "Inadequate Damages for Torts—Common-Law Rule," it also adds immediately thereafter these words: "But the modern rule is that a new trial may be granted, in actions for torts, where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive." And under the head of "Code Provisions," on page 766, it also says: "The Code provisions as to new trials for inadequate damages appear, in general, to be merely declaratory of the com-

mon law. In some states the Codes have been amended so as to permit new trials where the verdict is so inadequate as to indicate passion or prejudice. In the absence of such amendment, a new trial may be granted for inadequate damages, on the theory that *the verdict is contrary to the evidence.*" (Italics ours.) In 16 Ency. of Law (1st Ed.) 591, it is said: "Where a verdict gives grossly inadequate damages to a plaintiff, it is as much a ground for a new trial upon the motion of the plaintiff as a verdict for excessive damages would be upon the motion of the defendant." In a note on the same page, the following language is quoted from McDonald v. Walter, 40 N. Y. 551: "A verdict for grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged." The case of Benton v. Collins (N. C.) 34 S. E. 242, 47 L. R. A. 83, is well considered, and fully sustains our views upon this question. The cases from our Reports, cited in the opinion of Chief Justice POPE, while showing that the courts should cautiously exercise the right to grant new trials for inadequacy in the amount of the verdict, nevertheless clearly lay down the principle that the court has the power to grant a new trial in such cases. See, also, Stuckey v. R. R., 57 S. O. 895, 35 S. E. 550, and cases therein cited, which even show that the circuit judge may, in his discretion, impose conditions upon granting a new trial.

Second Exception. Assignments of error "a," "b," "c," and "d" will be first considered. The only ground of objection interposed by the defendant to the introduction of the testimony on the trial of the case in the circuit court was that it was incompetent. This objection failed to specify in what particular the testimony was inadmissible, and is therefore too general to be considered. But waiving this objection, and considering the grounds set forth in the exceptions, they cannot be sustained, as the testimony was explanatory of the method for operating the appliances.

Assignment of error "e." In the first place, the witness testified that a larger force of hands would not have been safer in this case; and, in the second place, the testimony was responsive to the issues made by the pleadings.

Third Exception. The jury informed his honor the presiding judge that they had decided that it would be of no benefit to them to visit the place where the accident occurred. It was wholly within the discretion of

the presiding judge whether he would send the jury to view the place where the injury occurred, and, under the circumstances, his discretion was properly exercised.

Fourth Exception. When the presiding judge spoke of "this extra work," he did not mean to decide the question of fact, but only to refer to the extra work mentioned in the pleadings, which he had just explained to the jury, and which he pointed out as an issue in the case.

Fifth Exception. The charge embodied a sound proposition of law, and, if the defendant desired further explanation of the principle therein stated, it should have prepared requests to that effect.

Sixth Exception. The charge mentioned in this exception is to be considered in connection with other portions of the charge. By reference to the charge set out in the seventh exception, it will be seen that the appellant had the benefit of the principle as the proximate cause of the injury.

Seventh Exception. The charge, as modified, conformed to the principle stated in Harrison v. Berkeley, 1 Strob. 525, 47 Am. Dec. 578, cited with approval in Pickens v. R. R., 54 S. C. 508, 32 S. E. 567, in which the court says: "It is required that the consequences to be answered for should be natural as well as proximate. By this I understand, not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjunction of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from."

Eighth Exception. The presiding judge said: "I refuse to charge you that, that way. I charge you that request as follows: 'If the jury believe that the cause was the accidental falling of one of plaintiff's co-workers, and that this fall, I have added, or its consequences, was not due to the negligence of the railway company, then the plaintiff cannot recover.'" The authority last cited sustains the charge as modified.

Ninth Exception. His honor said: "I cannot charge you that way, but I charge you that with this modification, and you will pay attention now to the charge as I now read it to you: 'If the jury believe that the force of hands furnished the plaintiff was sufficient and safe for doing the work in hand in a different way from that which he adopted, then the plaintiff cannot recover, if the evidence shows that his injury resulted from his negligence, from his negligent use of the force for the work in a more dangerous way, unless the evidence also shows that he was directed or required by his employer to adopt such more hazardous way.' That is for you. Take into consideration the facts as they presented themselves to plaintiff on that oc-

casion. Was he negligent? Did he lack ordinary care in the way in which he handled those rails? Gentlemen of the jury, in handling them, did he fall short of that standard—the standard of ordinary care? If you find that he did, and that caused the injury, then—why, then, of course, under the charge which I have given you, he contributed to his own injury. If you find on that occasion that he didn't fall short of the standard, taking everything into consideration—he handled the rails with the force of hands just as an ordinarily prudent man would have been expected under the same circumstances—he would not be guilty of a lack of ordinary care. Then, if defendant was negligent, you cannot charge him with contributory negligence." The request to charge was objectionable, for the reason that it undertook to say what facts would constitute negligence. Even if the evidence showed that the plaintiff's injury resulted from his use of the force for the work in a more dangerous way, and also that he was not directed or required by his employer to adopt the more hazardous way, nevertheless it was for the jury to draw the inference therefrom, and to determine whether such facts constituted negligence.

Tenth Exception. The case of *Youngblood v. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, shows that the request to charge was properly refused, in which the court uses this language: "Section 15, art. 9 of the Constitution, sets at rest any doubts that might be entertained on this question. It provides that 'knowledge by an employee injured by the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to the conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them.' In other words, where an employé is injured while voluntarily operating machinery after knowledge of its unsafe condition, his action for injury caused thereby shall not be defeated by reason of this fact. The word 'defense' is not used in its technical sense. The words 'shall be no defense to an action' are to be understood as meaning 'shall not defeat an action.' The Constitution did not intend to deal with pleadings, but with a principle of law. It did not intend that a defendant on a motion for nonsuit should get the benefit of a state of facts which the Constitution declared should be no defense to the action." The object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employé by showing that he did not act with due care in voluntarily operating the machinery after knowledge of its defective condition.

Eleventh Exception. This exception is likewise disposed of by the case last mentioned.

Twelfth Exception. There was testimony

to sustain the finding of the jury. This exception must therefore be overruled.

The judgment of the circuit court is affirmed.

JONES, J., concurs.

POPE, C. J. (dissenting). This is the second visit of this action to this court. The jury at the first trial gave the plaintiff \$2,400 damages. A new trial was ordered by this court. See 61 S. C. 468, 39 S. E. 715. At the time of new trial, before Judge Ernest Gary and a jury, a verdict for \$1,000 was given the plaintiff, but, on the ground of inadequacy of verdict, the circuit judge ordered a new trial. At the third trial, before the Honorable Joseph A. McCullough, as special judge, and a jury, a verdict for \$3,000 was given the plaintiff. After entry of judgment on this last verdict, the defendant gave notice of its appeal from the order of Judge Ernest Gary granting a new trial, and also its appeal from the judgment for \$3,000. Exceptions were exhibited against the order of Judge Ernest Gary and the judgment for \$3,000. It is apparent that if the order of Judge Ernest Gary is untenable, because erroneous, there is no necessity to consider any of the grounds of appeal in the last case, for, if Judge Ernest Gary was in error, the verdict for \$1,000 still remains a valid verdict, and the judgment for \$3,000 must be set aside as a nullity. We will therefore first consider the exceptions presented to Judge Gary's order for a new trial.

It will be proper to state what the character of the action is, as stated by the pleadings and the judgment of this court in this action, as found in 61 S. C. 468, 39 S. E. 715. Mr. Justice JONES, in passing upon the issues as presented by the pleadings, said:

"This appeal comes from a verdict and judgment in favor of plaintiff in an action for damages for personal injuries alleged to have been sustained through defendant's negligence in failing to furnish an adequate force of laborers to do the work required of the plaintiff as section track foreman, in the hauling and piling of steel rails, after application for additional help by the plaintiff, and promises of defendant to supply the same. The sixth paragraph of the complaint alleged:

"(6) That on the 15th day of February, 1900, while the plaintiff, in compliance with the orders of the defendant, was trying, with the assistance of his three hands, to carry one of the said steel rails up an embankment for the purpose of loading it on his car, and hauling and piling it, as aforesaid, one of the said hands was entirely overcome and exhausted by the great weight of the said steel rail, on account of the failure of the defendant to furnish a sufficient force to carry the same, and fell to the ground, thereby causing the whole weight of one end of the steel rail to be thrown on the plaintiff,



by which his right leg was knocked out of place, his back injured, and a great strain put upon his whole body, causing a lesion of his kidneys and other internal organs.'

"Besides the general denial, the defendant interposed, as special defenses, contributory negligence and assumption of risk after knowledge."

As before stated, at the trial before Judge Ernest Gary and a jury, a verdict for \$1,000 was given to the plaintiff. Just then the "case" for appeal is as follows: "The plaintiff's counsel moved on the minutes of the court for a new trial on the ground of inadequacy in the amount of the verdict. Against the objection of defendant's counsel, this motion was granted, and a new trial ordered; the presiding judge signing the following order: 'The jury charged with the above-stated case having rendered a verdict in favor of the plaintiff for \$1,000, and it appearing to the court that, if he was entitled to recover any sum at all, the said amount is inadequate, on motion of Caldwell & Park and Graydon & Giles, plaintiff's attorneys, it is ordered that the said verdict be set aside and a new trial granted.'" No notice of appeal was given and no exceptions were taken immediately after this order for a new trial, and no notice of appeal nor exceptions taken to said order until after the judgment on the verdict for \$3,000 was entered.

The grounds of appeal as to the order for a new trial were as follows: "(1) The defendant excepts to and appeals from the order or judgment of Judge Gary setting aside the verdict rendered on the trial before him, and granting a new trial, on the ground that the circuit judge did not have the power to grant such new trial for inadequacy of the amount of the verdict rendered, and it was error of law for him to do so." In considering the error alleged, we will first examine the question as to the right of the appellant to maintain his appeal, under the law of this state governing appeals; then we will examine the right of the circuit judge, under the rules of the common law, to grant a new trial for inadequate damages awarded by the jury; and, lastly, what the rule is as fixed by our decisions and statutes on this subject.

1. Has the defendant the right of appeal from Judge Gary's order for a new trial because the damages awarded were inadequate? We have before stated that all that the defendant did at the time that the order for new trial was made by Judge Gary was to object to the passage of such order. It must be manifest that, when this order was made, the whole proceeding of the second trial became as if nothing had been done, so far as the trial was concerned; that the action stood for trial just as it did when the court awarded a new trial, as laid down in 61 S. C. 468, 39 S. E. 715. There having been a verdict for the sum of \$1,000 for the plaintiff before Judge Gary, this verdict was wiped out, at the instance of plaintiff. Was

this not a material matter to the defendant? Now, there can be no doubt that it was in the power of the defendant to have appealed from that order forthwith after its passage. Section 11 of the Code of Civil Procedure of this state, "D," under subdivisions 1 and 2, amply provide for an appeal from an order of this character, for in (1) it is provided, "Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas, \* \* \*" and in (2) "an order affecting a substantial right made in an action, when such order determines the action and prevents a judgment from which an appeal might be taken \* \* \* and when such order grants or refuses a new trial. \* \* \*" Thus it is shown that an appeal could have been taken as soon as the order was made. Could the defendant safely await the rendition of a final judgment before Special Judge McCullough, at which time he gave notice of appeal from Judge Gary's order, and exhibited his ground of appeal therefrom? Under section 11 of the Code of Civil Procedure of South Carolina, at page 7, under subdivision 1, it is provided: "Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas \* \* \* brought there by original process \* \* \* provided, if no appeal be taken until final judgment is entered, the court may, upon appeal from such final judgment, review any intermediate order or decree necessarily affecting the judgment not before appealed from." In construing this provision, this court has held that, where no notice of appeal was given and no exceptions taken at the time the intermediate order was made an appeal from such intermediate order may be taken along with the final judgment appealed from. *Hyatt v. McBurney*, 17 S. C. 150; *Lee v. Fowler*, 19 S. C. 607; *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430; *Morgan v. Smith*, 59 S. C. 49, 37 S. E. 43, and many other cases cited on page 8 of the Code of Procedure. We hold, therefore, that the order was appealable, and that the appeal could be heard by this court on the hearing of the final appeal in this case.

2. Could the circuit judge (Judge Ernest Gary) base his order upon the rules of the common law relating to orders for new trials because of inadequacy of verdict? In the fourteenth volume of *Encyclopædia of Pleading & Practice*, 764, the following statement is made: "Inadequate Damages for Torts—Common-Law Rule. At common law, new trials were not granted on the ground that the damages awarded for torts were inadequate or insufficient; at least, such was the rule as to damages for trespass and slander, which were regarded as analogous to prosecutions for crime. It was also said that, where there was no legal measure of damages, the verdict should be conclusive. The rule was to some extent influenced by a rule

of court that a new trial would not be granted where the verdict was small in proportion to the costs required for a new trial." Again, in the same work, at page 765, under the heading, "New Trials for Inadequate Damages not Granted at Common Law," is the following: "There has never been a doubt that the power to grant new trials for excessive damages exists at common law, as well in actions *ex delicto* as in actions *ex contractu*; but smallness of damages seems not to have been ground for a new trial, at least in actions of trespass, until it was made such by statute apparently for no better reason than that actions for torts (at least, actions of trespass *vi et armis*), were considered as bearing an analogy to prosecutions for crimes, as to which it is an admitted doctrine that whilst a new trial may be granted, upon the application of the accused, upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth because the penalty assessed by the jury is too small." We might cite many other authorities, but upon reflection it seems the foregoing citations are sufficient to establish the proposition that, under the common law, the trial judge had no right to pass the order.

3. What is the rule as to granting new trials in cases of personal injuries, when the plaintiff conceives his verdict to be inadequate, established in this state both by our decisions and our statutes? We remark that in the year 1789 (see 7 St. at Large, p. 253) our General Assembly enacted as follows: "That from and after the sitting of the several circuit courts next ensuing, the said circuit court shall [have] and they are hereby declared to possess and shall be capable of exercising the same complete and original and final jurisdiction as possessed and exercised by the courts of general sessions of the peace and of common pleas now held in Charleston unless otherwise directed by this act according to the custom, usages and practice of the said courts; any law, custom or usage to the contrary notwithstanding." The common law of England was made of force in this state to govern the courts as they existed in this state prior to 1789, but a more generous holding of the courts in this state was provided by this statute in the year 1789, and the object of this statute was to clothe these new courts of common pleas with all the power formerly exercised by the courts that were confined to the city of Charleston. This statute remained of force until the year 1872, when it was formally repealed. But in the year 1868, in September, an act was passed by the General Assembly of this state by which it was enacted, in section 1, that circuit judges "shall have the power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of the United States." See 14 St. at Large, p. 136. This provision

was adhered to in the General or Revised Statutes adopted in 1872. However, the General Statutes of 1882 changed this by striking out the words "of the United States," and inserting the words "of the courts of law of this state." See section 2113 of General Statutes of 1882. And so the law stands till to-day. See section 2734 of the Code of 1902. Thus it is made necessary for us to see, by examination of our decisions, what were the reasons given for granting new trials, as they have been usually granted. We find but two decisions when new trials were granted because of inadequacy of verdicts in cases of personal injuries. These are *Bacot v. Keith*, 2 Bay, 466; *Wallace v. Frazier*, 2 Nott & McC. 516. In the former, where there was a ferocious assault and battery, the jury only accorded the plaintiff \$1 of damages. The Court of Appeals declared: "The judges were unanimously of the opinion that the jury in this case had behaved most shamefully, and deserved the severest reprehension of the court for such glaring partiality and injustice. And although it was not usual to grant new trials on account of the smallness of damages, yet this was so extraordinary a case, in which every principle of justice has been outraged, that they could not hesitate a moment in ordering a new trial, and that without costs." In the latter case, it was a suit to recover damages for the breach of a warranty in writing for the soundness of a negro which was really unsound. This was, therefore, *ex contractu*. The jury found for plaintiff one cent damages. The court ordered a new trial, and said: "The testimony on the point was clear and uncontradicted, and the jury was not authorized to disregard it, and adopt an arbitrary rule of their own, unsupported by any testimony. The verdict was clearly against the evidence, and a new trial must be awarded." Now, we come to examine cases in our Reports on the subject granting new trials for verdicts for excessive damages. Many cases will be found sustaining that right. *Bourke v. Bulow*, 1 Bay, 49; *Netties v. Harrison*, 2 McCord, 230; *Richardson v. Murray*, Cheves, 11; *Morgan v. Livingston*, 2 Rich. Law, 581; *Mayson v. Sheppard*, 12 Rich. Law, 254; *Poppenheim v. Wilkes*, 2 Rich. Law, 354; *Fripp v. Martin*, 1 Speer, 236; *Davis v. Ruff*, Cheves, 17, 34 Am. Dec. 584; *Stott v. Ryan*, 8 Brev. 417. It was well said: "That courts have no right to annul the verdict of a jury solely on account of the smallness or insignificance of the sum allowed is well settled. They have the authority only where gross injustice clearly appears aliunde the verdict. It is a power the courts are loath to exercise, for in no case is there greater danger of usurping the exclusive function of the jury. In actions of the nature of the one at bar, there is no measure of sums." "No custom or market or law fixes a value to the injury done, and therefore the law has made it the exclusive

and peculiar province of the jury to name the amount to which a plaintiff may be entitled. No other judgment or opinion must be substituted for the combined judgment and opinion of the jury."

But what is our statute law on this subject? Very clearly, provision is made for the grant of a new trial for excessive damages by the circuit judge, but no mention is made therein of the power of a circuit judge to grant a new trial for inadequacy of the verdict in cases of personal injury. Our Code of Civil Procedure, under section 286, in the fourth subdivision, provides, "The judge who tries the cause may in his discretion entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, if heard upon the minutes, can only be heard at the same time at which the trial is had." This has been the statute law of this state for years. We thus see that the motion granted by the circuit judge in the case at bar was not sanctioned by the common law, nor was it sustained under the statutes of this state, as is shown by the decisions of our court. It was not a usual course in our courts to grant motions for a new trial upon the inadequacy of verdicts of juries. An examination of our Reports will fall to disclose an instance where a verdict of \$1,000 in a suit for \$10,000 has ever been held as an inadequate verdict. The very fact that every Code of this state has provided the power in circuit judges to grant new trials for excessive damages, and in no instance has provided for power in circuit judges to grant new trials for inadequate damages, is a strong circumstance. To admit the existence of this power in the circuit judges, without a line of authority therefor, is fraught with great danger.

This conclusion renders it unnecessary to consider any other questions presented by this appeal. In my opinion, it follows that we must reverse and set aside all the proceedings before Special Judge Joseph A. McCullough, and order the action remanded to the circuit court, with directions to that court to carry out our judgment, reversing the order for a new trial granted by Judge Ernest Gary, with leave to the plaintiff to enter up his judgment on the verdict for \$1,000 rendered by the jury in the trial of this action had before the Honorable Ernest Gary as circuit judge.

On Rehearing.

(May 18, 1903.)

**PER CURIAM.** After careful examination of the petition for a rehearing in this case, and the court being satisfied that no material question of law or of fact has either been overlooked or disregarded, it is ordered that

the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(101 Va. 690)

# SHUFFLEBARGER v. BLANCHARD.

(Supreme Court of Appeals of Virginia. July 2, 1903.)

## JUDGMENT—RES JUDICATA—SAME SUBJECT-MATTER.

1. Complainant filed her bill to have set aside a tax deed dated December 23, 1899, conveying to defendant 84 acres of land. Defendant filed a plea of *res judicata*, setting up that she obtained title to the land embraced in the deed of December 23, 1899, by virtue of another tax deed dated December 13, 1898, and that this last deed was confirmed to her by decree of court in a suit to which complainant was a party, etc. It appeared that defendant, as assignee of a third person, obtained from the clerk of the county court of the county a deed dated December 13, 1898, conveying to her 60 acres of land; that on December 23, 1899, she obtained from the same clerk a second deed conveying to her 84 acres of land. There was nothing in the description of the deeds to suggest whether the larger tract embraced the smaller, and the evidence in the record tended to show that it did not; the larger tract being bounded at several points by the smaller. *Held*, that the plea was not sustained.

Appeal from Circuit Court of City of Bristol.

Bill by Mary L. Shufflebarger against Bessie B. Blanchard. Bill dismissed, and complainant appeals. Reversed.

H. G. Peters, for appellant. A. H. Blanchard and J. S. Ashworth, for appellee.

**HARRISON, J.** The bill in this case was filed by the appellant, Mary L. Shufflebarger, seeking to have set aside a tax title deed dated December 23, 1899, from the clerk of the county court of Washington county, conveying to appellee, Bessie B. Blanchard, a tract of land containing 34 acres, 1 rood, and 2 poles, upon the ground of irregularities in the proceedings by which the deed was obtained, and, further, upon the ground of fraud in its procurement.

There was no error in the action of the circuit court in overruling the demurrer to the bill. The allegations of the bill furnish ample ground for the interposition of a court of equity, and the demurrer admitted their truth. The demurrer being overruled, appellee filed a plea of *res judicata*, in which she alleges that she obtained title to the land embraced in the deed of December 23, 1899, under and by virtue of another tax deed from the clerk of the county court of Washington county, dated December 13, 1898; further alleging that this last-mentioned deed was confirmed to her by the circuit court of Washington county by a decree entered on the 19th day of April, 1899, in the suit of J. H. Miller v. Wm. Shufflebarger, etc., and that appellant was a party to that suit, and had full opportunity therein to obtain the relief

now sought in this suit; and therefore that the matters in controversy are *res judicata* as to her. Issue was joined upon this plea, and the circuit court sustained the contention of appellee, holding that the land in controversy, embraced in the deed of December 23, 1899, was covered by the deed of December 13, 1898, and dismissed the bill.

It appears that appellee, as assignee of the rights of L. P. Summers, obtained from the clerk of the county court of Washington county a deed dated December 13, 1898, to 60 acres of land, described by metes and bounds. It further appears that on the 23d day of December, 1899, appellee obtained from the same clerk a second deed of the last-named date conveying to her 34 acres, 1 rood, and 2 poles, which is likewise described by metes and bounds. These two deeds purport to be executed, in pursuance of the statute, for land sold and bought in by the commonwealth for taxes. They are practically in the same words, except the amount and description of the land mentioned in each. As already shown, the deed of 1898 conveys 60 acres, while the deed of 1899 conveys 34 acres, 1 rood, and 2 poles. There is nothing in the description by metes and bounds to suggest that the larger tract embraces the smaller; on the contrary, it would seem that such was not the case, as the outside boundaries of the larger tract make it, at certain points, bounded by the Finley Shaffer land, which is the smaller tract, or land in controversy.

There is in the record a deed dated December 16, 1879, from Joseph Booker, of the county of Washington, which conveys to the widow and heirs of Robert Kindrick—the widow mentioned being the appellant here—a tract of land containing 60 acres, described as the land of one James Shaffer. The metes and bounds given in this deed are exactly the same as those in the deed dated December 13, 1898, from the clerk to the appellee, and show that the 60-acre tract is bounded at several points by the land of Finley Shaffer.

There is also in the record a deed dated February 22, 1901, from Finley Shaffer to the widow and heirs of Robert Kindrick, conveying to them a tract of land containing 34 acres, 1 rood, and 2 poles. This deed states that it is in lieu of a lost deed to the same land made to Robert Kindrick in his lifetime. The metes and bounds given in this deed are practically the same as those given in the deed dated December 23, 1899, from the clerk conveying to the appellee the 34 acre, 1 rood, and 2 pole tract.

These two deeds show that the land in controversy, 34 acres, 1 rood, and 2 poles, is an entirely different tract of land from the 60-acre tract, and was derived by the appellant from an entirely different source.

The record in the case of *Miller v. Shuffebarger*, which is the sole evidence relied on in support of the plea of *res judicata*,

wholly fails to sustain such plea. The bill in that case was filed to subject to sale a tract of 60 acres of land. The allegation is that the debtor owned a tract of 60 acres, describing it as the James Shaffer land, and the same conveyed by Joseph Booker to the widow and heirs of Robert Kindrick. The commissioner to whom the cause was referred reports that the land sought to be subjected in that suit had been sold for taxes, and conveyed to appellee by deed dated December 13, 1898; thus identifying the land embraced in the last-mentioned deed as the Booker land, derived from James Shaffer. And the final decree of April 19, 1899, brings the cause on upon the commissioner's report, and the deed from the clerk to the appellee for the 60 acres, and, recognizing that said deed defeated the object of the suit, dismissed the cause at the cost of the complaining creditor. There is nothing in the record of *Miller v. Shuffebarger* to show that the tract of land containing 34 acres, 1 rood, and 2 poles was involved in that suit, or that the parties thereto could have, or were called upon to litigate therein, any right or question with respect thereto. If it be true, as contended by appellee, that her first deed to the 60-acre tract covers and embraces the 34 acre, 1 rood, and 2 pole tract now in controversy, the record affords no explanation of the apparently unnecessary course of afterwards obtaining a second deed to part of the same land already covered by the first.

Upon the whole case, we are of opinion that the plea of *res judicata* was not sustained, and that appellant was not estopped by the record of *Miller v. Shuffebarger* to maintain her present suit.

For these reasons the decree complained of must be reversed, and the cause remanded to the circuit court for further proceedings to be had therein, not in conflict with the views expressed in this opinion.

(66 S. C. 328)

**ABBEVILLE ELECTRIC LIGHT & POWER CO. v. WESTERN ELECTRICAL SUPPLY CO.**

(Supreme Court of South Carolina. July 11, 1902.)

**OBJECTION TO JURISDICTION—RES JUDICATA.**

1. Where an objection to the jurisdiction, based on the alleged illegal service of a summons, has been made and overruled, no second objection based thereon can be admitted, however much the specifications of the objections taken the first and second time may vary from each other.

Appeal from Common Pleas Circuit Court of Abbeville County; Townsend, Judge.

Action by the Abbeville Electric Light & Power Company against the Western Electrical Supply Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank B. Gary, for appellant. Wm. N. Graydon, for appellee.

YOUMANS, A. A. J. (in place of McIVER, C. J., indisposed). For a proper understanding of the questions involved in this appeal, a statement somewhat minute of the proceedings is necessary. The action was commenced by service of summons and complaint upon one George F. Schminke, under the claim of plaintiff that Schminke was an agent of defendant, a corporation duly chartered under the laws of the state of Missouri. In the complaint it is alleged that the cause of action set forth arose in the state of South Carolina, and the other allegations set forth as the cause of action, the breach of a contract whereby defendant guaranteed that a certain electric machine for the purpose of generating electricity, known as a "45 K W Warren alternator," sold by defendant to plaintiff in December, 1899, was free from any and all inherent electrical or mechanical defects. The complaint alleges, also, that the defendant promised time and again to remedy the defect in said machine, or furnish a new one, but failed to do so. Before the time for answering expired, the following notice was served on plaintiff's attorney: "To Wm. N. Graydon, Esq., Plaintiff's Attorney: Please take notice that the undersigned hereby enters a special appearance for the above-named defendant, and upon the call of this case will move the presiding judge to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the 7th day of November, 1900, was not an agent of the defendant. Defendant will appear for the purpose of objecting to the jurisdiction of this court, and for no other purpose. Frank B. Gary, Defendant's Attorney. November 26, 1900." The defendant placed the case upon the docket of the court, and the motion was heard before Judge Benet at the February term, 1901, of the court of common pleas for Abbeville county. The defendant offered the following affidavit in support of its motion, viz.: "Now comes the Western Electrical Supply Company, defendant herein, and states that George F. Schminke, the person upon whom service of summons was had herein, at the time of said service was not an officer of this defendant, nor a director thereof; that he was simply and solely the traveling salesman for this defendant; that his duties and powers with this defendant were simply and solely to take orders for the sale of merchandise, subject to the approval of this defendant, in such states as he might be directed by this defendant from time to time; that he had no other powers or duties than these; that he was a resident of the city of New Orleans, state of Louisiana; that this defendant has no office or place of business in the state of South Carolina; that said George F. Schminke was especially sent to the town of Abbeville at the time of said service to examine into the running of the machinery in controversy and report the facts to defendant, and that he was so sent at the

request of plaintiff; that the contract between plaintiff and defendant, out of which the alleged cause of action arose, if plaintiff has any cause of action, was not made in the state of South Carolina. Western Electrical Supply Co., per R. V. Scudder, Genl. Manager." (Sworn to.) The plaintiff offered the following affidavit and card and letters in rebuttal, viz.: "Personally appeared before me W. N. Thompson, who, being duly sworn, says that he is the president of the above-named plaintiff; that the letters hereto attached were received from the defendant in due course of mail, and letters, copies of which are hereto attached, sent defendant; that the card hereto attached was handed deponent by Mr. George F. Schminke, when he came to Abbeville, representing the defendant in negotiations looking to the settlement of the differences between the plaintiff and the defendant, which resulted in the suit now pending in this court. W. N. Thompson." (Sworn to.) The following is the card referred to in the above affidavit: "George F. Schminke, Western Electrical Supply Company. Electrical Supplies, St. Louis." The following are the letters and copies of letters, in their regular order, referred to and attached to the affidavit of W. N. Thompson, viz.: "St. Louis, October 23d, 1900. Abbeville Electric Light and Power Co., Abbeville, S. O. Gentlemen: Referring to your favor of October 6th, which has been held for the writer's return to the city, we note fully what you have to say, and as there is such a marked difference between your report and the factory's report, and as we are put into the position of middleman, as a sort of humper, between you and the factory, you can readily appreciate our position, and we will defer writing you at any great length excepting to say that if your position is correct, you shall certainly be treated right. We have written our Mr. George F. Schminke, who will be in Abbeville now in about ten days, and we will get a full report from him, and we have also written the factory fully regarding the matter and enclosed them a copy of your letter, and we are satisfied that it will be news to them, and we will advise you as soon as we hear from them, and we have requested them to write us by return mail fully regarding the matter, and we assure you that if your position is correct in this matter and the machine is defective, that we will replace it with a machine that will perform in accordance with the contract. We trust you will bear with us until we can get a full and definite report from the factory and a reply to our letter to them to-day enclosing a copy of your letter under answer." (Signed by the defendant.) The following is the letter of plaintiff in reply to the above: "Abbeville, S. C., October 27th, 1900. Gentlemen: In reply to your favor of the 23d inst., we note what you say, and would say that we are taking steps to buy a new machine at once, for we cannot afford to be delayed any longer in this

matter. Now, in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3d proximo, we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date, with power to act so that we may be assured of a speedy settlement." (Signed by the plaintiff.) The following letter in reply to the letter of plaintiff follows: "St. Louis, October 29, 1900. Abbeville El. Lt. and Power Co., Abbeville, S. C.—Gentlemen: Your favor of the 27th inst. to hand, and this is simply to acknowledge receipt of your letter and to let you know that we are following up the matter. Before answering your letter, we are waiting to have a reply to a telegram we have sent to our Mr. Geo. F. Schminke to-day, asking him to wire us when he would arrive in Abbeville, and also asking him to advise us by wire where a letter would reach him, as we want to write him fully regarding the situation at Abbeville, and upon receipt of his reply advising us when he will be able to reach Abbeville, we will answer your letter fully. We have no doubt, however, that he will be able to get into Abbeville not later than November 5th, and we think it will be very foolish of you to replace the Warren machine with a machine of another make, if you intend trying to operate the other machine under the same conditions as the Warren, and we are very sure that if you will improve the conditions under which you are trying to operate this Warren machine and have your Warren machine fixed up, that you will have no trouble with it. We are very sure that under the conditions you are trying to operate, you cannot get any machine to give you satisfaction, and we doubt if any machine would have stood the racket as long as the Warren machine has. Mr. Schminke is a very competent man and capable of passing on a thing of this kind, and can advise you in a very few moments whether or not the conditions under which you are operating are unfavorable, and we trust that you will defer action on this matter until you give us an opportunity to look over the ground for ourselves, which we will do when our Mr. Schminke arrives in Abbeville. We will defer writing further until hearing from Mr. Schminke, and will notify you as soon as we have his telegram." (Signed by the defendant.) The next letter is dated St. Louis, October 30, 1900, addressed to plaintiff, and is as follows: "Gentlemen: Referring to your favor of October 4th, in which you enclosed your bill of October 1st, against us amounting to \$32.00, we return you herewith the invoice, and will thank you to kindly hold this with the balance of the papers until final adjustment is made of the account in accordance with the agreement, and when final adjustment is made of the account, if you are entitled to credit for those items, you shall certainly receive them, but we would

prefer not dividing the thing up and making an entry now and another entry at the final adjustment, but will simply make one bite of the cherry. Please attach this letter and your bill to the other papers pertaining to this settlement and keep all of the papers together so that we can have them at the proper time. This letter was in a basket on the writer's desk during his absence in the East, and in cleaning up the basket to-day he found the letter, and he thinks this will be the best way to dispose of the matter temporarily. We have not yet received a telegram from our Mr. Schminke in reply to ours of yesterday, asking him when he would reach Abbeville, but we have received a letter which indicates that he will be in Asheville, N. C., tomorrow, at which time we expect to receive an answer to our telegram, and we will then notify you just when you can expect Mr. Schminke in Abbeville." (Signed by the defendant.) Postscript: "We are sending Mr. Schminke some letters in your care which we will thank you to kindly deliver to him when he reaches Abbeville." The next letter is dated St. Louis, November 1, 1900, addressed to the plaintiff, and is as follows: "Gentlemen: Our Mr. G. F. Schminke will be in Abbeville on the 5th inst., and we are writing him fully to-day regarding the situation there." (Signed by the defendant.)

After argument of counsel for and against the motion, his honor Judge Benet signed the following order: "This case came before me on a motion to set aside the service of summons. The defendant is a corporation under the laws of the state of Missouri, and enters a special appearance through its attorney, for the purpose of setting aside the service of summons and of objecting to the jurisdiction of this court. Affidavits were presented by both plaintiff and defendant as to the capacity in which Geo. F. Schminke, the person on whom the service was made, was acting. After argument of counsel on both sides, I hold that defendant nonresident corporation could not be brought within the jurisdiction of this court by service of the summons upon the said George F. Schminke; he not being, in my opinion, an agent in the sense in which 'any agent' is used in the Code. It is, therefore, on motion of Frank B. Gary, defendant's attorney, ordered that the service of the said summons upon the said defendant, in the manner above related, be, and the same is, set aside. It is further ordered that the case be dismissed on the ground that this court has not acquired jurisdiction of the person or property of the defendant." Within 10 days after the rising of the court, the plaintiff duly served notice of its intention to appeal, and within 30 days served "case" and exceptions. The exceptions are as follows: "(1) Because his honor erred in holding that George F. Schminke was not an agent, in the sense in which 'any agent' is used in the Code. (2) Because his honor erred in limiting the scope of the word

'any agent,' as used in subdivision 1 of section 155 of the Code of Civil Procedure, as amended by the act of 1899 (23 St. at Large, p. 42). (3) Because the Code, in describing how service shall be made upon a foreign corporation, having named the president, cashier, treasurer, attorney, or secretary, and then saying 'or any agent thereof,' plainly meant to include every class of agents; and it was error in his honor to hold otherwise. (4) Because it plainly appears from the affidavit of the defendant, and from the letters written by them, that Geo. F. Schminke was the direct representative of the defendant in the very matter out of which the suit arose; and it was error in his honor to hold that he was not an agent, in the sense in which the words 'any agent' is used in the Code. (5) Because his honor erred in setting aside the service of the summons herein, the same having been duly and legally made upon an agent of the defendant within this state. (6) Because his honor erred in ordering that the case be dismissed; no notice of any such motion having been given, the only notice being that a motion would be made to set aside the service of the summons. (7) Because his honor erred in holding that the defendant could not be brought within the jurisdiction of the circuit court by the service of the summons upon George F. Schminke; he being, as shown by defendant's own affidavit, an agent of the defendant."

That appeal was heard by this court, and its judgment rendered and filed August 5, 1901, "that the order of the circuit judge, setting aside the service of the summons in this case, and dismissing the case for want of jurisdiction, be reversed, and that the case be remanded to the circuit court for Abbeville county for such further proceedings as may be necessary, with leave to the defendant to serve its answer within twenty days after written notice to the counsel who represented the defendant at the hearing of the motion to set aside the service of the summons of the filing of the remittitur in this case in the circuit court for Abbeville county." The opinion of the court was delivered by Mr. Chief Justice McIVER. 61 S. C. 361, 39 S. E. 559, 55 L. R. A. 146, 85 Am. St. Rep. 890. It is, *inter alia*, decided that the letters of the defendant used at the hearing of the motion below fully show that Schminke, when served with the summons in this state, was here as the representative of the defendant in the very transaction out of which the controversy arose; that the service upon him, in any view that may be taken of the case, was a good and valid service upon defendant, and would be held so to be by the Supreme Court of the United States, under their decisions, even apart from the South Carolina Code of Procedure. Within the time within which the Supreme Court permitted the defendant to answer the complaint, the defendant served upon the plaintiff's attorney the following notice of special appear-

ance, and the following affidavit: "To Wm. N. Graydon, Esq., Plaintiff's Attorney: Please take notice that the defendant herein declines to answer the complaint herein, in accordance with the allowance of the Supreme Court, as it is advised that by answering it would submit itself to the jurisdiction of the court. Nevertheless the defendant enters a special appearance for the purpose of objecting to the jurisdiction of this court, with the ultimate view of appealing to the Supreme Court of the United States from the final judgment in the case, should the same be adverse to the defendant. Upon the call of the case, the defendant will object to the judgment on the ground that the summons has not been served upon the defendant in this state, and this court has not, therefore, acquired jurisdiction of the person or property of the defendant. The defendant will move the court to set aside the attempted service of the summons on the defendant, on the ground that subdivision 1 of section 155 of the Code, providing for service on a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident,' approved the 2d of March, 1899, are in contravention of the fifth and fourteenth amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of South Carolina, entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within this state,' approved the 2d day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States. The affidavits upon which this motion will be made will be duly served upon you hereafter. The defendant will appear for the foregoing purposes, and for no other. Frank B. Gary, Defendant's Attorney. September 10, 1900."

In due time the following notice and affidavits were served upon the plaintiff's attorney:

"To Wm. N. Graydon, Esq., Plaintiff's Attorney: Please take notice that the motion of which you were heretofore given notice will be made upon the accompanying affidavits and the papers in the case. Frank B. Gary, Defendant's Attorney. September 16, 1901."

"Now comes the Western Electrical Supply Company, defendant herein, and states that it is not now, and never has been, engaged in business in the state of South Carolina, and that it has not now, nor has it ever had, an office or place of business in said state; that the contract between plaintiff and defendant, which is pleaded in plaintiff's petition, was not made in the state of South Carolina; that said contract, by its terms, was to be performed by defendant in the town of Sandusky, state of Ohio, and that said contract was actually and fully performed by defendant in said town of Sandusky, state of Ohio,

by delivering certain merchandise in said town and state of Ohio to plaintiff; that George F. Schminke, the person upon whom service of summons was had herein, was not at the time of said service, and never has been, an officer of this defendant, nor a director thereof, but had been employed by defendant for a short time as a traveling salesman; that his duties and power were simply and solely to take orders for the sale of merchandise, subject to the approval of this defendant; that he was not employed to make adjustments, and was not sent by defendant in this particular case to make any adjustment or settlement in the controversy between plaintiff and defendant, but, while on his route as a salesman, was requested by defendant to go to Abbeville and examine into the running of the machinery in controversy, and the complaints of the plaintiff, and report the facts to this defendant; and that, while said plaintiff was in the town of Abbeville for that purpose, service of summons herein was had on him. Defendant further states that it has a just and meritorious defense to this action. Western Electrical Supply Co., H. K. Gillman, Treasurer." (Sworn to.)

Upon the call of the case for trial, the defendant, through its attorney, Frank B. Gary, objected to the jurisdiction of the court, in pursuance of the notice above set forth, and presented the affidavits above set forth in support of the objection, and set forth its objections in writing as follows: "The defendant, having entered a special appearance, interposes a demurrer to the jurisdiction of this court on the ground that the defendant has not been brought within the jurisdiction of the court by service of the summons upon it in this state, and on the ground that subdivision 1 of section 155 of the Code of Procedure of South Carolina, providing for service upon a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident,' approved 2d March, 1899 (23 St. at Large, p. 42), are in contravention of the fifth and fourteenth amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of the state of South Carolina entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within this state,' approved the 2d day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States."

The presiding judge, Hon. D. A. Townsend, overruled the objection to the jurisdiction of the court, and made the following order: "The defendant, Western Electrical Supply Company, through its attorney, Frank B. Gary, entered a special appearance for the purpose of objecting to the judgment in this case, and demurs to the jurisdiction of this court on the ground that the said defendant

is a foreign corporation, has not been served with summons in this state, and has not been brought in the jurisdiction of this court, and on the ground that subdivision 1 of section 155 of the Code of Civil Procedure of South Carolina, providing for service upon a foreign corporation, and the act of the General Assembly of the state of South Carolina amending the said section of the Code by striking out the word 'resident,' approved the 2d of March, 1899, are in contravention of the fifth and fourteenth amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of the state of South Carolina entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within this state,' approved the 2d day of March, A. D. 1897 (22 St. at Large, p. 484), is in contravention of the fifth and fourteenth amendments to the Constitution of the United States. The defendants offered affidavits, which are herewith filed. I am constrained to adopt the construction placed upon said statutes by the Supreme Court of the state, and I hold that the acts and section of the Code referred to in the demurrer are not in contravention of the fifth and fourteenth amendments to the Constitution of the United States. I hold, further, that this court has acquired jurisdiction of the person of the defendant. The demurrer to the jurisdiction of this court and the objection to the court rendering judgment are overruled."

The defendant thereafter had no further connection with the case. The plaintiff then offered evidence tending to support the allegations of the complaint, and the jury rendered a verdict for the plaintiff in the sum of \$1,995, and judgment was duly entered up upon said verdict in accordance with law. In due time the defendant gave notice of intention to appeal to the Supreme Court of the state from the order, rulings of his honor, verdict of the jury, and the judgment entered thereon, and, in the time prescribed by law, served this "case" and the following exceptions:

"(1) Because his honor the presiding judge erred in holding that the court of common pleas for Abbeville county had acquired jurisdiction of the person of the defendant, when it appeared that the defendant is a foreign corporation; had not come within the limits of South Carolina to do business; that the contract for the sale of the machinery was not made in South Carolina; by its terms, was to be performed in Ohio; and that the only service of process made was upon a person in the state in no representative capacity, with no authority to bind the defendant in any way, and only connected with the defendant as a traveling salesman to take orders for the sale of machinery, subject to the approval of defendant.

"(2) Because his honor the presiding judge erred in not holding that it was beyond the power of the state to enact a law that would



authorize service of process upon any agent of a foreign corporation, and thus bring such foreign corporation within the jurisdiction of the court of this state; such a law being in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without the due process of law.'

"(3) Because his honor erred in holding that subdivision 1 of section 155 of the Code of Procedure of South Carolina, as amended by the act of the General Assembly of South Carolina approved the 2d day of March, 1899, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States, in which amendments it is provided that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law.'

"(4) Because his honor the presiding judge erred in holding that the act of the General Assembly of South Carolina entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business in this state,' approved the 2d day of March, 1897, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States. It is respectfully submitted that the said act, and especially section 4 thereof, providing that 'it shall be a further condition precedent to the right of any such corporation to do business in this state, that it shall be taken and deemed to be the fact or rebuttable and part and parcel of all contracts entered into between such corporation and a citizen or corporation of this state, that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, impost, premium, or other money or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place and of the making and of performance of such contract, shall be deemed and held to be within this state, anything contained in such contract, or any rules or by-laws of such corporation, to the contrary notwithstanding,' abridges the privileges or immunities of citizens of the United States, and deprives the citizens of their property without due process of law, and denies the equal protection of the law.

"(5) Because his honor the presiding judge erred in not holding that the defendant had come within the limits of the state of South Carolina, and that the summons in this case had not been served upon it in this state.

"(6) Because the presiding judge erred in not setting aside the service of the summons and in not dismissing the complaint, and erred in allowing verdict to be rendered and judgment entered in this case."

Written notice was given April 30, 1902, to defendant's attorney, that plaintiff's attorney would, on the printed record in this case and the record on file in this court upon the former appeal, move this court to dismiss this appeal on the ground that the ruling sought to be appealed from was res judicata, and had already been passed upon by this court in the former appeal. This motion of plaintiff was heard along with this appeal of defendant.

From this statement, it would seem that the decision of this court (61 S. C. 361, 39 S. B. 550, 55 L. R. A. 146, 85 Am. St. Rep. 890), was, if not the law of the land, at least the law of this case, on the question of the validity or invalidity of the service of the summons. It decided that the service of the summons was a good and valid service, by which the defendant was brought within the jurisdiction of the circuit court. It gave defendant 20 days after service of notice of the filing of the remittitur within which to serve answer—the full time allowed by the Code after service of summons and complaint. Defendant declined to answer, but objected to and interposed a demurrer to the jurisdiction of the court on the ground that defendant had not been brought within its jurisdiction by the service of the summons made, and that certain South Carolina statutory provisions named were in contravention of the fifth and fourteenth amendments of the Constitution of the United States. We are of opinion that when an objection to the jurisdiction, based on the alleged illegal service of a summons, has been made and overruled, no second objection based thereon can be admitted, however variant may be the specifications of the objections taken the first and second time from each other; the same rule applicable to dilatory pleas being applicable to such objections, at least in this regard. "After any dilatory plea had been overruled, no second plea of the same kind or class can be admitted." Gould on Pleading, p. 277. "There must be an end of litigation somewhere, and parties cannot be permitted to try their cases by piecemeal." *Bleckley v. Branyan*, 28 S. C. 450, 6 S. E. 291. A fortiori, they cannot be permitted to try the disputed validity of the service of a summons by piecemeal. The decision of this court was conclusive not only of all objections based on the alleged illegality of service which were made, but also of all objections based thereon which could have been made. *Tate's Ex'rs v. Hunter*, 3 Strob. Eq. 189; *McDowall v. McDowall*, Bail. Eq. 330; *Stoney v. Bank*, 1 Rich. Eq. 276; *Hibler v. Hammond*, 2 Strob. 107; *Maxwell v. Connor*, 1 Hill, Eq. 22. "A demurrer on the ground that the complaint does not state facts suffi-

cient to constitute a cause of action \* \* \* when once taken and lost on certain specifications showing wherein the complaint is defective, cannot be renewed at any subsequent trial on the same or other specifications. This ground of demurrer is single, and all specifications thereunder not made when heard are deemed waived." *Turner v. Association*, 51 S. C. 36, 27 S. E. 947. We are therefore of opinion that the circuit judge was correct in holding, in accordance with the previous decision of this court, that the circuit court had acquired jurisdiction of the defendant, and in overruling the demurrer to the jurisdiction of the court, and the objection to the court's rendering judgment, and that the judgment below must be affirmed.

It might be plausibly contended that a decision holding service of a summons to be good and valid involves in it the idea that the same has been made by due process of law, but, as we do not regard it necessary to the determination of the case to pass upon the constitutionality of the acts alleged to be in contravention of the federal Constitution—the record presenting the other and clear ground above, on which this court rests its judgment—we decline to indicate any opinion as to the constitutional questions, resting our affirmance of the judgment below solely upon the grounds hereinabove stated. *Coolley*, Const. Lim. (2d Ed.) 163; *Ex parte Florence Schools*, 43 S. C. 15, 20 S. E. 794; *Butler v. Ellerbe*, 44 S. C. 266, 22 S. E. 425.

The judgment of this court is that the judgment entered in the circuit court upon the verdict for the plaintiff be affirmed.

GARY, A. J., concurs in the result only, as he thinks the federal question that appears in the record is satisfactorily disposed of by the former opinion in this case.

(66 S. C. 384)

**SETERFIET et al. v. SHEALY et al.**  
(Supreme Court of South Carolina. June 19, 1903.)

**POSSESSION OF LAND—ACTION—COMPLAINT.**

1. A complaint alleging that plaintiff was the owner in fee of the land described therein, and that the defendants were in unlawful possession, and refused to surrender, to plaintiff's damage in the sum fixed, states a good cause of action for possession.

Appeal from Common Pleas Circuit Court of Lexington County; Klugh, Judge.

Action for possession of land by H. B. Senterfiet and others against Amanda Shealy and others. From order sustaining demurrer to complaint, plaintiffs appeal. Reversed.

B. W. Crouch, Esq. & Dreher, and E. S. Asbill, for appellants. E. F. Strother and G. T. Graham, for appellees.

GARY, A. J. This is an appeal from an order sustaining a demurrer to the complaint

on the ground that it did not state facts sufficient to constitute a cause of action, in that it was "necessary not only to allege ownership, but the right of the plaintiff to immediate possession, in order to make out a complete statement of cause of action." The first paragraph of the complaint alleges that the plaintiff is the owner in fee of the land therein described. The second paragraph of the complaint is as follows: "(2) That the defendants, Amanda Shealy, Jane Shealy, and R. B. Shealy, are in the wrongful and unlawful possession of said tract of land, and have refused to surrender possession of same to plaintiffs after demand made, and that, by reason of the wrongful and unlawful withholding of the possession of said tract of land by the defendants from the plaintiffs, the said plaintiffs have been damaged by the said defendants in the sum of one hundred dollars." It is only necessary to cite the recent case of *Livingston v. Ruff*, 65 S. C. 284, 43 S. E. 678, to show that the order was erroneous.

The judgment of this court is that the order of the circuit court be reversed.

(66 S. C. 407)

**GUNTER v. SEIVERN & K. R. CO.**

(Supreme Court of South Carolina. June 19, 1903.)

**ACTION FOR PRICE.**

1. A complaint alleged that plaintiff had furnished a railroad corporation certain cross-ties and lumber, which were used by such road in the construction of its road; that such road had been sold at judicial sale, and purchased by defendant, who was in possession and use of such cross-ties and lumber. Held not to state a cause of action for the purchase price.

Appeal from Common Pleas Circuit Court of Lexington County; Dantzler, Judge.

Action by Marshall Gunter against the Seivern & Knoxville Railroad Company. From order dismissing complaint on demurrer, plaintiff appeals. Affirmed.

E. F. Strother and Lyles & McMahan, for appellant. B. L. Abney, for appellee.

POPE, C. J. This action is on an alleged contract to purchase cross-ties and lumber. When the complaint was read in open court, the defendant interposed an oral demurrer to the same on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The presiding judge, by a short order, sustained the demurrer, and dismissed the complaint. Thereupon the plaintiff appealed to this court. Therefore the question made by the appeal is, was the circuit judge in error in passing the aforesaid order? To correctly answer this question, we deem it necessary to set out the text of the complaint, the grounds of demurrer thereto, the order of the judge, and the exceptions thereto:

"The plaintiff, complaining of the above-named defendant, would allege:

"(1) That the defendant is a railroad corporation operating a line of railroad from the town of Seivern to the town of Batesburg, in the aforesaid county and state, having purchased the same at a sale as the property of the Greenwood, Anderson & Western Railway under certain proceedings in the United States Circuit Court for the District of South Carolina.

"(2) That during the year 1896 the South Carolina Midland Company, a corporation organized under the laws of South Carolina, engaged in the construction of the line of the Greenwood, Anderson & Western Railway from Seivern to the town of Batesburg, in the said state, proposed to purchase from the plaintiff a lot of cross-ties and lumber, to be used in building the said railway, whereupon the plaintiff entered into a contract with the said South Carolina Midland Company for the delivery of cross-ties and lumber to the said company on the line of said railroad, whereby it was agreed that the said cross-ties and lumber being gotten out by certain dimensions were to be piled along the line of the said railroad so that they might be inspected by the proper officer of the said company; and when received the cross-ties were to be paid for at the rate of 20 cents per cross-tie, and the lumber at the rate of \$8 per thousand feet.

"(3) That in pursuance of said agreement the plaintiff caused to be piled along the line of the said railroad 686 cross-ties at 20 cents per cross-tie, and 5,990 feet of lumber at \$8 per thousand feet, all of which said cross-ties and lumber were inspected by said company; but they did not pay the price thereof as agreed upon with the plaintiff, and the plaintiff never did deliver said cross-ties or lumber to the said company, but left them there after inspection, to be delivered when they should be paid for.

"(4) That thereafter, without the knowledge or consent of the plaintiff, the said South Carolina Midland Company removed the said cross-ties from the place where they were piled, and put the cross-ties under the track of the said Greenwood, Anderson & Western Railway, where they now are, and used the lumber in the erection of a depot of said Greenwood, Anderson & Western Railway at Seivern, where it still is.

"(5) That the taking of the said cross-ties and lumber by the said South Carolina Midland Company without paying therefor was unlawful, and in violation of the rights of this plaintiff, and passed no title to the said Greenwood, Anderson & Western Railway, or to the defendant company, who is the purchaser thereof.

"(6) That the defendant company now refuses to deliver the said cross-ties and lumber to the plaintiff, or to pay therefor.

"(7) That the said cross-ties are reasonably worth 30 cents each, and said lumber is

worth \$10 per thousand feet, all of which property has been converted to the use of the defendant company unlawfully.

"Wherefore, plaintiff demands judgment against the defendant for \$265.80 and costs of this action."

Grounds of demurrer were as follows:

"First. Because it appears upon the face of the complaint that, in accordance with the terms of the contract, the cross-ties and lumber had been delivered to the vendee at the place designated, and had been inspected by it and received, and that this made a complete contract of bargain and sale. That upon such inspection and receipt the title of the property passed to the vendee, and the vendor was only entitled to the purchase price. That the vendor could not maintain an action for the specific chattel, but was confined to his action for the purchase price; and hence this action for the value of the specific property could be maintained; or

"Second. Because it appears upon the face of the complaint that after the delivery of the cross-ties and lumber upon the line of railway for the purpose of the construction of the same they had been inspected and used in such construction, and that thereafter it was alleged that the said railway was sold under the proceedings in the United States court, at which sale the defendant became the purchaser of the railway on which the cross-ties and lumber were used, and it does not appear from the face of the complaint that the contract was reduced to writing, in which any alleged reservation of title was made. Nor does it appear from the complaint that any notice of such reservation was given at the sale. Such parol contract, therefore, was in contravention of the statute, and, as no notice was alleged as having been given at such sale at which the defendant purchased, and as plaintiff parted with the possession of the property, it therefore appears from the complaint that the defendant obtained a good title, and this action cannot be maintained."

Judge Dantzler's order was as follows:

"Upon hearing argument by the counsel for the respective parties, it is, upon consideration, ordered that the demurrer be, and is hereby, sustained, and the complaint dismissed."

Plaintiff's grounds of appeal are:

"(1) Because his honor concluded that it did appear upon the face of the complaint that, in accordance with the terms of the contract, the cross-ties and lumber had been delivered to the vendee at the place designated, and had been inspected by it and received, and this made a complete contract of bargain and sale. That upon such inspection and receipt the title of the property passed to the vendee, and the vendor was only entitled to the purchase price. That the vendor could not maintain an action for the specific chattel, but was confined to his action for the purchase price; and hence this

action for the value of the specific property could not be maintained.

"(2) Because his honor concluded that it appeared upon the face of the complaint that after the delivery of the cross-ties and lumber upon the line of railway for the purpose of the construction of the same they had been inspected and used in such construction, and that thereafter it was alleged that the said railway was sold under the proceedings in the United States court, at which sale the defendant became the purchaser of the railway on which the cross-ties and lumber were used, and it does not appear from the face of the complaint that the contract was reduced to writing, in which any alleged reservation of title was made. Nor does it appear from the complaint that any notice of such reservation was given at the sale. Such parol contract, therefore, was in contravention of the statute, and, as no notice was alleged as having been given at such sale, at which the defendant purchased, and as plaintiff parted with the possession of the property, it therefore appears from the complaint that the defendant obtained a good title, and this action cannot be maintained.

"(3) Because his honor should have held by the allegations of the complaint that there had been no delivery of the cross-ties and lumber described in the complaint, and that the taking thereof by the South Carolina Midland Company was unlawful, and should have held that the complaint stated sufficient cause of action in favor of the plaintiff against the defendant company."

We will now consider these exceptions in a group. The great work covered by a demurrer is to test the complaint. When the latter states a cause of action by its allegation, any objection to it by reason of its lack of fullness, etc., is cured not by a demurrer, but by a motion to require the plaintiff to make his complaint more definite and certain. So our first aim should be to ascertain if a cause of action is stated in the complaint. Now, it must be remembered that there is no allegation in the complaint of any contractual relation between the plaintiff and the defendant. The only possible connection between the two is the alleged purchase of a railroad by the defendant at a sale made by the United States Circuit Court for the District of South Carolina. It is evident that the plaintiff must connect himself with the railroad which was sold, and which was purchased by the defendant. Certain it is that at said sale, as alleged in the complaint itself, there is the absence of all allegations that at said sale the defendant was notified of plaintiff's alleged claims touching his alleged cross-ties being in the railroad sold, or his lumber used in the construction of a railroad depot. Nor do the allegations of the complaint set forth any constructive notice of the plaintiff's rights to the cross-ties or lumber used in the construction

of the railroad depot or station house. There is an absence in the allegations of the complaint of any written contract providing for a conditional sale of his cross-ties and lumber, or setting up any lien thereon by the plaintiff. The laws of our state provide that any rights of a person making a conditional sale of personal property to another person must, so as to affect third persons, be reduced to writing and recorded, as required of mortgages. See section 2655 in volume 1 of the Code of this state, adopted in the year 1902. Here is its language: "Every agreement between the vendor and vendee, bailor or bailee, of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers or any other persons letting or hiring property for temporary use, or depositing such property for the purpose of having repairs or work or labor done thereon." Then, as we have stated, it is necessary in the plaintiff's complaint that there should be allegations showing how his cause of action arose as to the defendant under its purchase of the line of railway here in question, and so he has absolutely failed to do, what could the circuit judge do but apply the law in sustaining the demurrer of defendant and dismissing his complaint? We fail to see. We do not quite see that the complaint is liable to the objection by defendant as to the delivery of the cross-ties and lumber used by the plaintiff to the South Carolina Midland Construction Company, but this cannot inure to the benefit of the plaintiff under the views hereinbefore expressed.

It is the judgment of this court that the order of the circuit court appealed from be, and it is hereby, affirmed.

(56 S. C. 393)

#### STATE v. LONG.

(Supreme Court of South Carolina. June 19, 1902.)

#### CRIMINAL LAW—APPEAL BY STATE—AUTHORITY OF ATTORNEYS—WORKING ON SHARES—CONTRACT.

1. Notice of an intent to appeal from an order dismissing a prosecution before a magistrate, signed by attorneys other than the solicitor as attorneys for the state, and exceptions signed by the same attorneys and the solicitor, and a statement in the case that "the state duly served the following notice," with the notice following signed by such attorneys as attorneys for the state, sufficiently showed an authority to appeal for the state.

2. Under Cr. Code, § 357, making it an indictable offense for any laborer working on shares to receive advances and willfully fail to perform the service required of him under the contract, and requiring a verbal contract to be witnessed by at least two disinterested persons,

a contract reduced to writing and signed by the parties in the presence of one witness is sufficient.

Appeal from Common Pleas Circuit Court of Sumter County; Townsend, Judge.

Wade Long was prosecuted for failure to perform a contract on a farm after necessary advances. From a judgment of the circuit court reversing conviction, the state appeals. Reversed.

John S. Wilson and Moise & Clifton, for the State. L. D. Jennings, for respondent.

JONES, J. The defendant was prosecuted before Magistrate Jennings, in Sumter county, for violation of a written farm labor contract, under section 357, Cr. Code, and was found guilty by a jury, and sentenced by the magistrate. On appeal therefrom, the circuit court reversed the judgment of the magistrate's court, and ordered the case dismissed, upon the ground that the contract would not sustain a criminal indictment. From this judgment the state appeals, assigning error to the ruling that the written contract was insufficient to support a criminal indictment under the statute.

Before considering this question, however, we will briefly notice a motion by defendant (respondent) to dismiss the appeal, which motion was heard along with the cause. The ground of the motion to dismiss is that no notice of intention to appeal, signed by the solicitor, was served on respondent or his attorney within 10 days after the rising of the circuit court. It appears in the "case" that a notice of intention to appeal, signed by "Moise & Clifton, Attorneys for the State," was served in time; but it is contended that the notice is without authority, because it was not signed by the solicitor of the Third Circuit. This contention is without merit. The "case" contains this statement: "The state duly served the following notice." Then follows the notice, signed by Moise & Clifton, as attorneys for the state. It further appears by the "case" that the exceptions to the judgment of the circuit court are signed by John S. Wilson, who is the solicitor of said circuit, and by Moise & Clifton, as attorneys for the state. There being nothing in the record to the contrary, it is manifest that the notice of appeal was served by one representing the state by authority from the solicitor in charge of the prosecution.

Recurring to the state's ground of appeal, we think the circuit court erred in dismissing the prosecution on the ground stated. The statute (section 357, Cr. Code) is as follows: "Any laborer working on shares or crop, or for wages in money or other valuable consideration, under a verbal or written contract to labor on farm lands, who shall receive advances either in money or supplies, and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall

be liable for a misdemeanor, and on conviction shall be punished by imprisonment for not less than twenty days nor more than thirty days, to be fined in the sum of not less than twenty-five dollars nor more than one hundred dollars in the discretion of the court: provided, the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses." This statute makes it an indictable offense for any laborer, under verbal or written contract to labor on farm lands, and after receiving advances in money or supplies, to willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract. State v. Chapman, 58 S. C. 420, 34 S. E. 961, 76 Am. St. Rep. 557; State v. Easterlin, 61 S. C. 72, 39 S. E. 250. The contract established in this case was in these terms:

"This memorandum of agreement entered into this first day of May, 1901, between R. C. Folk, farmer, of the 1st part, and Wade Long, a laborer of the 2d part, witnesseth:

"(1) That the party of the 1st part agrees to pay to the party of the 2d part, in money or goods, between the 1st day of May, 1901, and the first day of Aug., 1901, the sum of twenty-five no/100 dollars at such time and times as the said party of the 2d part shall require the same or any part thereof.

"(2) That in consideration of such payment, the party of the 2d part agrees to labor as an agricultural laborer for the party of the 1st part, at any time from the 1st day of Jan., 1902, to the 1st day of Dec., 1902.

"Provided always, nevertheless, and it is the true intent and meaning of the parties to these presents.

"(1) That for the performance of the labor aforesaid, the party of the 2d part shall be entitled to a credit on account of 35 cents for each day's labor, except when he is required to pick cotton, and then shall be entitled to a credit of 40 cents for each hundred pounds of seed cotton picked.

"(2) That the party of the 2d part shall not within the period aforesaid remove farther than two miles from the residence of the party of the 1st part.

"(3) That the party of the 1st part shall give the party of the 2d part twelve hours' notice of the time, place, and nature of such agricultural labor as — may require of the party of the 2d part.

"In witness whereof, the parties hereto have hereunto interchangeably set their hands and seals the day and date first above written. R. C. Folk. [L. S.] Wade (his X mark) Long. [L. S.] In the presence of H. D. Moise."

This contract, we think, complies with the requirements of section 355, Cr. Code, which provides: "All contracts made between owners of land, their agents, administrators or executors, and laborers, shall be witnessed by one or more disinterested persons, and excepting the verbal contracts pro-

vided for in section 357, at the request of either party, be duly executed before a magistrate, whose duty it shall be to read and explain the same to the parties. Such contracts shall clearly set forth the conditions upon which the laborers engage to work, embracing the length of time, the amount of money to be paid and when; if it be on the shares of the crop, what portion or portions thereof, etc." So far as it appears in the "case," it was not disputed in the circuit court that defendant made the contract stated, received advances in money or supplies thereunder to the stipulated amount, and thereafter willfully and without just cause refused to perform the labor required of him by the contract. It was therefore error in the circuit court to reverse the judgment of the magistrate court and dismiss the prosecution.

The judgment of the circuit court is reversed, and the judgment of the magistrate is affirmed.

(66 S. C. 385)

#### JENNINGS v. PARR.

(Supreme Court of South Carolina. June 19, 1903.)

##### BOND-CREDITING PAYMENT-COSTS IN EQUITY.

1. Where, on appeal, the Supreme Court directed certain payments to be applied on the debt on a bond as of the time when they were received, but made no direction as to interest, the claim of defendant that he is entitled to have interest on such payments will not be allowed.

2. Costs below in an equity suit are in the discretion of the circuit judge.

Appeal from Common Pleas Circuit Court of Fairfield County; Aldrich, Judge.

Action by Robert H. Jennings as clerk against Henry Parr and others. From circuit order, defendant Parr appeals. Affirmed.

G. W. Ragsdale and George Johnstone, for appellant. James G. McCants and J. G. McDonald, for respondent.

GARY, A. J. The last decision rendered by the Supreme Court in this case is reported in 62 S. C. 306, 40 S. E. 683, which affirmed the decree of his honor, Judge Gage, except as therein modified. That portion of the decree was affirmed which ordered that "the cause be remanded to the referee, W. D. Douglass, Esq., to report the amount due on the bond in accordance with the decision of the Supreme Court." The referee in his report (made in pursuance of said order) says:

"The Supreme Court (51 S. C. 209, 28 S. E. 89) says: 'The plaintiff is entitled to a judgment subjecting the land to the payment of the mortgage, for the benefit of the representatives of Mary Ann Elkin and Judith W. Ruff. This mortgage, however, should be credited with the proceeds arising from the sale of the 181 acres, to wit, \$726, and with

\$172 of the proceeds arising from the sale of the Mill tract, as of the time when said proceeds were received. Interest on the mortgage should only be calculated from the time when Wm. B. Elkin died, as he was entitled to the interest up to that time, and the amount due by him to the defendant is more than sufficient to extinguish the interest he had in the mortgage.' Counsel for the defendant Parr contends that interest on these credits should be calculated from the time they were received up to the present time, and the amount thus ascertained deducted from the amount due on the bond. \* \* \* He further contends that the bond draws simple interest."

After stating the amounts which he finds to be due, the referee proceeds as follows:

"I find, however, and so report, that there is due the representatives of Judith W. Ruff, for principal and interest on the bond and mortgage, up to and including the date of this report, the sum of \$1,237.64. This is obtained by taking one-half of what was the principal of the bond, after the application of the payments aforesaid, and calculating the interest thereon from the date of W. B. Elkin's death, payable annually, thus: One-half of \$1,132.93, the interest-bearing principal at the time of Wm. B. Elkin's death, which would be \$566.46; and by calculating the interest on \$566.46, at 7 per cent. per annum, payable annually, from the 5th of April, 1890, the date of W. B. Elkin's death, it would amount to \$1,237.64 at the date of this report."

The appellant filed the following exception to the report of the referee: "(4) Because the referee erred, in that he should have applied to the said bond the credits of \$726 arising from the sale of the 181 acres of land, and \$172 of the proceeds arising from the sale of the mill tract, together with interest on said credits from the dates when they were received, as directed by the decision of the Supreme Court."

In considering this exception, his honor, the circuit judge, says: "Defendant's fourth exception is overruled, because the decision of the Supreme Court does not direct the credits of \$726 and \$172, 'together with interest on said credits from the date when they were received,' should be 'applied to the said bond.' The Supreme Court directed said payments to be applied upon said debt, as of the time when the said payments were received, but did not direct that interest should be allowed thereon. I do not think that the claim of the defendant that he is entitled to have interest calculated on said payments, as stated in his said exception, is sustained by the facts or warranted by law."

The principal question presented by the exceptions is whether the circuit judge erred in so ruling. This court concurs in the conclusion announced by the circuit judge for the reasons stated by him.

This disposes of all the exceptions except

¶ 2. See Costs, vol. 12, Cent. Dig. § 21.

these relating to the payment of costs. It is not contended by the respondent that the circuit judge had any reference in his decree to the costs of the Supreme Court. This was an action on the equity side of the court, and all other costs were in the discretion of the judge.

It is the judgment of this court that the judgment of the lower court be affirmed.

(66 S. C. 379)

**COMPUTING SCALES CO. v. LONG.**

(Supreme Court of South Carolina. June 18, 1903.)

**PLEADING—STRIKING OUT—SALE—ACTION FOR PRICE—RESCISSION—INTEREST.**

1. A pleading will not be stricken out on motion because indefinite and uncertain.

2. In an action for the price of goods sold, evidence held insufficient to show that they were not of the quality represented, where defendant, in returning them, makes no complaint of the quality, but places his refusal on the sole ground that the patent under which they were manufactured was litigated.

3. A purchaser of goods cannot rescind the sale because of a dispute between the seller and another as to an infringement of a patent right.

4. An express written contract to pay a certain sum at a fixed time will carry interest from maturity.

Appeal from Common Pleas Circuit Court of Lexington County; Dantzier, Judge.

Action by the Computing Scales Company against J. W. Long. From judgment of circuit court, defendant appeals. Affirmed.

E. S. Asbill, for appellant. Jos. A. McCullough, for respondent.

WOODS, J. The plaintiff, through its traveling salesman Hardy, sold by written contract to defendant, on March 4, 1897, computing scales for the price of \$40, payable 10 days after shipment. The defendant duly received the scales, but, after keeping them in his store for some days unopened, reshipped them to plaintiff's address, and refused to pay the purchase money. The plaintiff then commenced this action for the contract price. By a consent order the cause was referred to a referee, who sustained the defenses involved in this appeal. The circuit judge, at the hearing, reversed the findings of the referee, and upon his decree judgment has been entered for the plaintiff for the full amount claimed.

The grounds of appeal to this court involve only two paragraphs of the answer, and these will be considered separately. The first of them is as follows:

"That the computing scales offered to the public by the plaintiff's agent, P. D. Hardy, during March, 1897, at Lexington, S. C., were fraudulently represented by false claims and flagrant misrepresentations by the said P. D. Hardy, and that the said computing scales had acquired a false value by fraudulent misrepresentations in advertisements,

and that the said scales are not as represented by the plaintiff and its agent, P. D. Hardy."

The plaintiff moved before the referee and the circuit judge to strike out this defense as too indefinite and uncertain. Neither referee nor circuit judge made any ruling on this motion, but the plaintiff, after due notice to the defendant, asks this court to hold that the motion should have been granted. A pleading cannot be stricken out for indefiniteness. The remedy is a motion to make more definite and certain. Code Civ. Proc. § 181. The plaintiff having made no motion of that kind, evidence of any misrepresentation whatever to defendant tending to defeat the recovery was properly admitted and considered. To sustain this defense the defendant testified that Hardy, the selling agent, had represented the scales to be dust-proof, and afterward, when the scales were sent, told him to keep paper over them as a protection from dust. The witness Gunter testified that scales sold by plaintiff to other parties had rusted, that they would not compute certain fractions of a cent, and that mistakes could be made in using them. In the sale of machinery the court must assume that representations as to its fitness are based on the supposition that it will be used with some degree of care and intelligence. There is no evidence here of the conditions under which the scales rusted, or how the mistakes were made, nor whether the use of the paper to keep out dust was a necessity or only suggested as an extra precaution; and it does not appear that the selling agent represented the scales would compute all fractions. Aside from all this, the scales sold to the defendant were never unpacked, no testimony was offered that those spoken of by defendant's witnesses were of the same pattern, and the court cannot assume this as a fact. It is significant that the defendant, in his letter to plaintiff giving notice of the return of the scales and of his refusal to pay for them, makes no complaint of the quality of the scales, but places his refusal on the sole ground that suits were pending involving the patent rights. In his testimony he again says he returned them because he had been notified of such suits. The defendant has entirely failed to sustain his allegation of misrepresentation as to the quality of the scales.

The other defense involved in this appeal is thus stated in defendant's answer:

"That the plaintiff is not the undisputed owner of the patent rights to the said scales and fixtures thereof mentioned in plaintiff's complaint, and that the defendant could not use the said scales without subjecting himself to suits for infringements."

If the defendant had alleged and proved that the plaintiff had sold him scales in infringement of the patent of a third party without giving notice of such infringement, he could have rescinded the sale without

¶ 1. See Pleading, vol. 29, Cent. Dig. §§ 1092, 1174.

waiting for suit and judgment against himself for using the scales in violation of the patent rights of another. It is true, as a general proposition, that a purchaser cannot rescind for failure of warranty until there has been eviction or other actual damage suffered. *Bethune v. McDonald*, 35 S. C. 93, 14 S. E. 674; *Childs v. Alexander*, 22 S. C. 185; *Lessly v. Bowie*, 27 S. C. 200, 3 S. E. 199. These cases all involved express warranty in the sale of real estate, but in the sale of personal property there is an implied warranty of title, and the same rule applies. *Ware v. Weathnall*, 2 McCord, 413; *Habersham v. Rodrigues*, 1 Speers, 318; *Benjamin on Sales*, § 961. If, however, the vendor at the time of the sale knew of a valid outstanding title or incumbrance, and failed to give notice to the vendee, the element of fraud is introduced, and the vendee may rescind without waiting for actual loss to come to him. This doctrine is stated by Chancellor Harper in *Whitworth v. Stuckey*, 1 Rich. Eq. 410, and is founded upon the plainest principles of justice. But mere dispute about the title, or the contingency of future loss, does not warrant a rescission, and, where the buyer returns the goods, and refuses to pay the purchase money, it is incumbent on him to show that there is a valid adverse claim, from which loss to him would inevitably occur. 14 Am. & Eng. Ency. Law, 142; *Benjamin on Sales*, § 849, note. This rule is applied to the defense set up by a vendee that the use of the article purchased would involve him in litigation for infringement of an outstanding patent, in *Gas Co. v. Electric Co.*, 50 Fed. 778, 1 O. C. A. 663, and *The Electron*, 74 Fed. 689, 21 C. C. A. 12. The application of the rule may sometimes result in hardship, but to adopt any other would make it possible for a purchaser to escape from his contract upon any claim coming to his notice, however baseless or absurd it might be. The utmost that can be claimed for the defendant here is that he alleged the patent rights to the scales sold were in dispute. The evidence does not connect the scales sold to defendant with any disputed patent. The letter of Hoyt Scales Company, competing dealers, which the defendant says in his letter of May 1, 1897, caused him to return the scales, refers to them as an imitation of Troemner scales; but there is no evidence whatever that the Troemner scales are patented. The testimony of Koehne is that the scales sold defendant are not provided with weights of the design involved in the Culmer patent suit, and this is undisputed, for there is no proof whatever that the scales referred to by plaintiff in the letter to Fox, Marsh & Co. were of the same pattern as those sold to defendant. The testimony of Ozias, the manager of the plaintiff company, to the effect that the scales were not like the Phelps patent, which was in litigation between the Hoyt Company and the plaintiff, is also undisputed. There is, therefore, an entire absence of

proof that the scales involved in this suit fall under any disputed patent; but, even if the right to make and sell them had been in dispute, this would be no defense.

Upon the question of interest it is only necessary to say there was an express written contract to pay a certain sum of money at a fixed time, and this sum should bear interest from maturity.

We are unable to find grounds upon which any of the exceptions can be sustained.

The judgment of this court is that the judgment of the circuit court be affirmed.

(66 S. C. 413)

Ex parte RICHARDSON.

(Supreme Court of South Carolina. June 19, 1903.)

WILLS—CONSTRUCTION — LIFE ESTATE — ASSIGNMENT—RIGHTS OF ASSIGNEE.

1. A will provided that, if testator's wife should remarry, she should be entitled to one-third of the estate for her sole use until her death; then to return to testator's estate for the use of his children. The widow remarried, and thereafter died. *Held*, that on her death the property returned to the person then entitled to the estate, which right could be in no way prejudiced by any attempt of the life tenant to convey away her interest.

2. Where a life tenant assigns a bond and mortgage in which her share had been invested, the assignee was entitled to the interest thereon up to the death of the life tenant.

Appeal from Common Pleas Circuit Court of Barnwell County; Buchanan, Judge.

Petition of Katie E. Richardson in ex parte Thos. L. Enicks in re estate of last will of Thos. L. Enicks. From circuit decree, petitioner appeals. Modified.

J. O. Patterson and Davis & Best, for appellant. Bates & Simms, for respondents.

POPE, C. J. The questions presented by this appeal arise upon the construction of the will of Thomas L. Enicks, deceased, by his honor Judge O. W. Buchanan, on an agreed statement of facts, as follows:

"(1) That one Thomas L. Enicks, of this county, died in 1843, leaving of force his last will and testament, which is submitted for construction.

"(2) That the beneficiaries under the said will were his widow, Jane M. Enicks, and the following named children: Clifford Enicks, Melissa Independence Enicks, Mary Enicks, and Isabella Philadelphia Enicks. And the said will is to be construed with reference only to the share of the testator's estate which was given to the widow, Jane M. Enicks, who, after the death of the testator, intermarried with one William Hogg, and will hereafter be known as Jane M. Hogg.

"(3) That Mary Enicks died before she was grown, unmarried, and was the first of the children to die.

"(4) That Melissa Independence Enicks married one W. W. Enicks, a relative, of



which marriage Thomas L. Enicks, the petitioner, was born, and he was the only child of this marriage, and both father and mother died while he was a child.

"(5) That the third one of the testator's children to die was the son, Clifford Enicks, who died about the year 1886, having never married, and hence left no children.

"(6) That Isabella Philadelphia intermarried with one Jabez Nobles, but never had any children. Nobles died years ago, and his widow, Isabella Philadelphia, died some three or four years ago, being the last one of the said testator's children to die.

"(7) That Jane M. Hogg died some time during the year 1901, surviving Mrs. Nobles about two years, which left the petitioner, Thomas L. Enicks, the sole surviving heir and distributee at law of the testator, Thomas L. Enicks, deceased.

"(8) That in 1882 a proceeding was had in this court, in which Jane M. Hogg was the plaintiff, and J. J. Brabham et al. defendants (but the petitioner herein, Thomas L. Enicks, was not a party thereto), which resulted in an order for the master to invest the share of Jane M. Hogg, given her for life by the will of Thomas L. Enicks, deceased, in a mortgage on real estate, taking the mortgage in his (master's) name and his successors, and for him to collect the interest annually, and pay it over to Jane M. Hogg as long as she lived.

"(9) That the master, in pursuance of the said order of the court, loaned out the amount, viz., \$1,048.39, on the 18th of July, 1883, and took a bond, secured by mortgage on real estate, and has been collecting the interest, and paying annually to Mrs. Jane Hogg, up to and until the — day of —, 1900, when she (Mrs. Hogg) assigned all of her right, title, and interest in the said bond and mortgage to Mrs. Katie E. Richardson.

"(10) That, upon the death of Mrs. Hogg, Thomas L. Enicks filed his petition in this court, which has just been read, claiming that he is entitled to the said bond and mortgage under the will of Thomas L. Enicks, deceased, as the sole surviving heir at law of the testator, and subsequently the said Katie E. Richardson interpleaded, and she claims that she is entitled to the bond and mortgage under the assignment made to her by Mrs. Jane M. Hogg as aforesaid."

The will of Thomas L. Enicks is as follows:

"State of South Carolina, Barnwell District. In the name of God, amen. I, Thomas L. Enicks, being of sound mind and memory, do make this, my last will and testament. After all my just debts and funeral expenses are paid, I wish the remainder of my property, both real and personal, to be kept together for the support of my wife and children during the widowhood of my said wife.

"If my said wife, Jane M. Enicks, shall enter into a second marriage, then, and in

that case, she shall be entitled, and do hereby give to her, one-third of my estate, both real and personal, for her sole use, until her death, then to return to my estate for the use and benefit of my children.

"If my children, Clifford, Melissa Independence, Mary and Isabella Philadelphia, should die before they marry or arrive at the age of twenty-one, then, and in that case, my said children that may be alive at the time of the death of such of my children or child shall be entitled to receive the part or portion of such deceased child or children, share and share alike.

"I will and desire that my negro man, Aleck, be sold so soon as it may or can be done for the advantage of my estate, and the money arriving from the sale of said negro, Aleck, be laid out in the purchase of another negro for the use of my wife and children and that the said negro be sold at a distance. Thos. L. Enicks. [L. S.]"

The decree of Judge Buchanan is:

"This was a proceeding brought to construe the will of the late Thomas L. Enicks, deceased, in so far as it may bear upon the interest taken by the widow, Jane M. Enicks, who, after intermarrying with William Hogg, died in the year 1901. She was to have the estate during widowhood, but, if she married again, she was to have one-third for life. It is only that matter which is involved here. Thomas Enicks is the sole surviving heir and distributee. I think the better view is that Jane Hogg had but an estate for life, and upon her death the property returned to the person then entitled to the estate. After her death the sole plaintiff here, Thomas L. Enicks, became entitled to, and is now the owner of, the property. The life tenant could assign or convey only her interest, and could convey nothing beyond such life estate. She could in no way prejudice or affect the interest of the next taker, Thomas L. Enicks, who will hold as if there had never been any attempt to affect the property he is entitled to hold. The assignee of the life tenant has no interest after the life estate has ceased to exist."

The petitioner, Katie E. Richardson, presents the following grounds of appeal:

"(1) Because his honor erred in holding that, after the death of Jane Hogg, Thomas L. Enicks became entitled to, and is now the owner of, the property, whereas his honor should have held that Katie E. Richardson, the assignee of the said bond and mortgage, owned an interest in said bond and mortgage by reason of the assignment to her by the said Jane Hogg.

"(2) Because his honor erred in holding that Jane Hogg was a life tenant, and could convey nothing beyond such life estate, whereas his honor should have held that Jane Hogg, under the will of said Thomas L. Enicks, took an estate for life, with remainder to the children of the said Thomas L. Enicks named in said will; said remainder,

under the terms of said will, became vested in each of said children upon their arrival at the age of twenty-one or upon their marrying, and that, upon the death of any such child or children who had arrived at the age of twenty-one or married, then their interest in said bond and mortgage passed to their heirs at law, under the statutes of distribution, and that their mother, Jane Hogg, inherited from such deceased child under the statutes of distribution; and that such interest was passed to Katie E. Richardson by the assignment of said bond and mortgage.

"(3) Because his honor erred in holding that the assignee of Jane Hogg had no interest after the life estate ceased to exist, whereas his honor should have held that the interest upon said bond and mortgage, which accrued before the death of the said Jane Hogg, passed under the said assignment to the said Katie E. Richardson."

We have carefully considered the exceptions, and have reached the conclusion that the circuit judge should be sustained, except as to the third exception. It is evident that the testator, by his will, intended that all of his estate, real and personal, except the slave, Aleck, should be kept together during the widowhood of his wife, Mrs. Jane Enicks, and used for her support and that of testator's children. This arrangement of the testator was defeated by the intermarriage of his said widow with one William Hogg. But the will contained a provision which governed in this contingency, viz., that in that event Jane, the widow, should receive one-third of the whole estate, real and personal, to be enjoyed by her for and during her natural life, and no longer, and that after her death her share should return to testator's estate, for the use and benefit of testator's children. Now, it is this item of the will which by the agreement of parties has come before us. The fact that the said widow of testator did, in the last years of her life, assign all her interest in the bond and mortgage, which now represents the whole of the one-third part of her husband Enick's estate, can make no difference. The widow could assign only what her estate was in said bond and mortgage. And as her estate was only a life estate, she could only assign her life estate therein. She died in the year 1901. Therefore, the assigned estate terminated in that year—1901.

The clause or item of the will which referred to the shares of testator's children does not allow the widow any share in the shares of the children who shall die before marriage, or before reaching the age of 21 years. The surviving children inherit. So, therefore, the first and second exceptions should be overruled.

We think the petitioner, Katie E. Richardson, is entitled to receive any and all interest due on the bond and mortgage at the date of the death of Mrs. James Hogg, in the year 1901. This exception is therefore sustained.

The decree must be modified to this extent.

It is the judgment of this court that the decree of the circuit court be so modified that Katie E. Richardson shall receive all the interest on the bond and mortgage due thereon up to the date of the death of Mrs. Jane Hogg, in the year 1901, and in all other respects the said circuit decree is affirmed.

(66 S. C. 233)

### MORGAN & AUSTIN v. SAMMONS.

(Supreme Court of South Carolina. June 19, 1903.)

#### ACTION ON ACCOUNT—PLEADING—ANSWER.

1. In an action on an account, it is proper to order the answer made more definite, where it does not show which of the items sued on are admitted, and which denied.

2. Where, in an action on an account, defendant was required to make his answer more definite, such order was no limitation on his right to set up in his amended answer additional defenses.

Appeal from Common Pleas Circuit Court of Greenville County; Gary and Watts, Judges.

Action by Morgan & Austin against J. A. Sammons. From an order requiring the answer to be amended, and from an order striking out the answer and giving judgment for plaintiffs, defendant appeals. Affirmed as to the first order, and reversed as to the second.

Blythe & Blythe, for appellant. B. A. Morgan, for appellees.

GARY, A. J. The appeal herein is from an order of Judge Gary requiring the defendant to make his answer definite and certain, and from an order of Judge Watts striking out the defendant's answer on the ground that it failed to comply with the order of Judge Gary. The fourth paragraph of the complaint is as follows:

"(4) That between the 21st day of January, 1901, and April 28, 1901, the defendant purchased from the plaintiffs, and the plaintiffs sold and delivered, as they estimated and believed, to the defendant, from time to time between said dates, lumber and other building material of the quantity, quality, at the prices named, and delivered at the buildings named at the times stated in the verified, itemized statement of account hereto attached, incorporated in and made a part of this complaint, and the defendant agreed to pay the prices charged therefor, which were reasonable."

The exhibit contained several pages of items.

The second and third paragraphs of the defendant's answer to the complaint are as follows:

"(2) Further answering, this defendant admits that between the dates mentioned in section 4 of the complaint he did purchase certain lumber and other building materials

• from the plaintiffs, to be used in constructing the three houses mentioned in the itemized statement of the account in the complaint herein, to wit, the Hayes house, the Green house, and the Hellams house, and that the materials so purchased were used by him in the construction of said houses; but he denies that the account attached to the complaint, as a part thereof, is correct, and he further alleges that he has paid the plaintiffs in full for all the materials so purchased by him, and delivered at the buildings named in said complaint, and denies that he owes them anything whatever on account thereof.

"(3) Further answering, this defendant denies each and every allegation in said complaint contained, except as herein admitted, explained, or denied."

The plaintiffs' attorney gave notice that he would make a motion requiring the defendant to make his answer definite and certain: "That is to say, paragraph 2 of said answer, by setting forth the items of or wherein the itemized statement of account attached to and made a part of said complaint is incorrect; and, further, by showing which items he used in the construction of the houses therein admitted and paid for as alleged in said answer; and, upon your failure to so make more definite and certain as the court may require, that the answer be stricken out, and judgment be entered for the sums demanded in the complaint. That said motion will be made upon the pleadings herein."

Judge Gary signed the following order: "That the defendant be, and he is hereby, required, within forty days from the date of this order, to serve upon plaintiffs' attorney his amended answer, fully setting forth wherein the itemized statement of account is incorrect, as alleged in the answer; also what items of said account were used in the respective houses named in the answer, and which items have been paid for, as alleged in said answer.

"It is further ordered that, upon the failure of defendant to serve such amended answer within the time herein fixed, that the answer heretofore served be stricken out, and the plaintiffs allowed to apply for an order granting the relief prayed for in the complaint as by default."

The second, third, fourth, and fifth paragraphs of the amended answer are as follows:

"(2) Specifically answering paragraphs 3 and 4 of the complaint, this defendant admits that between the said 21st day of January, 1901, and the said 28th day of April, 1901, he purchased from the plaintiffs, and the plaintiffs sold and delivered to him, from time to time between said dates, lumber and other buildings named in the complaint, to wit, the Hayes house, the Green house, and the Hellams house, but denies that the quantity and quality of the said materials are cor-

rectly set forth in plaintiffs' itemized account, and made a part of his complaint; and he further denies that he agreed to pay the prices therein charged, and denies that such prices so charged were reasonable.

"(3) Further answering, this defendant alleges that the materials so purchased by him from plaintiffs, and used in the John W. Hayes house, amounted to \$104.17, the amount so purchased and used in the Green house amounted to \$144.49, and the amount so purchased and used in the Hellams house amounted to \$118.67, aggregating for the three houses the sum of \$367.23; and he further alleges that he paid to the plaintiffs, before the commencement of this action, the whole amount of said sum above specified, and that he has actually overpaid the same by the sum of \$78.30, all of which is specifically shown by an itemized account herewith filed as part of this answer.

"(4) This defendant here sets up the said sum of \$78.30 as a counterclaim, and demands judgment therefor in this action.

"(5) This defendant, further answering, denies each and every other allegation in said complaint contained, not herein specifically admitted or denied, and demands judgment for the said sum of \$78.30 and the costs of this action."

The form of the itemized statement is as follows:

Statement of account between J. A. Sammons and Morgan & Austin. Material used in the John W. Hayes house:

1,260 ft. siding.....	\$ 13 20
350 ft. ceiling.....	3 85
7 bbls. lime.....	5 95
1,000 ft. $\frac{3}{4}$ flooring.....	16 00
8,000 shingles.....	24 00
500 ft. 1x3.....	5 00
5,000 laths.....	10 00
250 lbs. nails.....	6 95
2 doors, 2x6.....	2 00
2 doors, 2x6.....	2 00
3 doors, 2x6.....	2 70
250 ft. 4 molding.....	2 50
250 ft. $\frac{3}{4}$ x10.....	3 12
50 lbs. gray ochre.....	2 50
5 gals. raw oil.....	3 50
6 pr. butts.....	90

Total ..... \$104 17

The account is similar as to the materials furnished for building the two other houses.

#### Summary.

Materials received on Hayes house... \$104 17  
Cash paid by J. A. Sammons..... 144 07

Balance due J. A. Sammons..... \$ 39 90

Materials received on Green house.... \$144 49  
Cash paid by J. A. Sammons..... 101 56

Balance due Morgan & Austin... \$ 42 93

Materials received on Hellams house.. \$118 67  
Cash paid by J. A. Sammons..... 200 00

Balance due J. A. Sammons..... \$ 81 33

Total value of materials received.... \$367 33  
Total cash paid by J. A. Sammons.... 445 68

Total balance due J. A. Sammons \$ 78 30

The plaintiffs' attorney gave notice of a motion "for an order striking out the amended answer of the defendant above named herein on the ground that the same is not in accordance with an order passed in this case by Judge Ernest Gary, presiding judge, at Greenville, S. C., July 21, 1902, and will ask for judgment as prayed for in the complaint. The pleadings and said order will be used upon the hearing."

Upon hearing the motion, Judge Watts granted the following order: "The above-stated case came before me on notice of motion on the part of the plaintiffs for an order striking out the amended answer of the defendant on the ground that the same is not in accordance with an order passed in this case by Judge Ernest Gary, presiding judge, at Greenville, S. C., July 21, 1902, and, further, that plaintiffs would ask for judgment as prayed for in the complaint. The order of Judge Gary provided further that, if the defendant failed to serve such answer as is required in said order, the original answer be stricken out, and allowed to apply for an order granting the relief prayed for in the complaint as by default. Upon hearing said motion and argument of counsel, I do not think the amended answer is in accordance with Judge Gary's order; and it is ordered that original answer herein be, and is hereby, stricken out, and the plaintiffs allowed to apply for an order for the relief demanded in the complaint, as by default."

It will not be necessary to consider the appellant's exceptions *seriatim*. Our conclusion is that the order of Judge Gary was proper, because it did not appear from the original answer which of the items were admitted, and which were denied. This defect was, however, cured when the defendant set out in his amended answer the items which he admitted, and denied all the other items set out in the complaint.

As the question was discussed whether the defendant had the right to set up a counterclaim in his amended answer, we take occasion to say that the order of Judge Gary was not a limitation upon the right of the defendant to interpose any defenses he saw fit.

It is the judgment of this court that the order of Judge Gary be affirmed, and that the order of Judge Watts be reversed.

(66 S. C. 394)

#### STATE v. HUDSON et al.

(Supreme Court of South Carolina. June 19, 1903.)

#### CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

1. An instruction on circumstantial evidence, stating that the circumstances relied on must be proven to the entire satisfaction of the jury, should also state that the circumstances must be inconsistent with any other reasonable hypothesis than the guilt of the accused.

2. Where an instruction on complicity in crime was correct as far as it went, it was incumbent on defendant, on appeal, to show that it was prejudicial to his rights, and that a necessity existed for an amplified statement of the doctrine.

Appeal from General Sessions Circuit Court of Oconee County; Gage, Judge.

Indictment for murder against John Hudson, Henry Hudson, Money Hudson, Jack Centell, Thomas Hudson, and George Hudson. The three first were convicted of manslaughter, and appeal. Reversed.

Jones & Shelor and J. P. Carey, for appellants. Asst. Atty. Gen. Townsend, for the State.

GARY, A. J. John Hudson, Money Hudson, George Hudson, Thomas Hudson, and Jack Centell were all charged, in one indictment, with the murder of Rachel Thomas, and were tried at the March term of court of general sessions for the county of Oconee. George Hudson and Thomas Hudson were acquitted, and the other defendants were convicted of manslaughter and sentenced. The defendants who were convicted have appealed to this court. The exceptions make the point that the trial judge erred in his charge in two respects: First, in charging the rule as to circumstantial evidence; second, in charging the law as to complicity in crime where several are on trial.

There was no positive testimony as to which of the defendants did the killing, and the case was one of circumstantial evidence. Five persons were jointly indicted for the murder, and there was no direct proof as to who fired the fatal shot; but the state relied upon the theory that all the parties charged went to the house of the deceased for an unlawful purpose, and that all of the defendants, or such of them as went there under the common design, were just as guilty as the one who fired the fatal shot.

The exceptions assign error as follows:

"(1) Because the circuit judge erred in charging the jury as follows as to circumstantial evidence: 'These circumstances surrounding the transaction would be proved to your entire satisfaction; that is to say, the different incidents—each one—must be proved to your entire satisfaction. The circumstances must be consistent with themselves, and they must all point to one thing—the guilt of the defendants; and any other reasonable theory than the theory that the defendants at the bar, charged with the crime, did do it, would tend to prove that they were not guilty.' Whereas he should have charged the jury that the circumstances must point conclusively to the guilt of the defendants, and that, if any other reasonable theory than the theory that the defendants committed the crime should appear, the defendants were entitled to a verdict of not guilty.

"(2) Because the circuit judge, when he undertook to charge the rule as to circum-

stantial evidence, erred in not charging the true rule, as follows: That the circumstances must be proved to the entire satisfaction of the jury, and, when these circumstances are so established, they must point conclusively to the guilt of the defendants, and must be inconsistent with any other reasonable hypothesis.

"(3) Because the circuit judge erred in charging the jury that 'if the men went to Rachel Thomas' house for the purpose of, not killing her, but to do a wrongful act—to do an illegal act, and yet not to kill—and if, as a result of that illegal act, springing out of it, if, under these circumstances, Rachel Thomas was killed, then that is manslaughter.' Whereas he should have charged the jury that if the men went to the house of Rachel Thomas with a common purpose to do an illegal act, and, in the execution of this common purpose, Rachel Thomas was killed by one of the defendants, as a probable or natural consequence of the acts done in pursuance of the common design, then the persons present, participating in the unlawful common design, would be as guilty as the actual slayer; but if the killing had no connection with the common purpose, and did not ensue as a probable result of an attempt to execute it, then the slayer alone would be responsible for the killing.

"(4) Because, the defendants being indicted jointly for killing Rachel Thomas, and it appearing that only one shot was fired, and that shot resulted in her death, the circuit judge, in his charge with reference to convicting some of the defendants and acquitting others, ignored the view that one of the defendants might have done the act without the concurrence or aid of the others.

"(5) Because the circuit judge, in his charge, erred in ignoring the view that if, without concert or combination, one of the defendants, upon sudden quarrel or other cause, without the aid or support of the others, took the life of the deceased, he alone who did the act would be responsible."

We will first consider the exceptions relating to circumstantial evidence. The appellants contend that his honor the presiding judge erred in stating the rule to be that the circumstances are required merely to point to the guilt of the defendants, whereas, they submit, the correct rule requires the circumstances to point conclusively to the guilt of the defendants. The rules as to circumstantial evidence are thus stated in 1 Starkie on Evidence, 570-574: "(1) The circumstances from which the conclusion is drawn should be fully established. (2) All the facts should be consistent with the hypothesis. (3) The circumstances should be of a conclusive nature and tendency. (4) The circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved." These rules are approved in State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199. Under the charge of the presiding

judge, it was necessary that the jury should be satisfied entirely that the circumstances pointed to the guilt of the defendants. He charged: "These circumstances surrounding the transaction must be proved to your entire satisfaction; that is to say, the different incidents—each one—must be proved to your entire satisfaction." The charge substantially set forth the requirements of the rule, and this objection must be overruled.

The appellants also contend that the circuit judge erred in instructing the jury that, if any other reasonable theory than the guilt of the defendants appeared, it would tend to prove that they were not guilty, whereas the correct rule requires the state, before a party can be convicted, to show that the circumstances relied upon are inconsistent with any other reasonable hypothesis than the guilt of the accused. By reference to rule 4, hereinbefore mentioned, it will be seen that the circuit judge erred in charging that, if any other reasonable theory than the guilt of the defendants appeared, it would only tend to prove that they were not guilty, for, under the said rule, such facts would conclusively show that they were not guilty. The exceptions raising this question are therefore sustained.

We will next consider the exceptions relative to complicity in crime. The case of State v. Carson, 36 S. C. 524, 15 S. E. 588, shows that the charge was correct, as far as it went. It is incumbent upon the appellants to show that the charge was prejudicial to their rights, and that the necessity existed for an amplified statement of the doctrine. The testimony is not set out in the record, nor is there anything in the statement of facts contained in the record which shows that the charge was prejudicial to the defendants. Under these circumstances, the exceptions must be overruled.

It is the judgment of this court that the judgment of the circuit court be set aside, and the case remanded to that court for a new trial.

JONES and WOODS, JJ., concur in the result.

(36 S. C. 402)

## STATE v. BOX.

(Supreme Court of South Carolina. June 19, 1903.)

### CRIMINAL LAW—CONTINUANCE.

1. Where defendant was charged with a homicide committed in June, and the case was continued at the June term, and tried at the October term, refusal of a continuance because of the absence of witnesses was not an abuse of discretion, where the warrant for the witnesses issued 10 days before the trial.

Appeal from General Sessions Circuit Court of Hampton County.

H. G. Box was indicted for murder. From a judgment of conviction, he appeals. Affirmed.

G. Duncan Bellinger and W. S. Smith, for appellant. Jas. E. Davis, for the State.

POPE, C. J. The defendant was tried for the crime of murder at the fall term, 1902, of the court of general sessions for Hampton county. It was agreed by the counsel representing the prosecution and the defense that the trial should take place on Tuesday afternoon, the 7th of October, 1902. When the case was called for trial at the time fixed by counsel, the defendant moved for a continuance, upon affidavits submitted, because of the absence of witnesses deemed by him essential to his defense. We will refer to these matters more fully hereafter. After a full hearing, the circuit judge issued a bench warrant for the arrest of such absent witnesses. On the next morning three of said witnesses were brought into court. The solicitor admitted what one would swear—one Pompey Gadsden. Then the circuit judge ordered the trial to proceed, which resulted in a verdict of manslaughter. After judgment, the defendant appealed to this court for a new trial on the following exceptions, namely:

"(1) That his honor erred in concluding that the court was not 'warranted' in continuing the case, when the attempt to serve the witnesses was made not more than ten days before court, whereas his honor, it is submitted, should have concluded, as matter of law, that no specified time is required in which due diligence must be legally presumed, but that such diligence is a question of fact for the judge's determination, uncontrolled by any legal warrants as to time.

"(2) That his honor erred in mistaking a matter of discretion for a warrant of law, whereas he should have concluded that his discretion was independent of any warrant of law, save in the abuse of such discretion.

"(3) That it is respectfully submitted his honor did not use sound judicial discretion in forcing the defendant to trial, when sufficient time had not been allowed the sheriff for the proper execution of the bench warrant issued for defendant's witnesses, wherein his honor did abuse his said discretion.

"(4) That his honor did not use sound judicial discretion in forcing the defendant to trial, when it appeared from the return made on the bench warrant that the sheriff, as officer of the court, had not executed the same as to three witnesses therein named, wherein, it is respectfully submitted his honor did abuse said discretion.

"(5) That his honor abused his discretion by applying his opinion to this particular case, and not passing on the facts as they would apply to any case in a motion for a continuance."

Before passing upon the specific allegations of error alleged against the exercise of the discretion vested by the law in circuit judges as to the continuance of causes for

absence of alleged material witnesses for the defendant, it may be well to state that this court has repeatedly declared that the circuit judge is vested by law with the determination of the question of continuance of cases for the absence of alleged material witnesses for the defendant. In the case of *State v. Way*, 38 S. C. 345, 17 S. E. 39, this court said: "This matter of continuance is conferred to the wise discretion of the circuit judge, as this court has repeatedly and uniformly held." One of the strongest criticisms of the administration of the law relates to the many delays in the trial of cases. Parties in the criminal and civil courts should be ready to try their cases promptly; yet, if parties cannot go to trial safely in either court in the absence of their witnesses, where they have used due diligence to procure their attendance, the law vests the circuit judge with a power of continuance, and no amount of public clamor should move the circuit judge from the discharge of this delicate responsibility. The Constitution of this state, in section 18 of article 1, provides: "In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial by an impartial jury; and to be fully informed of the nature and the causes of the accusation; to be confronted with the witnesses against him, to *have compulsory process for obtaining witnesses* in his favor, and to be fully heard in his defense by himself or by his counsel or by both." (Italics ours.) It will thus appear that the law, while inflexible in its determination to prosecute those who violate our laws, is fixed in its determination that persons accused of crime shall have every means to vindicate their innocence, if innocent—a speedy trial, compulsory process to obtain their witnesses, and counsel to plead for them. But all these blessed safeguards entail a corresponding duty upon persons accused of crime. They should prepare themselves for a speedy trial. They should promptly employ counsel. They should promptly apply for all their witnesses, to be arrested and bound over to appear and testify. No slipshod methods should be countenanced. The law allows an application for a continuance if a fair trial cannot be had. Rule 27 of the circuit court of this state sets down what course the accused should pursue to obtain a continuance, if the same appeals to the sense of justice of the circuit judge. Having made these remarks, we will now pass upon the exceptions in their order:

1. The criticism of the language of the circuit judge as quoted in this exception cannot be sustained. The word "warranted," as so used, was entirely proper. The responsibility of a continuance is that of the circuit judge; hence he, in deciding this question, must determine whether the showing as laid down in rule 27 of circuit court has been

made, thus producing a conviction in his mind that he will be warranted or justified in granting the continuance prayed for. It is true, the law provides no square and compass to fix an exact period of time in which the defendant must move to have his witnesses arrested and bound over to attend court, yet, when months of inaction in this matter are allowed to pass away without any effort to secure his witnesses, the circuit judge may well conclude that there has been unnecessary delay by the defendant in this regard. This exception is overruled.

2. The circuit judge made no such mistake as attributed to him in this exception. No doubt, he had the rules of court—especially 27—before him when he made his ruling. He heard the testimony (by affidavits), he heard argument on both sides, and then made his ruling. This exception is overruled.

3. To our minds, the conviction is brought home, by the showing made by the defendant, that the circuit judge did use a sound judicial discretion in forcing the defendant to trial. The homicide occurred in June, 1902. The June term of court of general sessions was allowed by both sides to pass by without trial, and yet from June 27th to September, 1902, not a step is taken by the defendant to secure the presence of his witnesses. Was this to be construed as a compliance with rule 27, which requires that the applicant must show that he has used due diligence to procure the attendance of his witnesses? It seems strange that a bench warrant issued on the afternoon of the 7th day of October, 1902, should produce as its fruits the arrest and attendance of three out of five witnesses on the morning of the 8th October, 1902, at 9 o'clock, and yet defendant claims that he has not had time or could not procure the attendance of his witnesses. The solicitor admitted that, if Pompey Gadsden were present, he would swear as alleged by defendant in his affidavit. It seems to us that this exception should be overruled. Strictly speaking, we have no responsibility in this matter. As to questions of fact, it is only when there has been an abuse of discretion by the circuit judge that this court is authorized to interfere.

4. The defendant only lost the testimony of two of his witnesses, as Pompey Gadsden's testimony was admitted by the solicitor. This exception is without force, for the reasons already given.

5. We see no such error in the conduct of the circuit judge as here attempted to be pointed out. He accorded a full hearing of defendant's motion for continuance. He decided that defendant had not complied with rule 27 of circuit court. In reaching that conclusion, he violated no rule of law; he did not abuse his discretion. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 374)

## MOORE v. EWBANKS.

(Supreme Court of South Carolina. June 18, 1903.)

## CLAIM AND DELIVERY—RIGHT OF ACTION.

1. A claimant of liquors may maintain claim and delivery against the state constable who has taken the liquor in discharge of his duties on information that it was in possession of plaintiff for unlawful use, after the liquor had been disposed of under the provisions of the dispensary law; Cr. Code, § 587, not providing a remedy in such case, exclusive of all others.

Appeal from Common Pleas Circuit Court of Spartanburg County; Buchanan, Judge.

Action by Mattie Moore against Ben W. Ewbanks. From decree sustaining judgment of magistrate, plaintiff appeals. Reversed.

C. P. Sims, for appellant. Barber Hoke, for respondent.

WOODS, J. The defendant, Ben W. Ewbanks, a dispensary constable, seized as contraband a small quantity of lager beer in the possession of the plaintiff, Mattie Moore, who instituted claim and delivery proceedings for the recovery of the property or its value. The plaintiff alleged the beer was bought from the dispensary, and kept for her own personal use, but admitted in her reply that the constable, before making said seizure, "was informed that said beer was being stored and kept in the possession of the plaintiff for unlawful use; that, acting on such information, and in the faithful discharge of his duties as such ministerial officer, he made said seizure for and on behalf of the state, and had disposed of the same, according to the directions of the dispensary law in such cases, before the commencement of this action." Upon appeal from judgment of the magistrate in favor of the plaintiff, the circuit court dismissed the proceedings, holding that, where liquor is seized in good faith by a constable in the enforcement of the dispensary law, section 587 of the Criminal Code provides a remedy exclusive of all others, and therefore in such a case the action of claim and delivery could not be maintained. No question of the right to recover damages for tort is raised, and the sole inquiry involved in the appeal is, can an action of claim and delivery be maintained to recover liquor seized by a state constable in endeavoring in good faith to discharge the duties of his office?

The general rule is that, where there is a remedy already existing, and the statute provides another in the affirmative without a negative, express or implied, the latter remedy is regarded cumulative, and not exclusive of that already known to the law. *Gibbes v. Beaufort*, 20 S. C. 218. And the rule is the same whether the existing remedy was based on the common law or statute law. *Cyclopedia of Law and Procedure*, 709.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 295.

To this rule there is, however, a very important exception. Where a statute authorizes the taking or damaging of property for public purposes, and provides a remedy by which compensation may be obtained, such remedy is not cumulative, but exclusive. *Calking v. Baldwin*, 4 Wend. 667, 21 Am. Dec. 168; *Sams v. R. R. Co.*, 15 S. C. 487; *Fuller v. Eddings*, 11 Rich. Law, 245. The seizure of liquor in the enforcement of the dispensary law being for a very important public purpose, if the act providing for the seizure also provides a remedy to the person claiming the property which he may set in motion for the assertion of his rights, the remedy so provided should be regarded exclusive of all other remedies. This appeal is, therefore, narrowed to the inquiry whether the dispensary act, in providing for the seizure, has given a remedy which takes the place of claim and delivery. If such a remedy has been provided, it is exclusive, and this action could not be maintained.

The portion of section 587 of the Criminal Code considered by the circuit judge to furnish an exclusive remedy in such a case is as follows: "Second. If the said goods are believed by the officer making the seizure to be of less value than fifty dollars, no appraisal shall be made. The said officer or person shall proceed to publish a notice for three weeks, in writing, at three places in the county where the seizure was made, describing the articles, and stating the time and place and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice. Third. Any person claiming the liquors or other property so seized as contraband, within the time specified in the notice, may file with the board of state directors a claim, stating his interest in the articles seized, and may execute a bond to the board of state directors in the penal sum of five hundred dollars, with sureties, to be approved by the said board of state directors, conditioned that in the case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bonds to the board of state directors he shall transmit the same, with the duplicate list or description of the goods seized, to the solicitor of the circuit in which such seizure was made, and the said solicitor shall prosecute the case to secure the forfeiture of said contraband liquors or liquids in the court having jurisdiction. Fourth. If no claim is interposed and no bond given within the time above specified, such liquors shall be forfeited without further proceedings, and the dispensary commissioner shall have the said liquors tested by the state chemist, and, if pure, shall furnish the same through the state dispensary. If not pure, the same shall be destroyed by the chemist of the South Carolina College,

who shall make a report to the board of state directors of the amount and kinds of liquors so destroyed: provided, that in seizures in quantities less in value than fifty dollars of such illicit liquor or liquors, the same may be advertised with other quantities at Columbia by the board of state directors, and disposed of as hereinbefore provided: provided, further, that the claimants of such liquors may give bond in one hundred dollars, as when the value is fifty dollars or over, and shall bear the burden of showing before a magistrate that they have complied with the law and that the liquor is not liable to seizure." It will be observed, this law makes no provision for the claimant to receive back the property on giving the required bond, as would be his right on giving the undertaking in claim and delivery; the only result of giving the bond, under section 587, being to prevent the forfeiture of the property without judicial condemnation. What is still more important, no method is provided for the claimant to institute a suit or proceeding of any kind to recover the liquor or its value. The solicitor, on behalf of the state, is required to prosecute the case "to secure the forfeiture of said contraband liquors or liquids in the court having jurisdiction," but the claimant of the liquor has no means of forcing the solicitor to bring to issue and trial the question of his right to the liquor. Indeed, we have been unable to find in the statute any indication of the proceedings to be adopted by the solicitor in securing the forfeiture of the contraband liquor. It is obvious, therefore, that this section does not supply a remedy which, in any sense, takes the place of claim and delivery, or affords even the same character of relief, and it does not in terms or by implication take away the right to recover the property or its value. On the contrary, to hold that this statute excludes all pre-existing remedies would be to hold that the owner of liquor seized under a mistake by a constable has been deprived by this act of all methods of procedure by which he might legally assert his claim to the lawful possession and ownership of the property. It is not necessary to consider whether the General Assembly could constitutionally enact a law having this effect. A statute should not be construed to effect a change in the law so radical and far-reaching unless the intention of the lawmaking body has been expressed in unmistakable terms. But not only is there an entire absence from this section of the expression of a purpose to exclude the remedy of claim and delivery, but the General Assembly has elsewhere indicated an intention to leave this remedy available in dispensary issues. Section 600 of the Criminal Code provides: "Chapter I., title VII., of the Code of Civil Procedure of this state, entitled 'Of Provisional Remedies in Civil Actions,' shall not apply to any officer or person having duties to perform under this chapter, and in no case shall an action



lie against any such officer or person for damages to person or property, as provided in said chapter." Title 7 of the Code of Civil Procedure treats, under chapter 1, of "Arrest and Bail," and chapter 2 of the same article relates to "Claim and Delivery." When the General Assembly has expressly enacted that dispensary constables should not be subject to the provisional remedy of arrest and bail, this limits their exemptions, and strongly implies that they are still liable to the other provisional remedies of chapter 7, of which claim and delivery is one. For these reasons we conclude section 587 of the Criminal Code furnishes practically no remedy to the claimant of liquor taken from him, and that the General Assembly did not intend to interfere with the right of the claimant to institute proceedings to recover the property or the value thereof.

The judgment of this court is that the judgment of the circuit court be reversed.

(118 Ga. 240)

**SUMNER, Sheriff, v. BELL.**

(Supreme Court of Georgia. June 3, 1903.)

**INJUNCTION — EXECUTION OF POSSESSORY WARRANT — LIABILITY OF SHERIFF.**

1. The officer executing a possessory warrant is the custodian of the property involved until final judgment in the case. If he intrusts it to another he does so at his peril. But this alone does not authorize a court of equity to interfere with him in the control of the property.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Suit by H. F. Bell against J. N. Sumner, sheriff. Judgment for plaintiff, and defendant brings error. Reversed.

Perry & Tipton, for plaintiff in error. Sam S. Bennet, Claude Payton, Robt. A. Holmes, and G. G. Warren, for defendant in error.

COBB, J. Bell sued out a possessory warrant against Felt for two mules. The mules were seized by the sheriff. At the hearing the court awarded the mules to Bell upon his giving the bond required by law. Civ. Code 1895, § 4802. Felt gave notice of an intention to certiorari the case as authorized by law (Civ. Code 1895, § 4803), and within 10 days a certiorari was sanctioned. At this stage of the case Bell filed an equitable petition, alleging that the sheriff was about to turn the mules over to Felt pending the certiorari, and praying that the sheriff be enjoined from so doing. The sheriff answered that under the law he was the authorized custodian of the mules pending the case; that he was required to have the property forthcoming to answer the final judgment; and that he had the right to make any ar-

rangement for their safe-keeping that he deemed proper while he was responsible for them, taking the risk of being held liable in the event he did not have the property forthcoming to be delivered in conformity with the final judgment. The judge granted the injunction, and this is the error assigned.

The officer executing a possessory warrant is the authorized custodian of the property in dispute from the time the property is seized on the warrant until the final judgment is rendered by the officer issuing the warrant if there is no certiorari, or until the certiorari is finally disposed of if one has been sanctioned in 10 days from the judgment complained of. He is responsible for the property. He must have the property forthcoming to be delivered in conformity with the final judgment. He is not required by statute to deliver the property to any one pending the case. He may retain it in his own possession. If he delivers it to another, he does this at his peril. When the final judgment is rendered, and he is called upon to deliver the property to the prevailing party, if he fails or refuses to comply with the order of the court, he may be attached for contempt, the party aggrieved may bring an action for damages against him, or there may be a suit on his official bond as for a breach of official duty. How he shall dispose of the property during the pendency of the case is a matter left largely to his discretion. The law requires him to take care of the property, but does not set forth the details to be followed in taking care. He may keep it in his own possession, if he sees proper. He may intrust it to others at his peril. If the property is a beast of burden, and he allows others to work it, or works it himself, he may be liable for hire, and might not be allowed to charge for the keeping. See Civ. Code 1895, § 4335; Price v. Cutts, 29 Ga. 142, 74 Am. Dec. 52. It may be that in justice the party from whose possession the officer has taken the property should be allowed to keep the same pending the certiorari, upon giving bond with security to have it forthcoming to answer the final judgment; but the statute does not so provide. The officer executing the warrant is declared by the statute to be the custodian of the property pending the case, and he should not be interfered with while he is discharging this duty, unless it is made to appear that he is allowing the property to be removed beyond the jurisdiction of the state, that he is insolvent, and has no sufficient bond, or the securities on his bond are insolvent, or other sufficient reason exists for a court of equity to entertain a proceeding *quia timet*. No such reason appears in this case. The court therefore erred in granting the injunction.

Judgment reversed by five Justices.

(118 Ga. 149)

**MARTIN v. SCOTT.**

(Supreme Court of Georgia. June 1, 1903.)

**COURTS—ADJOURNMENT IN VACATION—DEFAULT JUDGMENT.**

1. A regular term of a superior court cannot lawfully be adjourned by the judge, in vacation, by an order which fails to show that the adjournment is rendered necessary by the sickness of himself or his family, or other unavoidable cause. Hence a default judgment rendered at a court held in accordance with such a void order of adjournment is a mere nullity.

(Syllabus by the Court.)

Error from Superior Court, Towns County; R. B. Russell, Judge.

Action by Henry F. Scott against W. C. Martin & Co. Judgment for plaintiff, and defendant Martin brings error. Reversed.

Jones & Martin and R. J. & J. McCamy, for plaintiff in error. John H. Davis, for defendant in error.

FISH, J. Henry F. Scott brought an action to the March term, 1902, of Towns superior court against W. C. Martin & Co. W. C. Martin alone was served, the service being made by the sheriff of Whitfield county. He filed a demurrer and plea to the jurisdiction of the court. At the appearance term the plaintiff moved to strike both the demurrer and plea, which motion was sustained by the court, and the demurrer and plea were stricken. To this ruling the defendant Martin filed exceptions pendente lite. The regular September term, 1902, of the court was not held; the judge of the circuit having passed the following order, in vacation, at his home, in Gainesville: "Chambers, Gainesville, Ga., Sept. 20th, 1902. It is hereby ordered that the term of Towns superior court, which should commence on the third Monday instant, be, and the same is hereby, adjourned or postponed until October 9th. All officers, jurors, parties, and witnesses will take notice thereof, and govern themselves accordingly. The clerk of the superior court of Towns county will enter the foregoing order on the minutes of said court. J. B. Estes, J. S. C." On the 9th of October, 1902, Judge R. B. Russell convened Towns superior court under this order. When the case under consideration was reached in its order, the defendant having filed no answer, counsel for the plaintiff moved the court to direct a verdict for the plaintiff, which motion was sustained, and a verdict for the plaintiff directed and returned, and judgment entered accordingly. Martin objected to this ruling of the court directing a verdict in favor of the plaintiff, and sued out a writ of error to this court. There are two assignments of error in the bill of exceptions, the first assigning error upon the action of the court in striking the demurrer and plea. The second assignment is that "the term of court held by the said Hon. R. B. Russell was without authority of law, and \* \* \* no legal judgment could be rendered at said court." As we

think this second assignment is well taken, it is unnecessary to consider the first one, for, as the term of court at which the verdict in favor of the plaintiff was directed and the judgment thereon entered up was, as to this case, at least, a mere nullity, the exceptions pendente lite are still pending in the court below, awaiting a final judgment in the case there.

Civ. Code 1895, § 4343, provides: "When the clerk of the superior is informed by the presiding judge that it is not possible for him to attend the regular term of said court, from sickness of himself or his family, or other unavoidable cause, which shall be expressed in the order of adjournment, the clerk shall adjourn such court to such time as the judge may direct, and shall advertise the same at the court-house of the county in which said court is to be held, and one or more times in a public gazette." Section 4344 declares: "No superior court shall be adjourned by the judge in vacation, except for the causes above stated; but the judge may in term time adjourn such court to such time as he may think fit." It will be seen that a regular term of a superior court cannot be lawfully adjourned by the judge, in vacation, except for sickness of himself or his family, or other unavoidable cause, and that the cause for the adjournment must be expressed in the order of adjournment. The order of adjournment involved in the present case was a nullity, because no cause for the adjournment is expressed therein. Our learned Brother Estes probably had a good and sufficient reason for adjourning the regular term of the court, and, by mere inadvertence, failed to express it in the order of adjournment; but as the statute imperatively, and, as we think, wisely, requires the cause for the adjournment to be expressed in the order, an order of adjournment passed by a judge in vacation which fails to show on its face a sufficient cause for adjournment is void. One purpose of the statute is to prevent a judge from adjourning in vacation a regular term of a superior court for any cause other than one of those which it specifies, and this purpose could be easily defeated if the judge were not required to express in the order the cause for the adjournment. In *Hoye v. State*, 39 Ga. 718, Chief Justice Brown, in discussing these provisions of the Code, and the legislative purpose in passing the statute, said: "The practice which had grown up in some circuits of adjourning the regular terms of the courts at the mere convenience or caprice of the judge, to the great detriment of parties and inconvenience of jurors and witnesses, was a great evil, and demanded the emphatic mandate of the Legislature which is now found in the Code." In that case the plaintiff in error had been convicted of voluntary manslaughter in Bibb superior court. "The regular term of the court was to begin on the third Monday in May. In vacation the judge or

dered it adjourned till the fourth Monday in May; stating in his order, as reasons for the adjournment, that several members of the bar could not attend on the third Monday, and that he had been appointed to attend the Commercial Convention in Memphis, which was to be held during the week beginning with said Monday." After the conviction of the accused, he made a motion in arrest of judgment "upon the ground that the court was sitting illegally at the time of the conviction," which motion was overruled. This court reversed this judgment of the court below; holding that the term of court at which the accused was tried was illegally held, as the adjournment of the regular term was without sufficient legal cause. Chief Justice Brown said: "When the judge, without any sufficient legal cause, has adjourned the regular term of the court by order in vacation, we hold that he has no power at such adjourned term to compel any party to go to trial before him." After stating that, if parties to civil causes made no objection and go to trial, the irregularity is waived, and they cannot afterwards be heard to object to the judgment on the ground of the illegal act of the judge in ordering the adjournment, he said the rule was different in a criminal case, involving the life or liberty of the defendant, who waives nothing by implication or intentment. The plaintiff in error in the present case waived nothing. He never even filed any defense to the merits of the case. All that he did was to file at the appearance term a demurrer and plea to the jurisdiction of the court, and, when these were stricken, exceptions pendente lite to such ruling of the court.

As the judgment complained of was rendered when the court had no jurisdiction to try this case, it is reversed. By five Justices.

(118 Ga. 143)

CENTRAL OF GEORGIA RY. CO. v. STANCEL.

(Supreme Court of Georgia. June 1, 1908.)

CARRIERS—INJURY TO PASSENGER—HARMLESS ERROR.

1. There being no error in the charge of the court respecting the measure of damages, nor any erroneous ruling, save that the plaintiff was competent to express his opinion, as a non-expert witness, that his injuries were of a permanent nature, the verdict of the jury should be allowed to stand, since it was not only fully warranted by the evidence, but was quite moderate in amount.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by William Stancel against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wimberly and J. E. Hall, for plaintiff in error. F. Chambers & Son, for defendant in error.

SIMMONS, C. J. An action for damages was brought by Stancel against the Central of Georgia Railway Company, because of injuries alleged to have been sustained by him while riding as a passenger on a train which collided with another train belonging to the defendant company. The contention upon which it mainly relied at the trial was that the plaintiff sustained only a few slight bruises as a result of the collision, and that the ailments of which he complained were brought about, not by the slight injuries he received at that time, but by the infirmities of old age, or other independent causes, for which the company was not responsible. The plaintiff, on the other hand, insisted that the injuries received by him while riding on the defendant's train were of a serious and permanent character, and had incapacitated him from performing labor of any kind. There was an irreconcilable conflict in the evidence touching this issue of fact, which was decided by the jury in favor of the plaintiff. The company made a motion for a new trial, based on divers grounds; but its motion was overruled, and it excepted. Complaint was therein made of certain instructions to the jury with regard to the measure of damages to be allowed the plaintiff in the event they should find he was entitled to recover; the criticism made upon these instructions being that they practically left the jury free to assess whatever amount of damages they might think proper, irrespective of whether the plaintiff had successfully established his contention that he had been permanently injured. This criticism is not well founded, for the instructions complained of, when considered in connection with the whole charge given the jury on the subject of damages, were clear and explicit, and in no way misleading.

It appears that the plaintiff introduced in evidence the Northampton, the Carlisle, and the Actuaries' mortality tables, as well as the annuity table appearing in Reese's Manual, copies of which tables are published in the appendix to the seventieth volume of the Georgia Reports, pp. 844-847. The trial judge explained to the jury how this annuity table could be used in conjunction with the Carlisle mortality table, but in so doing made no mention of the other mortality tables. In the company's motion for a new trial, error is assigned upon the charge of the court in this connection; the company contending that the charge was erroneous, "because it singled out one piece of evidence for the basis of the charge, and gave no instruction as to the other evidence of the same class." The obvious reply to this contention is that the annuity table above mentioned was prepared with a view to showing the value of annuities on single lives according to the Car-

His table, only, and cannot properly be used in conjunction with either of the other mortality tables, since each furnishes calculations concerning the expectancy of life of average men of different ages wholly at variance with the calculations set forth in the Carlisle table.

A physician, who was sworn as a witness in behalf of the plaintiff, testified: "From the examination I have given this man, I would say the disease he has now is what is called 'traumatic neurosis.' \* \* \* Neurosis is a suspended condition of the nervous system. It is like nervous prostration. By 'traumatic' is meant that this condition is attributed to some accident, physical violence, or shock. Neurosis is a thing that frequently exists from a number of causes other than shock, so that, in determining whether a thing is traumatic neurosis or not, you must have regard to its history. The symptoms are similar, whether it be from shock and violence, or from disease." On cross-examination of this witness, the defendant company elicited from him the statement that "anything that would keep the matter [an injury] before a man's mind, like the matter of attending court, or keeping his injury before him for the purpose of trials, retards recovery; and frequently, when that is removed, recovery is very rapid." Counsel for the plaintiff, on redirect examination of the witness, asked him the following question: "Do you think his condition of mind is what produces the disease, or the physical injury?" The witness answered: "I think it is both." Plaintiff's counsel then asked: "Isn't that condition of mind superinduced by the physical injury?" To this latter question defendant's counsel objected on the ground that the answer solicited was a matter to be passed on by the jury, but the objection was overruled by the court, and the witness was permitted to testify: "The rule is, with this condition, and I think with this man, the shock he has sustained has caused him, to a certain extent, to be afraid of what might happen to him, together with the injury he did sustain. In my opinion, this condition of mind was caused by the accident." Exception is taken to the ruling of the court just stated. We think the question propounded to the witness was entirely legitimate and proper. He was introduced as an expert whose opinion, because of his professional knowledge and experience, was entitled to much weight; had testified that he had made a careful and painstaking examination of the plaintiff, and found him to be suffering from a disease technically known as "neurosis"; counsel for the defendant had been permitted to elicit from the witness a statement to the effect that the bringing of a suit for damages by one suffering from that disease was calculated, because of the worry and anxiety incident to attending court and prosecuting his claim, to retard his recovery; and the witness had further

testified, in substance, that the condition of the plaintiff's mind, as well as the physical injury sustained by him, brought about and produced the disease from which he was then suffering. Whether or not "that condition of mind [was] superinduced by the physical injury" was an all-important matter to be inquired into and determined by the jury. The witness had, he testified, taken particular note of the character and extent of the physical injuries the plaintiff had received; and we have no hesitation in holding that it was perfectly competent for this witness to give his opinion, as a medical expert, that the plaintiff's "condition of mind was caused by the accident." This really amounted to no more than the expression of an opinion that the physical injuries received were of a character sufficiently grave to produce an unhealthy mental condition, which was, in part, the cause of the plaintiff's nervous affection.

In another ground of the motion for a new trial the following complaint is set forth: "After the plaintiff, William Stancel, had testified to his injury in his head, shoulder, back, and legs, counsel for the plaintiff asked the following question: 'State to the jury whether or not these injuries you have spoken of are permanent in their nature?' To which question counsel for the defendant objected on the ground that the answer sought was a medical or expert opinion, and, as the plaintiff was not a medical expert, he could not properly give a medical opinion. Over defendant's said objection, plaintiff was allowed to testify as follows: 'I hope that my back will get well, but I don't believe it will ever get well. I think it is ruined. I lost the use of this arm,' etc." As was expressly ruled in *Atlanta Street R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48: "It is not competent for a party who, as a witness, testifies to his feelings, pains, and symptoms, to state his opinion that the injuries which caused the same are permanent." The judgment in that case was reversed; it appearing that the trial court had not only allowed the plaintiff to testify to his opinion that his injuries were of a permanent character, but had also improperly permitted the plaintiff's wife to testify to self-serving declarations he had made to her as to the extent and cause of the suffering he claimed he was at the time undergoing. The gravity of the error committed in thus allowing the wife to attempt to bolster up her husband's testimony by swearing, in effect, that he had been consistent, in that he had prior to the trial told the same story he had related from the witness stand, was certainly not to be underestimated, and accordingly the conclusion was announced (page 467, 93 Ga., and page 49, 21 S. E.) that "the two errors in admitting evidence" referred to called for a new trial. So far as the present case is concerned, however, we are of the opinion that, as the sole error committed on the trial was

In allowing the plaintiff to testify as above set forth, a judgment of affirmance should be rendered. The physician who appeared as a witness in his behalf testified, as a medical expert, that the injuries he had received would doubtless prove permanent, and that he would, in any event, continue for some time in the future to suffer pain. The jury apparently took the view that he would eventually recover, for they awarded him only \$1,625 as damages, which amount was, in view of the testimony concerning the plaintiff's earning capacity prior to his injury, quite moderate, indeed, regarded merely as an award for actual loss of income, with no allowance whatever for past or future suffering.

Judgment affirmed by five Justices.

(118 Ga. 196)

### DALTON v. STATE.

(Supreme Court of Georgia. June 3, 1903.)

#### PARENT-ABANDONMENT OF CHILD—EVIDENCE.

1. To warrant a conviction under the Pen. Code 1895, § 114, the child must be not only dependent, but in a destitute condition.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

J. M. Dalton was convicted of abandoning his minor child, and brings error. Reversed.

G. Y. Tigner, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

SIMMONS, C. J. Dalton was tried and convicted of the offense of abandoning his minor child, leaving it in a dependent and destitute condition. His motion for a new trial was overruled, and he excepted. The judge charged the jury, in substance, that, if the accused and his wife had separated on account of his misconduct, and he failed to provide for and support the child, which was with its mother, the jury would be authorized to convict him, although the wife had returned to her relatives, and they had supported and provided for the child on account of their love for it and on account of charity. Pen. Code 1895, § 114, provides that, "if any father shall willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, he shall be guilty of a misdemeanor." The evidence adduced on the trial showed that the father was willing for the wife to leave him and return to her relatives. The child, which she took with her, was between four and five years of age, and was, of course, dependent. The evidence, however, does not disclose that the child was destitute at the time of the abandonment, or had even become destitute up to the time of the trial. So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all the

44 S.E.—62

necessaries of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that, if he fails in his duty, he may be convicted under the above section of the Code although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessaries, the father cannot be convicted. It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be construed strictly, we are constrained to give this statute this interpretation. Jackson, C. J., in discussing this question in *McDaniel v. Campbell*, 78 Ga. 188, said: "To leave a child dependent does not convey the idea of absolute destitution. The child may be cared for and comfortable, and yet dependent on some charity; but, left destitute, it has no protector, friend, or other author of benevolent kindness feeding and clothing it." Atkinson, J., in discussing the same question in *Crow v. State*, 96 Ga. 297, 22 S. E. 948, said (page 299, 96 Ga., and page 949, 22 S. E.): "Many cases occur in human experience where a child is less destitute under the tender care of affectionate grandparents than when its wants are left to be supplied by an improvident and shiftless parent. At all events, neither abandonment nor destitution is proven unless the father leaves the child, intending to abandon it to its own fate, without providing for it the necessaries of life, and leaving it wholly dependent upon others, who are themselves unable or unwilling to provide for it."

Judgment reversed by five Justices.

(118 Ga. 225)

### TRAMMELL v. ROME MUT. LOAN ASS'N.

(Supreme Court of Georgia. June 3, 1903.)

#### BUILDING ASSOCIATION—CONTRACT—CONSTRUCTION.

1. A calculation, by way of illustration, based on a stated estimate as to when the stock of a building and loan association would mature, printed in a pamphlet which also contains the by-laws of the association, cannot, in defense to a suit by the association, be relied upon to vary the terms of the written contract with the association, or as a guaranty of the time within which the stock will mature.

2. The questions made in the present case have been settled by repeated adjudications of this court. There was no error in any of the rulings of which complaint is made.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by the Rome Mutual Loan Association against G. W. Trammell. Judgment for plaintiff. Defendant brings error. Affirmed.

McHenry & Maddox and Geo. A. H. Harris, for plaintiff in error. Halsted Smith, for defendant in error.

SIMMONS, C. J. Trammell became a member of a building and loan association. He first subscribed for 10 shares of stock, and shortly thereafter for 5 more. He paid his dues, assessments, etc., for 84 months, and after that refused to pay anything more; claiming that, under his contract and the guaranty of the association, his stock had matured, and he was not liable for any further assessments. The association brought suit against him. The case was determined against Trammell in the court below, and he brought it to this court by bill of exceptions.

1. Trammell's defense was, in part, that he had been induced to enter into the contract with the association by reason of a printed copy of by-laws and regulations of the association, which had been furnished him, and which contained on certain pages the following:

"Inquirers will find below illustration showing the practical workings of the Rome Mutual Savings & Loan Association. The experience of all well-managed loan associations is that the stock matures in the average time of seven years. There can be no doubt that this one will not go over that time.

"Illustration showing the cost of a loan of \$1,000.00 if obtained ninety days from the date of a certificate." (Then follow the calculations used as illustrations.)

Defendant alleged that this representation became a guaranty that the stock would mature within seven years, and that, as he had complied with his contract for that length of time, his stock was therefore matured. This part of the answer was demurred to, and the demurrer sustained. Exceptions pendente lite were filed, and, when the case was finally brought here, error was assigned in the bill of exceptions on these exceptions pendente lite. The main argument of counsel was that the court erred in striking this plea, it being contended that the representation had become a part of the contract, and was a warranty or guaranty that the stock would mature within seven years. Counsel for the defendant in error argued that this representation, as set forth in the plea, was not a part of the by-laws of the association, but was merely an advertisement in the same pamphlet or prospectus. The plea did not allege that the statement and illustration copied above constituted a part of the by-laws, but that it was on certain pages of the printed copy of the by-laws and regulations of the association. It is clear that this estimate was not a by-law. By-laws of a corporation are the rules of law adopted by it for its government. They are made not only to regulate its conduct and that of its officers, but also, in a mutual association like this, to regulate the conduct of its members. The matter set out in the plea certainly could not have been a by-law. It was more in the nature of a prospectus or advertisement. It was addressed to "Inquirers," told of when stock usually matured in well-managed associa-

tions, and gave an opinion that this particular corporation would mature its stock in not more than seven years. It then illustrated the results by calculations based on the hypothesis that the stock would mature in eighty-four months. The defendant's written contract was to perform his obligations "until maturity of said shares according to the charter and by-laws of said association." This being true, his contract could not be changed or modified by reason of a statement elsewhere made, especially where such statement is obviously a mere expression of opinion. See *Mut. Life Ins. Co. v. Ruse*, and annotations thereto, in 8 Ga. 534. If defendant wished a guaranty that his stock would mature within seven years, he should have refused to contract unless such a stipulation was inserted in the contract which he signed.

2. The case, after the striking of these pleas, was referred to Judge Joel Branham, as auditor. After hearing and considering the case for several weeks, he made a full and exhaustive report, finding in favor of the association. Exceptions of law and fact were filed to this report. All of them were disallowed by the judge, and the case was brought here. After reading the report and the exceptions thereto, we find that no questions are made which have not been repeatedly adjudicated by this court. We deem it useless to take up the exceptions serialim, and again go over the same beaten track. There was no error in any of the rulings of which complaint was made.

Judgment affirmed by five Justices.

(118 Ga. 236)

#### **EQUITY LIFE ASS'N v. GAMMON.**

(Supreme Court of Georgia. June 3, 1903.)

#### **FOREIGN INSURANCE COMPANY—ACTION AGAINST—JURISDICTION.**

1. The plaintiff's petition was open to demurrer, and should have been dismissed, on the ground that the allegations of fact therein set forth failed to disclose that the court in which suit was instituted had jurisdiction over the insurance company, a foreign corporation, named as the defendant to the action.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by Marie Ann Gammon against the Equity Life Association. Demurrer to petition was overruled, and defendant brings error. Reversed.

S. Holderness, for plaintiff in error. S. E. Grow and Brown & Roop, for defendant in error.

SIMMONS, C. J. The plaintiff below, Mrs. Marie Ann Gammon, instituted suit against the Equity Life Association upon a policy of life insurance in which her husband had been named as the insured. The defendant demurred to the plaintiff's petition on the ground that she failed to therein set forth any facts showing that the court had juris-

diction to entertain the suit. The demurrer was overruled, and the defendant excepted.

It was alleged in the petition that the "Equity Life Association is a foreign corporation, organized under the laws of the state of Virginia, whose principal office is in Staunton, Va."; that it had "been doing business in this state as such, but now has no public place for doing business in this state, and has no person in this state upon whom service of process can be perfected"; that "said corporation has not appointed and authorized any person resident in this state to acknowledge or receive service of process, and upon whom process may be served, for and in behalf of said company," but that "the Insurance Commissioner of this state, under and by virtue of the authority invested in him by the laws of this state, has appointed John C. Printup, of Floyd county, as attorney for service of said company, notice of which appointment has been given to said Printup and to said company as required by law." The petition did not disclose whether the defendant did or did not have an agency or place of doing business in Carroll county, in which county the action was instituted, either at the time the contract sued on was entered into, or at the time the cause of action accrued. It is evident, therefore, that no facts were set forth which would authorize the action to be brought under the provisions of section 2145 of the Civil Code, which declares that "any insurance company having agencies or more than one place of doing business" in this state shall be subject to suit "within the county where the principal office of such company is located, or in any county where said insurance company may have an agency or place of doing business, or in any county where such agency or place of doing business was located at the time the cause of action accrued or the contract was made out of which said cause of action arose." *Atlanta Accident Ass'n v. Bragg*, 102 Ga. 748, 29 S. E. 706; *Orebaugh v. Equity Life Ass'n*, 115 Ga. 842, 42 S. E. 208. As the present suit was instituted on October 22, 1902, the act approved December 17, 1902 (Laws 1902, p. 53), amending the section of the Code just cited, has no application to the case, and need not be further noticed.

Presumably, the plaintiff sought to bring her suit in accordance with the provisions of the act of October 24, 1887, "to regulate the business of insurance in this state," etc. See Acts 1887, p. 123 (Civ. Code 1895, §§ 2057, 2058). That act declared that "any insurance company not incorporated or organized under the laws of this state, desiring to transact business in this state, shall file with the Insurance Commissioner . . . a written instrument or power of attorney duly signed and sealed, appointing and authorizing some person, who shall be a resident of this state, to acknowledge or receive service of process, and upon whom

process may be served, for and in behalf of such company, in all proceedings that may be instituted against such company in any court of this state, or any court of the United States in this state, and consenting that service of process upon any agent or attorney appointed under the provisions of this section shall be taken and held to be as valid as if served upon the company; and such instrument shall further provide that the authority of such attorney shall continue until revocation of his appointment is made by such company by filing a similar instrument with said Insurance Commissioner whereby another person shall be appointed as such attorney: provided however, that the provisions of this section shall not be construed to alter or amend the laws now of force in this state relative to bringing suits and serving process on foreign corporations doing business in this state. If any attorney so appointed shall absent himself from this state, or his usual place of business or abode, or shall secrete himself, so that process may not be served upon him, or shall have become disqualified from any cause whatever, or shall die, the Insurance Commissioner shall immediately appoint an attorney for service for such company, of which appointment notice in writing shall be immediately given by said Insurance Commissioner to such appointee and also be sent to the company by mail, or to its general agent or manager, which appointment shall be as valid as if made by the company, and shall continue in force until such absent agent or attorney shall return and give to said Insurance Commissioner written notice thereof, or until the company shall have made another appointment in the manner above prescribed; service of process as aforesaid, issued by any such court as aforesaid, upon any such attorney appointed by the company, or by the Insurance Commissioner, shall be valid and binding, and be deemed personal service upon such company so long as it shall have any obligations or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state. If any company shall fail, neglect or refuse to appoint and maintain within this state such attorney or agent, it shall forfeit the right to do or continue business in this state." That act further provided that any person acting as the agent of and carrying on business for any insurance company which had not received a certificate of authority from the Insurance Commissioner should be deemed guilty of a misdemeanor. Acts 1887, p. 122 (Civ. Code 1895, § 2059).

The evident purpose of the General Assembly in thus providing for the appointment of some person resident in this state who should be authorized to acknowledge or receive service of process was to require every foreign insurance company, as a condition precedent to acquiring a right to carry

on business in Georgia, to submit itself to the jurisdiction of the courts of this state, and the federal courts located therein. The proviso, above quoted, to the effect that existing laws "relative to bringing suits and serving process on foreign corporations doing business in this state" should remain of force, is to be understood as an expression of the legislative will that such companies should still be held subject to suit under the provisions of section 2145 of the Civil Code of 1895 in all instances where suit could be instituted in accordance therewith. As has been seen, that section applies only to an insurance company which has actually established agencies in this state, and not to a foreign corporation which sends its agents into the state for the purpose of soliciting business, but does not have within the state any agency or place of doing business. The act of 1887 was doubtless aimed at such foreign insurance companies as sought in this manner to conduct business in this state without submitting themselves to the jurisdiction of the courts therein. These companies were not required to establish agencies, but merely to appoint representatives residing in the state, who should be authorized to stand in their place so far as was necessary to the successful prosecution in the courts of claims against them by persons desiring to bring suit in Georgia. No foreign insurance company can, in view of this act, acquire a right to do business within the state without first filing with the Insurance Commissioner the "written instrument or power of attorney" specified. As to every foreign company failing to comply with the requirement as to appointing a local representative upon whom service could be perfected, the legislative scheme was, not to authorize the Insurance Commissioner to make an appointment for the company, but to deny to it the privilege of conducting business within the state, and punish all persons acting in its behalf who should attempt to carry on its business in violation of the statute. The appointing power of the Insurance Commissioner was expressly limited to instances where foreign companies should, before commencing operations, voluntarily appoint local representatives, and should subsequently fail in their duty to "maintain within this state" resident agents authorized to acknowledge service for them.

It is to be observed that the petition filed in the present case contains the unequivocal averment that the defendant corporation failed to make an appointment of a person upon whom service could be perfected. If, as matter of fact, this allegation be true, then it is obvious that the Insurance Commissioner was without power, "under and by virtue of the authority invested in him by the laws of this state," to make any appointment which would be binding upon that company, and thus subject it to suit in this state. It follows that the demurrer filed

by the defendant below should have been sustained, the plaintiff not undertaking by way of amendment to allege facts disclosing that the court in which she instituted suit had jurisdiction over the foreign corporation named as the defendant.

Judgment reversed by five Justices.

(118 Ga. 114)

**O'NEIL MFG. CO. v. WOODLEY.**

(Supreme Court of Georgia. May 30, 1903.)

**TROVER—VERDICT—SUFFICIENCY—EVIDENCE.**

1. In an action of trover the plaintiff has the option to "demand a verdict for the damages alone, or for the property alone, and its hire, if any." If he elects to take a verdict for the damages alone, these damages may, at his option, consist of the highest proven value of the property between the date of the conversion and the date of the trial, or the value of the property at the date of the conversion, with interest thereon from that date to the date of the trial, or, if the property is of a character that hire may be recovered, the value of the property at the date of the conversion, with hire of the same from that date to the date of the trial.

2. In an action of trover brought to recover two mules and their hire a verdict in the following words: "We, the jury, find for the plaintiff \$200.00 for value mules, and for hire for 302 days, 37½ cents each per day," is sufficiently certain to authorize a judgment to be entered for a gross amount, made up of the value of the mules and their hire at the rate and for the time stated in the verdict, and when the judgment is so entered it will bear interest on the gross amount from the entry of the judgment.

3. The evidence authorized the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by G. M. Woodley against the O'Neil Manufacturing Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Denny & Harris, for plaintiff in error. C. E. Carpenter and Griffith & Weatherly, for defendant in error.

COBB, J. Woodley brought an action of trover against the O'Neil Manufacturing Company to recover two mules, alleging that each of them was worth \$125, and that their hire was worth 50 cents per day each. The defendant filed an answer denying all the material allegations of the petition, and set up by special plea that it held a mortgage executed by Clark Bros. to it, embracing six mules, the two in controversy being among the number; that there was a lien upon these mules, both under the law of this state and under that of Alabama, where it had taken possession of the two mules in satisfaction of the debt for which the mortgage was given and it thereby became vested with the title to the mules; it being alleged that at the time the defendant took possession the title to the mules was in Clark Bros., who were



in partnership with the plaintiff, and were colluding together to defeat the payment of the debt due the defendant by Clark Bros. At the trial the evidence on many of the material issues was conflicting, but there was evidence authorizing a finding that the mules were worth \$100 each, and 50 cents a day each for hire. There was also evidence which authorized a finding that prior to the execution of the mortgage by Clark Bros. to the defendant they had executed a mortgage to one Coker on the mules in controversy, and that plaintiff had become security for the debt of Clark Bros. to Coker, and at the time of becoming security there had been an agreement entered into between plaintiff, Coker, and Clark Bros. that, if plaintiff was compelled to pay the debt to Coker, he was to take a transfer of Coker's mortgage, and the mules would become the property of plaintiff. Coker agreed to transfer his mortgage, and Clark Bros. agreed that upon the payment of the debt by plaintiff title to the mules should vest in him. Plaintiff was compelled to pay the debt to Coker, and took a transfer of the mortgage, and Clark Bros. put the mules in possession of plaintiff. All this occurred subsequently to the date of the defendant's mortgage. Plaintiff having carried the mules to Alabama, the defendant sent its debt secured by the mortgage to an attorney of that state for collection. With the consent of a member of the firm of Clark Bros., the mules were taken possession of by the representative of the defendant, and brought into the state of Georgia, and the mules were in possession of defendant at the time the action was brought. The jury returned a verdict for the plaintiff for "\$200.00 for value mules, and for hire for 802 days, 37½ cents each per day." The defendant's motion for a new trial was overruled, and it excepted.

1, 2. In an action of trover the plaintiff has, at his option, the right to "demand a verdict for the damages alone, or for the property alone, and its hire, if any." Civ. Code 1895, § 5335. If the plaintiff elects to take a verdict "for the damages alone," and the property converted is of such a character that hire for the same may be recovered, the plaintiff has a further right to elect to take as his damages the highest proved value of the property at any time between the conversion and the trial, or the value of the property at the date of the conversion, with interest on that amount to the date of the verdict, or the value of the property at the date of the conversion, with reasonable hire for the same from the date of the conversion to the date of the trial. Having a right to elect between a verdict for damages and a verdict for the property, he thus has a further right to elect in what way his damages shall be made up. *Schley v. Lyon*, 6 Ga. 530 (3); *Woods v. McCall*, 67 Ga. 506 (2); *Ezzard v. Frick*, 76 Ga. 512 (2); *Moore v. Dutton*, 79 Ga. 456, 4 S. E. 169 (4); *Jaques v.*

*Stewart*, 81 Ga. 81, 6 S. E. 815 (2). The plaintiff in the present case elected to take a verdict for the damages alone, and also elected that these damages should consist of the value of the property at the date of the conversion, with reasonable hire for its use from that date to the date of the trial. The verdict of the jury was by its very terms in strict accordance with the election of the plaintiff. It would have been in accord with the better practice if the jury had calculated the amount of the hire, and expressed their verdict in a gross sum; but the verdict sufficiently indicates the intention of the jury, and this intention is in exact accord with the law. It is a mere matter of calculation to ascertain the gross sum which the jury intended to find, and the judgment should have been entered for such gross sum, which would bear interest from the date of the entry of judgment. If the judgment has not already been entered in this way, the court has power to authorize an amendment to this effect. In a case where the plaintiff elects to take a verdict for the property and its hire, the hire as found by the jury would be calculated until the property was delivered in accordance with the verdict. *Sanders v. Williams*, 75 Ga. 283. But where the verdict is for the value of the property at the date of the conversion, with reasonable hire, no hire would be calculated after the trial, and the damages of the plaintiff would be the value of the property, with the hire from the date of the conversion to the date of the trial added. There is nothing in any ruling made in this case which conflicts with the rulings in *Mashburn v. Dannenberg*, 117 Ga. —, 44 S. E. 97. No question of hire was there involved. The property in dispute was not of such character that hire could be recovered for the same, and what was then said in reference to the measure of damages in trover cases must be taken in the light of this fact.

3. The judge charged the jury that the plaintiff was "entitled to the highest proved value, with interest from the time of the conversion." This charge was error. The plaintiff is not entitled to recover either interest or hire when he elects to take a money verdict for the highest proved value. See *Jaques v. Stewart*, supra. This error, however, did not prejudice the defendant, because the plaintiff had elected to take a verdict for the value of the mules at the date of the conversion, with hire, and the verdict was in strict conformity with this election. We find no error of law which required the granting of a new trial, and the evidence authorized the verdict. When the arrangement was made between Coker, Clark Bros., and the plaintiff that upon payment of Coker's debt the plaintiff should own the mules, the plaintiff became the owner of the mules, as against Clark Bros., the moment he paid Coker's debt; and Clark Bros., recognizing him as the owner, delivered possession of the

mules to him. If the arrangement between Coker and the plaintiff did not have the effect of subrogating plaintiff to Coker's rights as mortgagee, but the effect of it was simply to destroy the lien of Coker's mortgage, then the plaintiff, although he became the owner of the mules, took them subject to the defendant's lien. Having only a lien, the defendant would not be authorized to take possession of the property from the plaintiff without proceeding to enforce his lien in the manner prescribed by law; and, as we understand it, it is not claimed that either under the law of Georgia or of Alabama a mortgagee of personal property is entitled to the possession of the property. It is insisted that the defendant's title is complete, because Clark Bros. consented to its taking possession of the property and bringing it to Georgia. At the time this consent was given, however, Clark Bros. had no interest in the property. It was either the unincumbered property of the plaintiff, or his property subject to the defendant's right to enforce its lien in the manner provided by law. A mortgagee of personal property who takes possession of the property in the manner which the defendant did is guilty of a conversion, and the owner of the property may recover his full damages for the conversion. See, in this connection, *Schley v. Lyon*, 6 Ga. 530, 537. The defendant cannot, by asserting its mortgage lien, take advantage of its own wrong in thus seizing possession of the property. The remarks of Patterson, J., in *Finch v. Blount*, 32 Eng. Com. Law Rep. 591, quoted by Judge Warner, in *Schley v. Lyon*, *supra*, are pertinent. Said that judge: "I have never heard that where property is taken the plaintiff is to have a farthing damages and the defendant keep the property; that would be allowing the defendant to take advantage of his own wrong." Even a bailee is entitled to recover the full value of the property as the measure of his damages against a wrongdoer, because he is answerable over to the general owner. It would seem, for a stronger reason, that the general owner should always be entitled to recover full value as his damages against a wrongdoer.

Judgment affirmed by five Justices.

(118 Ga. 221)

#### DENNY v. BROADWAY NAT. BANK.

(Supreme Court of Georgia. June 3, 1903.)

#### DOCUMENTARY EVIDENCE—RECEIVER'S SALE—APPEAL—REVIEW—NEW TRIAL.

1. Under the Civ. Code 1895, § 5172, there was no error, in view of the evidence introduced, in admitting in evidence certified copies of the deeds claimed to have been lost.

2. A receiver's sale of land does not divest the lien of a judgment obtained prior to the sale, where the plaintiff in such judgment is a stranger to the proceedings under which the receiver was appointed and the sale ordered.

3. Questions not made in the record cannot be considered by this court, although argued and insisted on here.

4. The evidence authorized the finding of the judge, who tried the case without the intervention of a jury.

5. A fact which has transpired since verdict is not ground for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Claim proceedings between R. A. Denny, executor, and the Broadway National Bank. Judgment for defendant, and claimant brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Henry Walker and C. N. Featherston, for defendant in error.

SIMMONS, C. J. In December, 1891, the Broadway National Bank obtained a judgment against McGhee & Co. Upon this judgment execution was issued, and in 1896 was levied upon certain land as the property of J. F. McGhee, one of the partners of the firm of McGhee & Co. King filed a claim to a portion of the land levied upon. King subsequently died, and his executor was made a party in his stead. On the trial of the case the plaintiff in *fi. fa.* offered in evidence certified copies of two deeds which were necessary to show title in the defendant in *fi. fa.* The claimant objected on the ground that the original deeds had not been sufficiently accounted for. The objection was overruled. It was also shown at the trial that in 1888 McGhee had sold the land in controversy to one Holt, the latter paying one-fourth of the purchase money and giving his promissory notes for the remainder. The record does not disclose that Holt ever took possession of the property. It does disclose that McGhee sued Holt upon the notes given for the purchase money, and obtained judgment thereon, in January, 1892. In the same year other creditors of Holt filed an equitable petition against him, and had a receiver appointed to take charge of his effects and administer his assets for the benefit of creditors. In 1893 the court passed an order authorizing the receiver to sell the real property of Holt, and provided in the order that, if any of the realty was under bond for titles, the receiver should give notice to the maker and holder of the bond, and, upon the written consent of the maker, should sell the entire interest in the land, the proceeds of the sale being first applied to the payment of the amount due to such maker for the purchase money. The receiver sold the property here in dispute, and recited in his deed that he had obtained the written consent of McGhee to sell the entire interest. Upon the foregoing facts the case was submitted to the judge without the intervention of a jury. He found that the property was subject to the lien of the bank's judgment. The claimant moved for a new trial, the motion was overruled, and he excepted.

1. Two of the grounds of the motion for new trial complained of the admission in evi-

dence of the certified copies of the two deeds referred to above. The movant complained that there was not sufficient evidence to show that the original deeds had been lost or destroyed, and that it was therefore error to admit the copies. McGhee, the defendant in *fi. fa.*, testified that he had searched for the deeds and could not find them. He did not know what had become of them, although he was the grantee in each of them, but thought possibly he had given them to Holt. King being dead, it was admitted that he had on a former trial of the case testified that he had never had either of these deeds. The persons holding under King and in possession of the land testified that they had not and never had either of the deeds. Jennings, who made one of the deeds, was a nonresident. Holt, to whom McGhee said he might have given the deeds, had disappeared, and had not been seen for 10 or 12 years. Under this evidence we think the court did not err in admitting the certified copies. If inquiry could have been made of Holt, it is very likely he would not have had the deeds; for he had never held the land except under bond for titles and had never paid the purchase money. It is not reasonable to suppose that McGhee would have given him the title deeds before the purchase money was paid. Jennings, the grantor, would scarcely have kept the deed made by him or the other deed to the same land, and, besides, he was a nonresident, and could not have been compelled by subpoena duces tecum to produce papers in his possession.

2. After these certified copies of the deeds were admitted, the claimant introduced the deed made to King by the receiver of Holt. This deed was, of course, admissible; but, as the Broadway National Bank was not a party to any of the proceedings in the case against Holt wherein the receiver was appointed and the order of sale obtained, the bank was not bound thereby. The sale by the receiver did not and could not divest the lien of the bank's judgment. *McLaughlin v. Taylor*, 115 Ga. 671, 42 S. E. 30, and cases cited; *Beach*, Rec. 783. See Civ. Code 1895, § 4911.

3. Counsel for the plaintiff in error insisted with great earnestness that the finding of the judge was wrong, because the bank had lost the lien of its judgment, under Civ. Code 1895, § 5355, the claimant having been in possession under the receiver's sale for more than four years. We have scanned closely the motion for new trial and the pleadings, and find that this question was not raised thereby. There is no ground under which the point could possibly be considered, unless it be the complaint that the verdict is contrary to the evidence. We think that it should not be considered under that ground, as it does not appear that the point was made in the court below. We are confirmed in this by the fact that the evidence, as it appears in the record, contains nothing which would

have warranted the claimant in making this question. There was no evidence that King was ever in such possession of the land as is contemplated by the Code section cited, so as to relieve it from the lien of the judgment.

4. It was insisted by counsel for the plaintiff in error that under the ruling in *Leitch v. May*, 98 Ga. 714, 27 S. E. 151, the judge erred in his finding. We think the facts in that case and those in the present case are essentially different. In that case Austin was shown to have no interest in the land, even before the time of the judgment, and had transferred the notes to Mrs. May, and given her an escrow deed. The entire title was out of him before Leitch & Stubbs obtained their judgment, he having no further interest save that he had indorsed the notes, which had, however, been nearly all paid, and none of which became overdue without payment. In the present case, while McGhee testified that he had transferred the notes to other parties, the records show that he sued the notes to judgment a few days after the bank had obtained judgment against him. He made no deed to Holt, as Austin did to Williams. He consented to the receiver's sale, and received the purchase money for the land, but under the law the lien of the bank's judgment had attached from the time of the record on the execution docket (which was prior to the receiver's sale) upon all the property of McGhee. This lien was never divested. The bank not being a party to the equitable proceedings or to the receiver's sale, that sale did not divest its lien. The evidence and law warranted the finding of the judge, and there was no error in refusing a new trial.

5. It appears from one of the grounds of the motion that, under proceedings instituted after the judgment below, McGhee has been adjudged a bankrupt. The movant asked that the verdict be set aside for this reason. This ground is not based upon newly discovered evidence, but upon events which have transpired since the trial; and we are not aware of any law or practice which entitles a losing party to insist on a new trial because of some new fact which has come into existence since the verdict and judgment. The court properly refused to consider this ground of the motion.

Judgment affirmed by five Justices.

(118 Ga. 164)

#### GRANGER v. RIGGS.

(Supreme Court of Georgia. June 1, 1903.)

#### LEASE—OPTION TO PURCHASE—EXERCISE—LIABILITY FOR RENT.

1. A contract provided for the lease of property for two years at a rental of a fixed sum payable in two installments; one due on the execution of the lease, the other on the first day of the second year of the lease. The lessee had the option to purchase the property at any time before the expiration of the lease on stated terms. It was provided that, if a sale

was made before the date fixed for the payment of the second installment of rent, that installment should not be paid. The lessee exercised the option to purchase 5 days after the installment was due, and a deed to the property was delivered 48 days thereafter. In the negotiations of sale nothing was said concerning this installment of rent, and no reference to it was made in the deed. No demand for it was made until long after the deed was delivered, and suit was not brought until more than a year had elapsed after the sale. The court directed a verdict for 48 days' rent. *Held*, that this was error. The plaintiff was, under the contract, entitled to recover the full amount of the installment, with interest from the date it was due, and was not estopped from claiming payment of the same.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by A. O. Granger against L. C. Riggs. Judgment for defendant, and plaintiff brings error. Reversed.

John W. Akin, for plaintiff in error. J. M. Neel, for defendant in error.

COBB, J. On July 13, 1900, Granger brought suit against Riggs, claiming an indebtedness of \$400, besides interest from March 1, 1899. Under a contract dated March 10, 1898, in which Granger leased to Riggs an ice plant and other property connected therewith in Cartersville, Ga., from March 1, 1898, to March 1, 1900, Riggs agreed "to pay as rental for the ice plant and other property aforesaid the sum of eight hundred dollars (\$800.00), payable in two installments of \$400.00 each—one on the execution and delivery of this lease, and the other on March 1, 1899: provided, however, should said property be sold as hereinafter provided, or rendered unfit for use for the purpose of manufacturing ice through cause while in possession as aforesaid of A. O. Granger prior to March 1, 1899, then the said lease shall terminate, and the second installment of rent due hereunder shall not be paid." The contract further provided: "In consideration of the foregoing agreements the said A. O. Granger hereby agrees to sell to L. C. Riggs, trustee, at any time prior to the expiration of this lease, the ice plant, machinery, lands, buildings, and all the property heretofore owned by the Ice Company in Cartersville, Georgia, for three thousand dollars (\$3,000.00), or all property above described, excepting the land and buildings, for twenty-five hundred dollars (\$2,500.00), on the following terms: One-half on delivery of deed and abstract showing merchantable title in the grantor in said deed, and the balance in one year, with six per cent. interest, secured by mortgage on said property. The said A. O. Granger reserves, however, the right to sell the above-described property to others than L. C. Riggs, trustee, on the following conditions: Should the said A. O. Granger, at any time prior to March 1, 1900, find a suitable purchaser as aforesaid, he shall, before selling, notify the said L. C. Riggs, trustee, of his intention to

sell, and thereupon the said L. C. Riggs, trustee, shall have twenty-four hours in which to elect to purchase the property at the price and on the terms aforesaid; and should the said L. C. Riggs, trustee, not elect to purchase before the expiration of twenty-four hours from the notice as aforesaid, then the said A. O. Granger shall have the right to sell the property to parties who shall remove the machinery of the ice plant to a point as far distant from Chattanooga, Rome, and Atlanta as Cartersville is distant from each of these places respectively; and the said A. O. Granger agrees not to sell the ice plant before March 1, 1900, except for the purpose of removal as aforesaid. In the event of the sale of the property to L. C. Riggs, trustee, or any other person, before March 1, 1899, this lease shall terminate, and the said L. C. Riggs, trustee, shall not be held liable for the installment of rent due on March 1, 1899." It was alleged that the property was not sold before March 1, 1899, but that after that date, to wit, April 21, 1899, defendant exercised his option, and bought the property. It was also alleged that the property was not rendered unfit for use for the purpose of manufacturing ice at any time before the sale. The suit was for the installment of rent which fell due on March 1, 1899. The answer of the defendant set up that on March 5, 1899, the authorized agent of plaintiff gave defendant notice that plaintiff would sell the property to others unless he exercised his option to purchase on the terms prescribed in the contract; that on March 6, 1899, defendant exercised this option by notifying the agent of plaintiff that he would purchase; that, owing to plaintiff's absence in a foreign country, the deed was not delivered until April 21, 1899; and defendant claims that, if he is liable at all for rent after March 1, 1899, it is only from March 1st to March 6th. The answer further set up that the relation of landlord and tenant ceased on March 6th; that the lease was merged in the deed of April 21st, and plaintiff's right to demand rent became extinct on March 6th. It was alleged that nothing was said during the negotiations of sale about the installment of rent due on March 1, 1899, that no reference was made in the deed to the subject of rent, and that no claim of rent was made by plaintiff until long after the deed was delivered. The plaintiff's silence and the deed are pleaded as an estoppel. The deed, a copy of which is exhibited to the answer, is an ordinary deed of bargain and sale, with the clause of express warranty omitted. At the trial the facts alleged in the pleadings were made to appear by evidence. The court directed a verdict for the plaintiff for \$55.55, being the rent due from March 1, 1899, to April 21, 1899. The plaintiff excepted to this ruling, claiming that he was entitled to recover the full sum sued for. The second installment of rent was due March 1, 1899. The contract in terms dealt with the subject of what should relieve

the defendant from payment. Under the contract only two things would defeat the plaintiff's right to demand the payment of the full amount of the installment—First, a sale of the property before March 1, 1899; and, second, the property becoming unfit for the manufacture of ice. It is not claimed that either of these contingencies has happened. Under the contract the plaintiff was entitled to demand \$800 for two years' rent of the property, unless a sale was had prior to March 1, 1899. If a sale was had after that date, the whole \$800 was to be paid, and it was to be presumed that the defendant, by delaying the right to exercise his option until after the date fixed, would understand that the purchase price of the property was increased by a sum representing the rental from the date of the sale until the termination of the lease. If defendant desired to avoid payment of the second installment of rent, he should have taken care to exercise the option before that installment was due. If this installment had been paid on March 1, 1899, we do not suppose that any one would contend that a subsequent election to purchase would have given the defendant the right to recover it. If he could not recover it, he has no right to refuse to pay it, when nothing has occurred which would at all indicate that it was the intention of the parties at the time of the sale that the plaintiff's accrued right under the contract was to be surrendered. Even if the general rule is that a sale of leased premises terminates the lease and extinguishes the right to collect future rent, such a rule has no application to a case where the express stipulation in the contract is to the contrary. Even if the contract was illegal because the lease was made for the purpose of closing up the ice plant, and was in restraint of trade, and even if this illegality would constitute a good defense to a suit on the contract, it cannot be relied on in this case, because such a defense is not set up in the pleadings. Under the evidence the plaintiff was entitled to recover the full amount sued for, and the court erred in directing a verdict for a less sum.

Judgment reversed by five Justices.

(118 Ga. 198)

### ROBINSON v. STATE.

(Supreme Court of Georgia. June 3, 1908.)

#### MURDER—EVIDENCE—EXCLUSION—NEW TRIAL—INSTRUCTIONS.

1. In a trial for murder, the actions, intentions, and motives of both parties to the affray, and all the circumstances making up the *res gestæ*, may be proved.

2. The conduct and language of both parties at the time of the killing and in an affray immediately preceding the same were admissible in evidence. Pen. Code 1895, § 998.

3. The language sought to be proved by the excluded testimony was not denied, but was proved by the witnesses for the state and by others for the defense. Under the circumstances, the failure to allow it to be established by a

particular witness was not cause for a new trial.

4. The judge was not bound to read Pen. Code 1895, § 76, having in his general charge instructed the jury as to the form of their verdict, and as to the effect of finding that the killing was justifiable.

5. It was proper for the judge to charge Pen. Code 1895, § 65, which emphatically declares that provocation by words "shall in no case be sufficient to free the person killing from the crime and guilt of murder."

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

John Robinson was convicted of murder, and, brings error. Affirmed.

John R. Cooper, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. O. Hart, Atty. Gen., for the State.

LAMAR, J. According to the evidence of the state, half an hour before the homicide there had been an altercation between Robinson, the defendant, and Murphy, the deceased, when the latter cursed the former for a g—d s— of a b—, drew a knife, and threatened to kill him. Robinson withdrew, and went to a house near by, telling those there that he had been cursed, and was going to kill Murphy. He procured a rifle and returned, whereupon Murphy, seeing him armed with a rifle, attempted to screen himself behind a companion; but Robinson, finally securing a good aim, fired, and killed Murphy. According to the theory of the defense, Murphy went towards the house in search of Robinson with a drawn knife in his hand. Both parties advanced towards each other for the purpose of renewing the fight, and the deceased was shot while in the act of approaching the defendant. In the light of this evidence it was not error to charge on the subject of mutual combat and of voluntary manslaughter; in fact, the assignments of error on these points were abandoned on the argument here. The charge fully covers the law as to reasonable fear. *Cumming v. State*, 99 Ga. 662, 27 S. E. 177.

In every trial for murder the action, intention, and motive of both parties to the affray are proper subjects for consideration by the jury. All the circumstances of the quarrel, including those immediately preceding the killing, are admissible, and the defendant would be entitled to establish all that went to make up the *res gestæ* by every witness by whom the same could be proved; for the jury might be willing to believe one and disbelieve the others. In this instance, however, the use of the opprobrious words was not denied, and was proved by the witnesses for the state as well as for the accused. The failure, therefore, to allow it to be established in this instance by a particular witness worked no harm, and is not ground for the grant of a new trial.

The court charged that "words, threats, menaces, or contemptuous gestures shall not

be sufficient to reduce a killing from murder to manslaughter. There must be an assault, or other equivalent circumstances, sufficient, in the opinion of the jury, to excite the passion and exclude all idea of deliberation whatever." The plaintiff in error says that this was not a matter for the court, but for the jury. Where there has been conflicting argument as to the effect of provocation by words, the jury desire, and certainly are entitled, to be instructed as to the statute on that subject. While the words were admissible as part of the *res gestæ*, they did not afford a justification for the killing, and it was not error for the judge so to inform the jury. The epithets used were very insulting. In anticipation that it might be claimed that, while ordinary insults would not be sufficient, yet, if they were unusually and outrageously offensive, the provocation by words might be sufficient to justify a homicide, the Code meets that argument before it is made: in no case shall provocation by word be sufficient to free the person killing from the crime of murder. It goes even further: in no case shall provocation by word be sufficient to free the person killing from the guilt of murder. The section is as emphatic as it is possible for language to be, and in this positive and unequivocal form was enacted by the people's representatives as the law of the land. In special cases there is a duty to first withdraw; but, speaking generally, to take life to save life is no offense; to take life to save from felonious assault is justifiable; to take life in the heat of a passion aroused by an assault is manslaughter; to take life in resentment for words spoken is murder. Words may justify an assault (Pen. Code 1895, § 103), but they do not justify a homicide. The tongue is neither a weapon likely to produce death, nor is it the legal equivalent of a blow. That words, threats, menaces, and contemptuous gestures will not justify the taking of human life is as old as our criminal law. It has been reaffirmed and re-enacted four times in this state. By their chosen representatives it is the voice of the people that, however great the indignation, however hot the passion which they engender, words afford no justification when the state prosecutes for the death of one of its citizens.

Judgment affirmed by five Justices.

(118 Ga. 200)

#### WARREN COUNTY v. EVANS.

(Supreme Court of Georgia. June 3, 1903.)

#### DEFECTIVE BRIDGES—LIABILITY OF COUNTY—CARE REQUIRED.

1. The act of December 29, 1888, p. 39 (see Pol. Code 1895, § 603), does not apply to bridges built before its passage, unless they have since that time been practically rebuilt. Whether the work done on them was merely a repairing, or amounted to a rebuilding, is a question of fact for the jury.

2. County authorities are not insurers of the safety of county bridges, but are only bound to exercise ordinary care in maintaining and repairing them.

(Syllabus by the Court.)

Error from Superior Court, Warren County: H. M. Holden, Judge.

Action by B. D. Evans against Warren county. Judgment for plaintiff, and defendant brings error. Reversed.

E. P. Davis, for plaintiff in error. Evans & Evans, for defendant in error.

SIMMONS, C. J. In 1884 the people of a certain neighborhood in Warren county erected a bridge over Camp creek. In November, 1888, the board of roads and revenues of the county, by an order entered on their minutes, received and adopted this bridge as a county bridge. Some time thereafter—perhaps in 1892—the bridge was washed away or largely damaged by a freshet. Whether its destruction was partial or practically total is not clearly shown by the evidence. There is evidence that the flooring and sleepers were washed away, leaving the bents or arches standing. Other parts of the evidence seem to indicate that not all of the flooring and sleepers were washed away. The evidence also leaves it doubtful whether the bridge was practically rebuilt as a new bridge, or merely repaired by replacing the old sleepers and flooring, with the addition of some new planks in the flooring. After this the bridge stood until about August 1, 1900, when a man in the employment of Judge Evans undertook to cross it with a surrey and pair of mules. One of the sills or sleepers of the bridge gave way on account of its rotten condition, and the mules and surrey fell and were injured. An action was brought against the county for the damage sustained to the mules and surrey, and on the trial the plaintiff recovered a verdict against the county. A motion for a new trial was overruled, and the county excepted and brought the case here for review.

1. One of the grounds of the motion complains that the judge erred in charging the jury as follows: "I charge you, gentlemen, if this bridge was built prior to December 29, 1888, by private individuals, and the county authorities, after the bridge was built, and prior to December 29, 1888, adopted said bridge as a county bridge, and if the plaintiff's mules and surrey were damaged by said bridge falling in while said mules and surrey were passing over it, and said damage occurred because of said bridge being in a defective condition, or because of not being in reasonably good repair, plaintiff would be entitled to recover such damages as the evidence shows that he sustained, provided the party in charge of such mules and surrey at the time could not have discovered the condition of such bridge by ordinary care and dili-

¶ 2. See Bridges, vol. 2, Cent. Dig. § 102.

gence, and provided said damage did not occur on account of ordinary neglect or fault of said party." Under the evidence as above recited, and under the law, we think the exception to this charge is well taken. Prior to the act of December 29, 1888 (Acts 1888, p. 39), a county was not liable for injuries arising from defective bridges unless the bridge had been erected under contract, and the county had taken no bond from the contractor as required by law; and even then the county was not liable unless the injury occurred within seven years from the building of the bridge. This bridge was adopted by the county, as above cited, in November, 1888, and was repaired or rebuilt in 1892. The injury sustained by the property of the defendant in error occurred in August, 1900—more than seven years after the repairing or rebuilding of the bridge, and much more than seven years after it was originally adopted as a county bridge. As the act of 1888 applies only to bridges built or adopted since its passage, the pressure of the case was as to whether in 1892 the bridge was simply repaired, or was rebuilt so as to make it practically a new bridge. If the bridge was practically rebuilt anew in 1892, then the Political Code (section 603) makes the county liable for injuries sustained through its negligence in maintaining the bridge. *Hackney v. Coweta County*, 117 Ga. —, 43 S. E. 725. If, however, the work done in 1892 was only to repair the bridge, so that the old bridge remained as such, then the county could not be held liable for the injuries to the property of the defendant in error. *Helvingston v. Macon County*, 103 Ga. 106, 29 S. E. 596. The charge complained of instructed the jury, in substance, that if the bridge was built by citizens and adopted by the county prior to December 29, 1888, the county might be held liable for injuries occasioned by its negligence in maintaining the bridge, whether the bridge had or had not been rebuilt since that time. Under this charge, it was not necessary for the jury to consider the question discussed above, but they might find for the plaintiff although there had been no rebuilding of the bridge since the passage of the act of 1888.

2. Another ground of the motion complains that the judge refused a written request, properly made, to charge as follows: "If you should believe from the evidence that the defendant, Warren county, observed ordinary care in keeping the bridge . . . in repair, or that the plaintiff or his agent in charge of the team could have prevented the injury by observing ordinary care, then I charge you that it would not be liable." We think that the judge should have instructed the jury as to the matters covered by this request. It is true that he did cover the latter part of it, as to the result of a want of ordinary care on the part of the driver of the vehicle; but nowhere in his charge did he intimate that the county would

escape liability if its authorities had observed ordinary care in examining, looking after, repairing, and maintaining the bridge. While the Political Code (section 603) makes the county primarily liable for injuries caused by defective bridges, it does not make the counties insurers of the condition of the bridges. It does not require extraordinary care on the part of the county authorities in building or maintaining county bridges. Ordinary care is all that is required of them under the law. Whether the county authorities exercised ordinary care in examining or repairing the bridge was a question for the jury. It was also for the jury to say whether it was negligence or a want of ordinary care on the part of one of the commissioners, who, with a contractor, examined the bridge shortly before the accident occurred, to fail to discover the rottenness of the sill; whether if, when they examined it and found the exterior of the sill to be sound, they should, in the exercise of ordinary care, have made further investigation, and ascertained—what afterwards proved to be true—that the heart of the sill was rotten. These were questions for the jury to determine under proper instructions from the court.

Judgment reversed by five Justices.

(118 Ga. 152)

#### SCALES v. FAULKNER.

WALKER et al. v. QUILLIAN et al.

(Supreme Court of Georgia. June 1, 1903.)

MUNICIPAL CORPORATIONS—ELECTION OF OFFICERS—CONTEST—HOLDING OVER—REMOVAL OF OFFICER—QUO WARRANTO—ANSWER.

1. Where an election is held for a municipal office in the town of Belton, and a contest properly instituted, no certificate of election being issued to either of the candidates, the old incumbent holds over until such certificate has been issued or until the contest has been decided; and he cannot be removed from office on quo warranto proceedings instituted by the candidate who, according to the face of the returns, received the highest number of votes, although such candidate has taken the oath of office.

2. Where the answer of the respondent alleges that a contest has been filed with the officer having jurisdiction of such a proceeding, and that the same has been duly served, this part of the answer should not be stricken on demurrer or motion on the ground that it is insufficient, in that copies of the papers in the contest proceeding are not attached.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Quo warranto by R. L. Scales against C. R. Faulkner, and by H. H. Walker and others against R. F. Quillian and others. Judgment for defendants, and plaintiffs bring error. Judgments affirmed.

W. F. Findley and Spencer R. Atkinson, for plaintiffs in error. Ed. Quillian and F. M. Johnson, for defendants in error.

SIMMONS, C. J. On December 9, 1902, an election for mayor and five councilmen was held in the town of Belton, Ga. On the face of the returns, R. L. Scales appeared to have received a majority of the votes cast for mayor. The opposing candidate instituted a statutory contest before the ordinary of one of the counties in which Belton is situated. The managers of election, having been notified that such a contest would be instituted, refused to issue any certificate of election. Scales duly qualified by taking the oath required by the charter of the town, and demanded the office of Faulkner, who had been elected at the preceding election, and had served his term thereunder. Faulkner declined to surrender the office, and continues to hold it; claiming authority to do so under the provision of the town charter that the mayor shall hold office for one year, and until his successor is elected and qualifies. Scales thereupon applied to the superior court for leave to file proceedings in the nature of a quo warranto against Faulkner, the present incumbent. The application alleged the holding of the election, that the applicant had received the highest number of votes cast, that he had taken the oath, and that the respondent refused to comply with his demand for the books, etc., of the town, but continues to discharge the duties of the office. In response, the present incumbent denied that the applicant had received the highest number of the legal votes cast; stated, on information and belief, that the applicant had not taken the oath of office until after contest had been instituted; admitted that the applicant had, on the face of the returns, appeared to be elected, but alleged that no certificate of election had ever been issued, and that the opposing candidate had filed a contest with the ordinary of Banks county as provided by law. He alleged that the testimony had been duly taken by both parties to this contest, and that the case was ready for argument and hearing; that Belton lies in the counties of Hall and Banks, and that the election was held in the latter, and that the ordinary of that county had and has full and legal jurisdiction to hear and determine the contest; and that the ordinary is the proper officer to determine contested elections of this class. Respondent denied that he was an intruder, and claimed to be merely holding over until his successor could be determined. A similar proceeding was instituted by Walker, King, Oliver, Carlton, and Sumner against Quillian, Hathcock, Barrett, and Scoggins. The applicants claimed to have been elected aldermen, and to have taken the oath of office. The application was similar to that of Scales, and made practically the same allegations as to the offices claimed as he made with regard to that of mayor. The respondents' answer was similar to that of the respondent in the other case, except that it appeared that no contest had been filed against Sum-

ner, against whom there had been no opposing candidate. On the hearing the cases were consolidated. The applicants put in evidence the oath of office filed by each of them on December 11, 1902. Counsel for the respondents moved to dismiss the applications on various grounds. In each of the cases the judge denied the leave prayed, and ordered the application dismissed. To this judgment and order, exception was taken. The cases will be considered together, as the same questions are controlling in both.

1. The charter of Belton, as amended (see Acts 1887, p. 548), provides that the mayor and councilmen "shall hold their offices for one year and until their successors are elected and qualified." It also declares that the certificate of the managers of election "shall be sufficient authority to the persons elected to enter on the discharge of the duties of the office to which they have been elected." Had the managers issued certificates of election, these certificates would have given the holders of them the right to enter on the discharge of the duties of the offices, and to have held such offices until the determination of the contests filed by the opposing candidates. Such certificates would have been conclusive in any collateral proceeding, and would have been prima facie evidence in even a direct proceeding which called in question the legality of the election. Where no certificates are issued at all, neither party can show even a prima facie right to the office. In such a case the managers may be compelled by mandamus to take action by issuing certificates, though they cannot be made to issue certificates to any particular or named candidate or candidates. *Mechem, Pub. Off. § 973.* In the absence of any certificates of election, and where a contest has been filed, one of the candidates cannot give himself the right to the office by taking the oath. A candidate who, without even a prima facie right to the office, has nevertheless taken the oath, does not thereby become entitled to the office. It might well happen that each of two opposing candidates might take the oath of office, and certainly this could not affect their relative rights. It was contended that the provision in the charter making the certificates of election sufficient authority for the holders to enter upon the discharge of the duties of the offices is not intended to make this the only sufficient evidence, and that the admitted fact that the applicants had, on the face of the returns, received a majority of the votes cast, was enough. In support of this contention, *Cutcher v. Crawford*, 105 Ga. 181, 184, 31 S. E. 139, was cited. That case dealt with the rights of the court to inquire into the evidence upon which the General Assembly had acted in enacting a private law, and can have no controlling application here. Possibly the showing made in the present cases would have been sufficient, had there been no contest pending; but we are clear that



in these cases, where no certificates of election have been issued to any one, and there are contests pending, the present incumbents have the right to hold over until the contests are decided or the certificates issued. If the election managers are compelled to issue certificates of election, and they issue them to the present plaintiffs in error, the latter would have the right to enter upon the discharge of the duties of the offices, and hold the offices pending the contests. Or if the contests are decided in their favor, they would be entitled to the offices. But without any certificates of election, and with contests pending and undisposed of, they have no right to oust the present incumbents of the offices. One of the candidates for council had no opposition at the election, and as to him there is no contest; but this does not give him a right to have the four defendants in error, or any one of them, removed from office. The four present councilmen can occupy but four of the five places, and he can claim no more than the right to the one not occupied by them. Further than this, he has joined in a proceeding with others who should not prevail therein, and there are no assignments of error which relate to him separately from the others.

2. In the preceding discussion, we have assumed that the judge was correct in overruling a certain special demurrer filed in each case to the answer of the respondents. By these demurrers the applicants sought to have the allegations as to the institution and pendency of the contests before the ordinary stricken on the ground that, "if said fact existed, it was not made to appear in the answer, and that a copy of the same, and all other papers therein, should be attached to the pleadings, so that the court could, by inspection of said record, say whether or not the same was true or legal, or that the ordinary of Banks county had jurisdiction to hear and determine the same, or that the same was regular on its face." The allegations were clear and explicit, and set out all of the material facts, and we are not aware of any requirement of law or pleading that one's evidence need be attached to one's pleadings merely because it is in the shape of a writing. The record of the contests is not the basis and foundation of the plea, in the sense that it must be set out literally therein, or attached as an exhibit. If the contests filed were for any reason invalid, the applicants could have shown this on the hearing. It would be a matter for them to prove by the introduction of evidence, or to show from the evidence introduced by the respondents. The allegations of the answers as to the contests were full and specific, and there was no error in holding that they were sufficient in themselves, without having copies of the record attached.

Judgment in each case affirmed by five Justices.

(118 Ga. 208)

### DILL v. HAMILTON.

(Supreme Court of Georgia. June 3, 1903.)

#### MORTGAGE BY HUSBAND—EQUITY OF WIFE IN LAND—RIGHTS OF MORTGAGEE.

1. Although money belonging to a wife was expended in the purchase of land, to which her husband, without her knowledge or consent, took title in his own name, yet her secret equity in the land cannot be successfully asserted as against another who extended credit to the husband on the faith of his apparent ownership of the property, took from him a mortgage thereon, and subsequently reduced to judgment the debt thus created.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. B. Estes, Judge.

Action by R. L. Dill against Albert Hamilton. Judgment for plaintiff. On leave of execution, Lucinda Hamilton interposed a claim. Judgment for claimant, and plaintiff brings error. Reversed.

J. C. Edwards, for plaintiff in error. Erwin & McMillam, for defendant in error.

SIMMONS, C. J. A *fi. fa.* in favor of Dill was levied upon certain land as the property of Albert Hamilton, the defendant in execution; and his wife, Lucinda Hamilton, interposed a claim, based upon the contention that the land had been "bought and paid for by her," and that through mistake or accident her husband had caused the legal title thereto to be conveyed to himself. On the trial of the issue thus formed the claimant testified that the money with which the land was purchased had been earned by her prior to her marriage, and in this statement she was corroborated by another witness, who professed to know the truth in this regard. She further swore: "When it was paid for, my husband, Albert Hamilton, went to have the deed made, and he had it made to himself. I don't know why he had it made that way. I never knew the deed was made to Albert till this litigation arose. I never had a deed to it. The deed has always been in my husband's name; but, as I said, I didn't tell him to have it made to him, and didn't know that he did until this litigation." The deed referred to was dated December 19, 1887, and recorded on February 15, 1888. The judgment in favor of Dill, upon which the execution issued, was obtained in 1899. The levy was made the latter part of that year, and the claim was filed in January, 1901. Dill was introduced as a witness in his own behalf, and testified as follows: "On the 2d day of June, 1893, I sold Albert Hamilton a mule on a credit, and I took a mortgage on this land to secure the debt. Albert Hamilton showed me the land, and said he had a deed to it, and it was his; and I extended him credit on the faith of the land. I did not know anything about his wife having paid for the land, or that she had any interest in it or claim to it, and I never

heard of her having any until she filed this claim." No further evidence was introduced by either party to the case. The court below gave to the jury the following instruction: "If you believe that the claimant in this case paid for this land, the equitable title will be in her, and would not be subject; but if you believe that the plaintiff in *fi. fa.* extended credit to the defendant in *fi. fa.* upon the faith that defendant owned this land, and the claimant had knowledge of it, or had anything to do with it, then the land would be subject; but if she (the claimant) did not know of the credit being extended to defendant in *fi. fa.*, and had nothing to do with it, the land would not be subject." The verdict returned was: "We, the jury, find in favor of the claimant." Dill made a motion for a new trial, wherein he complained that the charge of the court above quoted was erroneous, and that the verdict was contrary to law and the evidence.

It is unquestionably true, as his honor of the trial bench in effect charged, that one having a secret equity in land cannot be heard to assert the same if he stood by and knowingly allowed another to act to his prejudice by extending credit to the holder of the legal title upon the faith of his apparent ownership of the land. *Kennedy v. Lee*, 72 Ga. 39. It was, however, erroneous to add that, if the claimant "did not know of the credit being extended to the defendant in *fi. fa.*, and had nothing to do with it, the land would not be subject." It was not incumbent upon Dill to prove that the claimant was a party to the fraud perpetrated upon him. He in good faith acquired a mortgage lien on the land in 1893, when credit was extended to her husband, and therefore stood in the attitude of a bona fide purchaser for value, and without notice of her equity. See *Parker v. Barnesville Savings Bank*, 107 Ga. 651, 34 S. E. 365, and cases cited on page 657, 107 Ga., and page 368, 34 S. E. Regarded even as an unsecured creditor, his judgment lien on the land, acquired in 1899, was, under the undisputed facts of the case, entitled to prevail over her mere secret equity. *Zimmer v. Dansby*, 56 Ga. 79; *Gorman v. Wood*, 68 Ga. 524; *Brown v. West*, 70 Ga. 201; *Hobbs v. Georgia Loan Co.*, 96 Ga. 770, 22 S. E. 331. In the first of the cases last cited this court held: "If the legal title to land be in the husband, and he holds the possession thereof under such title, and the title and possession so remain until a creditor, who gave credit on the faith that the property was the husband's without any notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land, and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land." The rule is different where a wife, whose money is used in the purchase of lands, the title to which is taken in the name of her husband, acquired from him a conveyance

of the legal title prior to the time a creditor of the husband secured a judgment against him, notwithstanding the creditor may have extended credit on the faith of his apparent ownership; for under such circumstances the creditor is not in a position to assert a lien on the land as the property of the husband, unless the conduct of the wife was such as to estop her from setting up a claim to the same. *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153; *Dodd v. Bond*, 88 Ga. 355, 14 S. E. 581. But, as has been seen, this rule has no application to the facts of the present case, the claimant never having acquired the legal title to the land, and being chargeable with inexcusable laches in not sooner informing herself of the fact that her husband took title to himself, instead of having a conveyance made to her.

Judgment reversed by five Justices.

(118 Ga. 164)

**ARMOUR PACKING CO. v. LOVELL et al.**  
(Supreme Court of Georgia. June 1, 1903.)

**EXECUTION—PARTIES SUBJECT—INJUNCTION.**

1. An execution against "James E. Leps, agent for the Armour Packing Co." is against James E. Leps alone, the words "agent for," etc., being merely descriptive personae. *Maxwell v. Collier*, 41 S. E. 620, 115 Ga. 304.

2. Where a party has an adequate remedy by claim, the successful prosecution of which would be as effectual as the equitable proceeding, he is not entitled to an injunction. *Bey-siegel v. Rome Mutual Loan Association*, 39 S. E. 405, 113 Ga. 1071.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by the Armour Packing Company against S. L. Lovell and others. Judgment for defendants, and plaintiff brings error. Affirmed.

A. S. J. Hall and Felder & Rountree, for plaintiff in error. Dupree & Dobbs, B. F. Simpson, Sol. Gen., and John W. Henley, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(118 Ga. 203)

**OGLESBY v. WALTON & CO. et al.**

(Supreme Court of Georgia. June 3, 1903.)

**FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—INSTRUCTIONS.**

1. In a proceeding to set aside a sale of a stock of goods because made to defraud creditors, where the pleadings did not ask for a judgment for the difference between the value and the price paid, and where the judge charged the provisions of Civ. Code 1895, § 2695, par. 2, a new trial will not be granted because of his failure without a request to charge as to the effect of inadequacy of consideration, the inadequacy, if any, not being sufficient to manifest fraud as a matter of law, and the verdict showing that the jury found as a fact that the purchase was bona fide, and without notice of an intent by the insolvent grantor to delay or defraud creditors.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action against Walton & Co. and others to set aside a fraudulent sale to one Bailey. Abda Oglesby, trustee in bankruptcy of Walton & Co., intervened, and from the judgment he brings error. Affirmed.

Z. B. Rogers and Slaton & Phillips, for plaintiff in error. Jos. N. Worley, for defendants in error.

LAMAR, J. The creditors of Walton filed an equitable petition under the traders' act to set aside a sale of his stock of merchandise to Bailey, alleging that the property was inventoried at \$3,500, and sold for \$1,500, much less than its value, and with intent to hinder, delay, and defraud his creditors, and that Bailey purchased with a knowledge of that intent. Bailey answered, claiming that he paid full price, and bought in good faith, without notice of Walton's intent to defraud his creditors. Walton having been adjudicated a bankrupt, the trustee intervened as plaintiff, and the trial proceeded without any amendment or allegation that the sale was void under the provisions of the bankrupt act. The evidence was conflicting. The judge charged (a) that, if Walton was insolvent, and made the sale for a valuable consideration, for the purpose of defrauding his creditors, and Bailey knew of that intent, they must find for the plaintiff; and (b) "if Walton did sell his stock of goods to Bailey with an intention to defraud and delay his creditors, if Bailey did not know of such intention, and had no reasonable grounds to suspect such intention, you should find in favor of Bailey." Error is assigned because the court did not qualify this by instructing the jury that they must find that the consideration was adequate before the sale to Bailey could be sustained. The judge's charge was, in substance, Civ. Code 1895, § 2695, par. 2. The plaintiff presented no request as to effect of inadequacy of consideration, and, as the consideration admitted to have been paid was not so small as to manifest fraud, the verdict must be treated as a finding that Bailey was a bona fide purchaser for value, without notice of any intention on the part of Walton to defraud his creditors. Every voluntary conveyance by an insolvent is void, whether the grantee has notice of the fraudulent intent or not. There are some cases which hold that, where the conveyance is to an innocent purchaser on a valuable consideration, but for considerably less than the worth of the property, in a proper proceeding by the creditors it may be treated as voluntary to the extent of the difference between the value and the price paid. 14 Am. & Eng. Enc. L. (2d Ed.) 292 (6). But the pleadings and prayers of the petition must be adjusted to such an issue. It may be, as suggested in

Scott v. Winship, 20 Ga. 429 (2), that the creditors would have to do equity, and refund the price as a condition of their right to maintain such an equitable proceeding. The question is not raised in this case by pleadings or request to charge, and, as the charge given was in the language of the Code, as there was no request improperly refused, and as the errors assigned on the admission of evidence were not such as to require the grant of a new trial, we cannot interfere. See Sharp v. Hicks, 94 Ga. 625 (5), 21 S. E. 208; Hawkinsville Bank v. Walker, 99 Ga. 242, 25 S. E. 205; Pool v. Gramling, 88 Ga. 653 (7), 16 S. E. 52; Trice v. Rose, 79 Ga. 78, 3 S. E. 701; Reese v. Shell, 95 Ga. 751, 22 S. E. 580.

Judgment affirmed by five Justices.

(118 Ga. 149)

#### DUNCAN et al v. HOPKINS.

(Supreme Court of Georgia. June 1, 1903.)

#### APPEAL—REVIEW.

1. The charge complained of announces a principle of law which is correct in the abstract, and, as no specific vice in it is pointed out in the motion, it will not be cause for a new trial. The court did not err in overruling the motion on the grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action between John Duncan and others and J. R. Hopkins. Duncan and others bring error. Affirmed.

Juhan & McDonald, for plaintiffs in error. T. M. Peeples and J. R. Irwin, for defendant in error.

PER CURIAM. Judgment affirmed.

(118 Ga. 225)

#### BRANNON v. DUNAHOO.

(Supreme Court of Georgia. June 3, 1903.)

#### CERTIORARI—PROCEDURE—DISMISSAL.

1. While the original papers in a case tried in a justice's court and the originals of the documentary evidence submitted upon the trial should not be attached to a petition for certiorari, the mere fact that such originals were so attached is not cause for dismissing the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action between M. M. Brannon and W. G. Dunahoo. From a judgment dismissing certiorari to a justice's court, Brannon brings error. Reversed.

J. W. Ewing and Harris, Chamlee & Harris, for plaintiff in error. M. B. Eubanks, for defendant in error.

PER CURIAM. Judgment reversed.

(118 Ga. 219)

**MARCHMAN v. CITY ELECTRIC RY. CO.**

(Supreme Court of Georgia. June 3, 1903.)

**APPEAL—HARMLESS ERROR.**

1. When in the trial of an action against a railway company for negligence in damaging property the evidence demands a finding that the defendant was not negligent, an error in the admission of evidence relating to the ownership of the property damaged will not authorize the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by Stephen Marchman against the City Electric Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lipscomb & Willingham, for plaintiff in error. Denny & Harris, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(118 Ga. 176)

**CEDARTOWN COTTON CO. v. HANSON.**

(Supreme Court of Georgia. June 1, 1903.)

**INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.**

1. On the trial of an action for damages by an employe against a cotton mill company, on account of injuries alleged to have been caused by the negligence of one claimed to have been a vice principal of the defendant, where the evidence for the plaintiff fails to show that the relation of principal and vice principal existed between the defendant and the person against whom the negligence is charged in the petition, but, on the other hand, discloses that the plaintiff and the alleged negligent person were fellow servants, subject to the same general master, a motion for nonsuit should be granted.

(Syllabus by the Court.)

Error from Superior Court, Polk County; O. G. Janes, Judge.

Action by John Hanson against the Cedartown Cotton Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fleider & Ault and Blance, Wright & Tyson, for plaintiff in error. Dean & Dean and Bunn & Trawick, for defendant in error.

**CANDLER, J.** This was a suit for damages on account of personal injuries brought against the Cedartown Cotton Company by John Hanson, one of its employes. It appeared that Hanson, at the time of his injuries, had been in the employment of the defendant company for about two months. At that time he was at work at what is known as "feeding the openings to the beaters." One of these machines became clogged with cotton, with the result that, while the machine continued running at so rapid a rate that its separate parts could not be seen, the feeding of cotton to the machine was stopped. Another employe of the defendant, named Patterson, who was regarded by the plaintiff and others of the mill hands as a

foreman or boss, but who was merely a laborer, like the plaintiff, being, on account of his experience, the "leader in the picker room," made a signal to the plaintiff, which he understood to be a direction to clean out or unclog the machine so that it would work properly. The noise made by the machines was such that voices could not be heard in that part of the mill and it was necessary to make signals, to be understood. The plaintiff had frequently seen the machine choked before, but had never tried to clean it. He had seen others clean it, and had always at such times seen the machine stopped. After making the signal to the plaintiff to which reference has been made, Patterson turned and went into another room. The plaintiff, without attempting to stop the machine, lifted what is known as the "apron," which covered it, when, according to his own testimony, the suction of the air drew his coat sleeve into the machinery, and his arm was caught and cut off. One of his witnesses testified that he "grabbed at a wad of cotton in the machine, and the beater cut his arm off." The foregoing appeared from the evidence offered for the plaintiff. At the conclusion of that evidence, the defendant made a motion for a nonsuit, the overruling of which is assigned as error in the bill of exceptions taken to this court.

We are clear that the motion to nonsuit should have been sustained. The petition is based upon the theory that Patterson, who is assumed to have directed the plaintiff to clean the machine while in motion, was the vice principal of the defendant. The evidence fails entirely to substantiate this theory. The following evidence of one of the witnesses for the plaintiff is the strongest statement in support of that contention to be found in the record: "Patterson was in charge of that picker room that night, and giving directions to the men. He was looking after the machines. He was the second man in the factory, and gave orders what to do about working with the machines. The man over Mr. Patterson was in the factory when Hanson got hurt. \* \* \* Patterson gave me all the orders I had when I worked in the picker room." A case directly in point, and which would seem to be absolutely controlling, is *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227, 5 S. E. 492, where it was ruled that "a workman engaged in working in the picker room of a factory with two others, and having the direction of the work therein as foreman, is not a general superintendent of the corporation operating the factory, so as to render it liable for his negligence in starting a machine which he and one of the others were engaged in cleaning, whereby such other employe was injured." In that case, as in this, the alleged vice principal worked in the factory as boss. "He showed the hands in there what to do, and was paid more than others. It was his business to start and stop the machinery. He

gave directions to the employés." The trial court granted a nonsuit, and the judgment was affirmed by this court. We cite this case because of its striking similarity to the case at bar in its facts. A more recent decision, which is also clearly in point, is that of *Hamby v. Union Paper Mills Co.*, 110 Ga. 1, 35 S. E. 297, where it was ruled that "two persons subject to control and direction by the same general master in the same common object are fellow servants, and, if one is injured by the negligence of the other, the master, save when by statute otherwise provided, is not liable, although the negligent servant has the right to direct the work of the other." And see the array of cases cited in the opinion on pages 3 and 4, 110 Ga., page 298, 35 S. E. We are assuming that the evidence for the plaintiff shows that the plaintiff's injuries were due solely to the negligence of Patterson. As a matter of fact, it is exceedingly doubtful if Patterson was shown to have been in any manner negligent. That, however, need not enter into the discussion, for the evidence for the plaintiff clearly established that the plaintiff and Patterson were fellow servants. The allegations of the petition were therefore not supported, and a nonsuit should have resulted.

As the foregoing disposes of the case upon its substantial merits, we will refrain from a discussion of the various points of law raised in the motion for a new trial, or the question whether or not the evidence showed that the plaintiff contributed by his negligence to his injuries. On the principles above announced, and the authorities cited, we have no hesitation in holding that the refusal of the motion for a nonsuit was erroneous.

Judgment reversed by five Justices.

(118 Ga. 157)

**LANE et al. v. WILLIAMS.**

(Supreme Court of Georgia. June 1, 1903.)

**ERROR—REVIEW—RULINGS ON EVIDENCE—BRIEF OF EVIDENCE.**

1. Following its oft-repeated rulings, this court will not consider an assignment of error upon the admission of evidence where it does not appear what objection, if any, was made to the introduction of such evidence on the trial below.

2. Other than as above indicated, there is no assignment of error in the bill of exceptions which does not depend upon an examination of the brief of evidence. It is apparent that no effort was made to brief the evidence, as required by law, and the assignments of error referred to will, therefore, not be considered. *Atlanta & W. P. R. Co. v. Upshaw*, 42 S. E. 82, 115 Ga. 688, and cases cited.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Action between Josie Lane and T. H. Wil-

liams. From the judgment, Lane and others bring error. Affirmed.

Smith & Carswell, for plaintiffs in error.  
Payne & Payne, for defendant in error.

PER CURIAM. Judgment affirmed.

(118 Ga. 219)

**PERRY v. SAYLOR.**

(Supreme Court of Georgia. June 3, 1903.)

**EJECTMENT—DIRECTING VERDICT.**

1. The evidence authorized the direction of a verdict finding part of the land in dispute for the plaintiff and part for the defendant, but the proportionate interest allotted to each in the verdict which was directed was incorrectly determined.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by R. S. Perry against B. F. A. Saylor. From the judgment, Perry brings error. Reversed.

Fouché & Fouché, for plaintiff in error.  
Dean & Dean, for defendant in error.

CANDLER, J. In 1843, James Fleming acquired, by grant from the state, a lot of land in Floyd county, now known, in the classic vernacular of the vicinage, as the "Booger Hollow" lot. Fleming died in 1850, leaving a will in which he devised the lot in question jointly to his wife and six children. Subsequently his wife died intestate, the six children surviving her. The plaintiff in error, Perry, acquired at different times title to the undivided interests of four of these children or their heirs at law. Saylor, the defendant in error, acquired the interests of the other two children. Just at this point there comes upon the scene the unique and picturesque figure of one Lewis Reynolds, a witness for the plaintiff below. Whence came Reynolds, and what is his excuse for figuring in the contest for this piece of land, are not readily apparent. According to his own statement, he had for an indefinite period "squatted" upon the Booger Hollow lot. His sire, who had obtained it in exchange for a night's lodging and board from an unknown man who did not pretend to have any title, had given it to him while they were "on a trade," neglecting the trifling formality of a deed. He himself seems to have recognized that his title was not, like Caesar's wife, above suspicion. He says: "I never did have a deed to this land from anybody. Alex Bobo [a neighbor, who was also quite innocent of title to this or any other land] gave me a deed to it. He just made me a quitclaim deed, because he said I didn't have one, and I made him a quitclaim deed to a lot. We just swapped deeds, so \* \* \* provided any claim ever did come \* \* \* he would have a deed and I would have a deed. \* \* \* 'Twas just a

1. See Appeal and Error, vol. 2, Cent. Dig. § 201a.

deed for a deed. I knew he didn't have any deed to his, and I made him one." And the ingenuous Mr. Reynolds, with a candor truly refreshing, adds: "I believe some of them called it we was land stealing. I didn't call it that way." It seems, however, that both Perry and Saylor regarded with concern the possibility of Reynolds setting up a claim to the land, and each made more or less persistent efforts to get a deed from him. Saylor obtained an option on the land, and subsequently gave Reynolds a paper of which the following is a copy: "For value received, I hereby agree to give Lewis Reynolds \$300.00 out of the proceeds of the sale of land lot 750, third district and fourth section of Floyd county." This was considered by Reynolds to be a contract to buy the land for the price named therein; but it seems that Saylor never paid Reynolds any money except what had been paid for the option, and Reynolds never attempted to convey the land to Saylor. Subsequently, for a consideration, Reynolds made a deed to the land to Perry, and, thus armed, the latter brought an action against Saylor to recover the entire tract. At the conclusion of the evidence the court directed a verdict finding for the plaintiff four-sevenths undivided interest in the land, and for the defendant three-sevenths, and finding also that within 10 days the defendant pay to the clerk of the superior court, for the use of the plaintiff, "one hundred and twenty-eight dollars and fifty-seven cents, the same being three-sevenths of three hundred dollars," in default of which it was provided that his interest should be sold, and the proceeds applied to the payment of that sum to the plaintiff. Perry made a motion for a new trial, which was overruled, and he excepted.

That both the plaintiff and the defendant are entitled to a fractional interest in the land in dispute is clear from the foregoing statement of facts gathered from the record, but we confess ourselves at a loss to understand how the court below arrived at the particular fractions named in the verdict which was directed. Upon the death intestate of Mrs. Fleming, the widow of the original grantee from the state, the entire interest in the lot became vested in her six children. As has been seen, Perry acquired by deeds four of these shares, and Saylor the other two. It is needless to say that Reynolds is not shown to have had any interest whatever in the land. Plainly, therefore, the verdict should have been in favor of the plaintiff for four-sixths of the land, instead of four-sevenths. We are also unable to see any reason why the trial judge should have included, in the verdict directed, a finding against the defendant for a sum of money. He is not shown to have been indebted to Perry in any sum, and certainly Perry could not profit in this action by reason of any agreement between Saylor and Reynolds. To this, however, Saylor did not

except, and therefore it will not furnish a ground for reversing the judgment.

The motion for a new trial complains also of the rejection of certain evidence offered by the plaintiff, but these grounds do not disclose that the court committed any material error. The judgment is reversed on the sole ground that the court erred in determining the fractional interests in the land found to be due to each party.

Judgment reversed by five Justices.

(118 Ga. 242)

### BATTLE v. MAYOR, ETC., OF CITY OF MARIETTA.

(Supreme Court of Georgia. June 4, 1903.)  
CRIMINAL LAW—PROSECUTIONS IN POLICE COURT—LIMITATIONS—VIOLATION OF ORDINANCE—EVIDENCE.

1. The provisions of Pen. Code 1895, § 30, in reference to when "indictments may be found and filed," have no application to prosecutions in the police courts of municipalities.

2. There is no general law in this state providing when prosecutions in police courts shall be barred by lapse of time.

3. Unless the charter or ordinances of a municipal corporation provide that offenses against the municipality must be prosecuted within a given time, no lapse of time after the commission of an act declared by ordinance to be unlawful will bar a prosecution therefor.

4. It is essential to the valid conviction of one charged with the violation of a municipal ordinance that the evidence should show with reasonable certainty that the act was committed after the passage of an ordinance declaring it to be unlawful.

5. Evidence that the act claimed to be unlawful was committed "during the Christmas holidays" does not fix the time with sufficient certainty to authorize a conviction, such evidence being equivocal in its nature, and not showing whether the act was committed before or after the passage of the ordinance.

(Syllabus by the Court.)

Error from Superior Court, Cobb County: Geo. F. Gober, Judge.

Margaret Battle was convicted of violating a municipal ordinance, and brings error. Reversed.

J. Z. Foster, for plaintiff in error. J. E. Mozley and D. W. Blair, for defendant in error.

COBB, J. Judgment reversed by five Justices.

(118 Ga. 181)

### ROSER v. GEORGIA LOAN & TRUST CO.

(Supreme Court of Georgia. June 2, 1903.)

TAX EXECUTION—EXCESSIVE LEVY—SALE—TITLE ACQUIRED.

1. The levy of a tax execution for \$9.90 on a city lot 100 by 163 feet, valued at between \$600 and \$1,000, and susceptible of division into two lots, each of which would be worth more than the amount of the fl. fa., is excessive.

2. The purchaser at a sale under such levy gets no title as against the owner or those claiming under him.

3. The fact that the lot as divided would not be worth as much as if sold as a whole is no

reason why it should be levied on and sold in bulk. It is better for the owner that the property should be somewhat damaged, than that the entire tract should be taken and sold under an excessive levy.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Claim action between Joe Roser and the Georgia Loan & Trust Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Dean & Dean, for defendant in error.

**LAMAR, J.** In 1892 land worth between \$600 and \$1,000 was by Corbin conveyed as security for a debt of \$500. In May, 1897, the property, having been levied on under a city tax execution for \$9.90 against Corbin, was bid in by Hight for \$40. He received a tax deed, but did not enter. Corbin having made default in July, 1897, the property was sold under a power of sale in the security deed, and bought by the Georgia Loan & Trust Company, who contracted to sell the same to Brooks, giving him a bond for titles therefor. Brooks entered into possession, and subsequently transferred his bond to Lizzie Roser. She entered into possession, assumed the indebtedness of Brooks to the Georgia Loan & Trust Company, and paid Brooks \$200 in cash, out of which he agreed to pay off the taxes, including the tax title held by Hight. Brooks paid Hight, and, instead of having the deed canceled, requested him to make a quitclaim deed to Lizzie Roser. This he did, though the time for redeeming had expired. This deed was duly recorded, and by successive conveyances under this tax sale the property was conveyed to the claimant, her brother-in-law, who was in Anniston, Ala. He made no examination of the title, but says that he got an attorney to look at the title and see whether it was good or not, though it does not appear what the report of the attorney was. The claimant relied on possession under the tax title, but the plaintiff in *fi. fa.* insisted that the tax deed was void, it appearing that property worth between \$600 and \$1,000 had been levied on to satisfy a tax *fi. fa.* for \$9.90; that the lot was 100 by 163 feet, and was susceptible of division, though there was some evidence tending to show that its value would be less when divided; that by cutting the property into 50-foot lots the house would have been on one, accessible only from the front, and there would have been a vacant lot on the corner, worth \$150. An inspection of the record would have shown that there were two outstanding titles—one the tax title in Lizzie Roser, and the other the title in the Georgia Loan & Trust Company under the Corbin power of sale. This, with the prior possession of Brooks, and the fact that Lizzie Roser had entered after him, may or may not ordinarily have been sufficient to put the pur-

chaser, Joseph Roser (the claimant), on inquiry; but when it appeared that the property itself was a city lot, with a residence thereon, and that there was a strip of 50 or 60 feet of vacant land on the corner, and that the whole lot, 100 by 163 feet, had been levied on and sold in bulk, without effort to subdivide, to satisfy a tax execution for less than \$10, the purchaser was put on notice of the invalidity of the sale because made under an excessive levy. The answer of the claimant to this proposition is that no one except Corbin or his privies in estate could attack the tax deed for that reason. Not only Corbin, but all of those claiming under him, as privies, including the plaintiff in *fi. fa.*, who bought under the power in the security deed, could complain that the tax sale was void. *Ryan v. Mortgage Co.*, 96 Ga. 322, 23 S. E. 411; *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68. The tax sale was void because of the excessive levy (*Brinson v. Lassiter*, 81 Ga. 40, 6 S. E. 468; *Forbes v. Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. Rep. 152; *Hobbs v. Hamlet*, 106 Ga. 403, 32 S. E. 351); and the fact that the lot, when divided, may have been worth less than the whole undivided, will not prevent it from being void. It is better that the land should have been somewhat damaged by a division than that the owner should lose property worth \$600 or more in payment of a tax *fi. fa.* for less than \$10. Where the character of the estate would be impaired or damaged by a subdivision, the entire property must be seized and sold. Houses cannot be divided, mills separated from water power, or farms from public highways; but a slight detraction in value, arising from a division, will not give validity to a tax sale, otherwise void, because the property is sold in bulk under an excessive levy. The more excessive the levy, the more certainly is the sale void, and therefore the less will be the price realized. The courts, therefore, are of necessity bound to apply the rule in this class of cases. Often the property is sold for a small tax without notice to those beneficially interested. The very fact that the tax sale defeats all prior liens imposes upon officers the exercise of a sound discretion in making these levies. They are allowed a liberal and generous margin. They can take what is amply sufficient. But when they go beyond that, and make a levy that is excessive, and sell in bulk, the purchaser gets no title as against the owner or his privies in estate.

Judgment affirmed by five Justices.

(118 Ga. 196)

# WILCHER v. STATE.

(Supreme Court of Georgia. June 8, 1903.)

## CRIMINAL TRESPASS—INDICTMENT—EVIDENCE.

1. It is not necessary that an indictment based upon Pen. Code, § 219, par. 3, should allege that the act of trespass therein mentioned was "willfully" committed.

2. The evidence introduced on the trial of the present case fully warranted the finding of the jury that the accused was guilty of the offense with which he stood charged; and, in view of the showing made by the state in resistance to his effort to secure a new trial on the ground of newly discovered evidence, his conviction should be allowed to stand.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

J. C. Wilcher was convicted of criminal trespass, and brings error. Affirmed.

B. F. Walker, for plaintiff in error. D. W. Meadow, Sol. Gen., and E. L. Stephens, for the State.

**PER CURIAM.** Judgment affirmed.

(118 Ga. 168)

### **ARMSTRONG v. BALLEW.**

(Supreme Court of Georgia. June 1, 1903.)

**ERROR—RECORD—CASES TRIED TOGETHER—REVIEW OF EVIDENCE.**

1. Where two cases between the same parties are, by agreement, simply tried together, and a separate verdict and judgment is rendered in each, and a motion for a new trial is made in one of them and overruled, and such case is brought by writ of error to this court, only the record in that case can legally be brought up; and, if the record in the other case is also sent up with the bill of exceptions, this court cannot consider it.

2. The claimant being the only witness in her behalf, and there being before the jury facts and circumstances apparently in conflict with her testimony, this court cannot say that the jury were not authorized to find against her testimony.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Claim case by M. S. Armstrong against J. M. Ballew. Judgment for defendant, and claimant brings error. Affirmed.

Starr & Erwin and Cantrell & Ramsaur, for plaintiff in error. Harkins & Dodd and R. J. & J. McCamy, for defendant in error.

**FISH, J.** From the bill of exceptions and the record in this case it appears that two claim cases, in which J. M. Ballew was the plaintiff, L. D. Armstrong the defendant in *fi. fa.*, and Mrs. M. S. Armstrong the claimant, were, by consent of the parties, consolidated simply to the extent of trying them together. In one of these cases, in which the execution in favor of Ballew and against L. D. Armstrong had been levied upon a mule and a yoke of oxen, the property was found subject, and, upon the claimant's motion for a new trial being overruled, she excepted. Upon the trial, the claimant admitted that the defendant was in possession of the property at the time of the levy, and assumed the burden of showing that it was not subject. She was the sole witness in her behalf, and testified that the property belonged to her; that her husband, the de-

fendant, had no interest in it; that she had owned the mule four or five years, and the oxen for two years; that the oxen were purchased with her money; that she owned a horse, which was traded (for her) by her husband for the mule levied on; that she had never returned the property for taxation, but left that for her husband to look after, and supposed he had done so. She further testified as follows: "When the sheriff made the levy, I did [not] tell him that Mr. Armstrong had gone to the station [Oostanaula], and to go there and see him, and maybe he would stop it, as I did not know anything about the property being mine at the time, but I did mention it to Mr. Everett, who was there, and he said that was a matter to come up later." The sheriff, who was introduced as a witness by the plaintiff, testified as follows: "I went to make a levy on the property, and went to the house and told Mrs. Armstrong my business, and I left the property. She said she knew nothing about it, and for me to go down to the station [Oostanaula] and see Mr. Armstrong, who might arrange it in some way. She did not claim the property in her conversation with me; she simply told me to go and see her husband. I went and saw Mr. Armstrong, and told him my business. He told me he was on his way to Rome, and that when he returned he would see the plaintiff about the matter. I afterwards went back after the property, and the mules and oxen were gone. Don't know where they were. I afterwards took bond for the property." The claimant's husband was present at the trial, and assisted her counsel in striking the jury, but was not introduced as a witness.

1. One of the grounds of the motion for a new trial was that the court erred in charging the jury that they could find part of the property subject and part not subject, the assignment of error being that, under the evidence, all of the property was subject, or all of it not subject. As the jury found all the property involved in this case subject, there is no merit in this ground of the motion; for, even if, under the facts in evidence, this charge was erroneous, the claimant was not hurt by it. Counsel for the plaintiff in error contend that the execution was also levied upon certain cows and calves, to which Mrs. Armstrong interposed another and separate claim, and that a verdict in the case in which the cows and calves were claimed was rendered, finding them not subject; and that as, upon the trial, the issues in the two claim cases were by consent tried together, and the evidence in both cases was the same, and the jury found the property in one case subject and the property in the other case not subject, they were probably influenced by this charge to find a compromise verdict. As there was no order of the court consolidating the two cases and making them one, but they were merely by agreement, for the sake of convenience, tried together, and continued to



be separate cases, in which, according to the contention of counsel for the plaintiff in error, separate verdicts were rendered, they could not be brought to this court as one case. *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444; *Wells v. Coker Banking Co.*, 113 Ga. 857, 39 S. E. 298. And certainly, when only one of such cases is brought up, the record in the other cannot legally be brought up with it. If the two cases were tried together, and a separate verdict and judgment rendered in each, the claimant gaining one case and the plaintiff prevailing in the other, and the claimant only moved for a new trial in the case which she lost, she could not, when this motion was overruled, bring to this court any part of the record which belonged exclusively to the case in which there was a verdict and judgment in her favor. With the case in which there was no motion for a new trial this court has nothing whatever to do, and cannot legally know anything as to its pleadings, or the verdict and judgment rendered therein. We cannot look beyond the record of the case which is properly before us; and, as the record in this case shows that the jury found all the property levied upon and claimed subject, it is clear that there is no merit in the ground of the motion for a new trial which we have been considering.

2. The only other grounds of the motion for a new trial were that the verdict was contrary to law, and that it was contrary to evidence. The claimant was the only witness in her behalf, and it is upon her testimony, which it is contended was contradicted, that the contention is based that the verdict was contrary to the evidence. While the claimant was a competent witness in her own behalf, the jury had the right, in passing upon the credibility of her testimony, to take into consideration her interest as a party in the case. *Atlanta & West Point R. Co. v. Hodnett*, 36 Ga. 669. In *Laramore v. Minish*, 43 Ga. 282, Chief Justice Lochrane, in discussing the act making parties competent witnesses, said: "We think, under a proper construction of this law, that witnesses introduced under its provisions are lifted out of the general rule, and that the jury may exercise their judgment on the credit of such witnesses from the fact of their interest, irrespective of other impeachment or attack." Only two judges presided in that case; but in *Penny v. Vincent*, 49 Ga. 473, which was decided by a full bench, what was said by Chief Justice Lochrane in *Laramore v. Minish* was approvingly quoted, and it was held that, under the act of 1866, juries have a larger discretion as to the credit which they will give parties testifying than in the case of witnesses testifying who are not parties. *Trippe, J.*, delivering the opinion, said: "With all this power, a jury should not capriciously discredit a witness or reject his testimony; but if there be in evidence any circumstances or facts in conflict with

the testimony of a party to the suit, \* \* \* and the point be directly made to the jury as to what credit shall be given to his testimony, and they deliberately decide to reject it, and the judge trying the case, who, with the jury, both see and hear the party testify, refuses to interfere, we do not think a case is made to demand our intervention." "Where witnesses are parties to the suit, whatever may be their numbers, their opportunities, or means of information, the jury are to judge of the degree in which their interest affects their credibility." *Amis v. Cameron*, 55 Ga. 449 (3). If we take it for granted that a jury cannot discredit the testimony of a party at interest in a case, when there are no facts or circumstances before them which conflict with it, still we think the jury in the present case were authorized to find against the testimony of the claimant. Although, according to her evidence, she had owned the mule four or five years and the oxen for two years, she testified that she had never returned the property for taxation, and, in explanation of her failure to do so, said she had left that to her husband, and supposed he had done so. Her husband was present in court and assisted her counsel in striking the jury, but he was not introduced as a witness to show that he had returned the property for her, nor for the purpose of corroborating her testimony as to her ownership of the property. When the sheriff went to her home to levy on the property, and told her his business there, she said she knew nothing about it, referred him to her husband, and made no assertion of ownership of the property. When the sheriff, after levying upon the property and leaving it at the residence of the defendant and claimant, went back there to get it, it could not be found, and he failed to ascertain what had become of it. There were circumstances which the jury might consider as conflicting with the testimony of the claimant, and, under the decisions of this court above referred to, we cannot say that they were too slight to authorize the jury to discredit such testimony. In our opinion, they were equally as strong as the circumstances in *Penny v. Vincent*, which the court held sufficient to authorize the jury to disregard the testimony of a party to the case.

Judgment affirmed by five Justices.

(118 Ga. 213)

# STRICKLAND v. PARLIN & ORENDORF CO.

(Supreme Court of Georgia. June 3, 1903.)

SALE—ACTION FOR PRICE—ELECTION OF REMEDIES—EVIDENCE—CONTRACT BY DRUNKEN MAN—VALIDITY.

1. Where suit is brought on a contract of purchase of certain goods, and on promissory notes given, in accordance with this contract, as evidence of the indebtedness thereon, there is no error in refusing to require the plaintiff to elect as to whether he will sue on the contract or on the notes.

2. Where a dealer in goods in another state sends to a person in this state two unsigned papers—one an order for the purchase of a carload of drills, and the other an order for a single drill—and such person, after keeping these blank orders for two or three weeks, hurriedly signs the one for the car load, intending to sign the other, and, without noticing the mistake, sends the order, and the dealer accepts it and ships the drills, and the vendee thereafter notifies the vendor of the mistake, but subsequently receives the drills, pays the freight thereon, stores them, exposes some of them for sale, and sells one of them, the purchaser is liable in a suit brought by the vendor to recover the price of the goods.

3. A contract made by a drunken man is not void, though his intoxication be brought about by the other party, but is merely voidable at his election, and may be ratified by him expressly, or by conduct inconsistent with its rescission.

4. Where one enters into a binding contract to give certain promissory notes for named amounts, and subsequently gives them, fraud in procuring him to sign the notes, or drunkenness at the time of their execution, is no defense, when the notes amount to no more than a compliance with his previous valid contract.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by the Parlin & Orendorf Company against R. L. Strickland. Judgment for plaintiff. Defendant brings error. Affirmed.

Starr & Erwin, for plaintiff in error. J. M. Neel and Cantrell & Ramsaur, for defendant in error.

SIMMONS, C. J. The record discloses that Strickland, who lived near Calhoun, Georgia, had received from the defendant in error two forms of order for goods. One of these was a form for ordering a car load of drills, with proper attachments; the other, for ordering one drill. Strickland kept these order blanks for two or three weeks, and then, according to his testimony, suddenly concluded that, as the season for selling drills was at hand, he would sign one of the orders. He intended to sign the order for the single drill, but, having both before him, he by mistake signed the order for the car load of drills, thinking he was signing the other. The reason for his immediate hurry was that some one was passing on the way to town, and he signed in haste, that he might give the order to the passer-by to take to one Neal, who was to mail it to the defendant in error. Some time later, Strickland discovered his mistake, either by receiving a communication from the defendant in error, or because of information received from Neal. After he ascertained that he had signed the wrong paper, and had ordered a car load of drills, when he intended to order but one, he claimed that he wrote a letter notifying the defendant in error of the mistake, and instructing it not to fill the order. This letter, if any such letter was ever written, was not introduced in evidence, although a notice to produce was given the

plaintiff company; but a letter was introduced which Strickland stated was a postscript to the letter above mentioned. This "postscript" was as follows: "Just as I go to post this, I received your card stating you had received my order per contract for one car load of drills. You will please not send car load as I do not know that I will need them yet. I will wait for a while till I see how the trade is first. But you will please send me one disc drill for sample at once, also ship with drill literature. I do not want the chain cover. Yours, etc. R. L. Strickland." On August 9, 1898, eight or nine days after the order for drills was sent, Strickland sent another letter, asking the company, if it accepted his contract, to "change it just a little and make the first payment due first of November instead of first of October," giving as his reason for this request that "the cotton crop is our money crop, and it never gets on the market till the first of November." The car load of drills arrived at the destination shortly thereafter. Strickland received them, paid the freight, and stored the drills in a warehouse. He took one of them out, and exhibited it in the courthouse square during the session of court. He carried one of them to Canton, and another to Ellijay. One of these he sold, while the other is still at Canton. He exercised acts of ownership and control over the drills during the fall of that year, and "talked them up" in his endeavors to sell them. The order sent to the defendant in error contained an agreement on the part of Strickland to give two notes for the purchase price of the drills; it being stipulated that these notes were to be received, not in payment, but merely as evidence, of the indebtedness. In December, 1898, an agent of the defendant in error met Strickland in Calhoun. There Strickland signed two notes covering his indebtedness under the contract. The notes not being paid at maturity, suit was brought on them in the superior court of Gordon county. Strickland filed two defenses: (1) That he had made a mistake in ordering the car load of drills, and had notified plaintiff of such mistake, and countermanded the order; and (2) that he had declined to sign the notes until the agent of the plaintiff gave him whisky and made him drunk, when he signed the notes without knowing what he was doing. The evidence relating to the plea of mistake and the rescission of the contract on that ground has already been recited. As to the plea of drunkenness, Strickland fully sustained the allegations as to his having been drunk at the time he signed the notes, except that he appeared to have remembered afterward that he had signed them. He testified that he at first refused to sign them; that he went to the agent's room, where he and the agent had divers and sundry drinks; and that he at last signed the notes. He had a rather faint recollection of signing them. The agent

denied having had any whisky in Calhoun, denied having taken any drink or drinks with Strickland, denied that he had offered Strickland any whisky, and denied that Strickland was intoxicated at the time he executed the notes. The evidence also showed that Strickland did not give the company any notice as to how the notes were procured, but that when they were sent to attorneys for collection, and one of the latter saw Strickland about the payment of the notes, he simply asked indulgence, without intimating how the notes were obtained. Strickland does not appear to have done anything towards a disaffirmance or repudiation of the notes until after he had been sued thereon. At the close of the evidence, the court, on motion, directed a verdict for the plaintiff below. Strickland filed his bill of exceptions, assigning error upon the refusal of the court to make the plaintiff elect whether it would rely upon the contract or upon the notes, and also complaining of the direction of the verdict.

1. The petition declared upon the contract contained in the order for the drills. That order specified the goods and the price to be paid therefor, and contained an agreement that the defendant should give two promissory notes as evidence of indebtedness. The petition declared also upon the two promissory notes, and prayed judgment upon them. In our opinion, there was no error in the refusal to require the plaintiff to elect. The contract and the notes constituted the same cause of action. A recovery on either would be for the purchase price of the goods. There could be but one recovery, and the petitioner could seek that upon the contract or upon the notes, or upon both.

2. Under the facts disclosed, Strickland was not entitled to a rescission of the order containing the contract of purchase of the goods. If there was a mistake in ordering a car load, when he intended to order but a single drill, it was brought about by his own negligence, in which the plaintiff had no part. He kept the order blanks two or three weeks; and while he may have signed one of them hurriedly, and thus made a mistake, the plaintiff knew nothing of this, and did not in any way contribute to the mistake which he claims he made. As far as the plaintiff was concerned, the contract was complete when the defendant deposited the order in the post office, provided plaintiff accepted it. Strickland testified that, as soon as he discovered that he had signed the wrong order, he notified the plaintiff of the mistake; but he did not testify that he wrote to it as to the reasons for the mistake, or what was the mistake made. Even if the order was signed by mistake, we think his subsequent conduct would amount to a ratification of the order, and would prevent him from insisting now upon a rescission. He did not deny that when the goods arrived at Calhoun he received them, paid the freight,

and stored them in the warehouse. He exhibited them in public, carried two of them to different counties, and sold one of them. It is true, he said he was "bothered in his mind" about the time the goods arrived, because he had a case in court; but it appears that at that very term of court, and "immediately" upon the arrival of the drills, he had time to exhibit one of them at the courthouse square. He also claimed to have sold the one drill in order to reimburse himself for the freight charges he had paid. If he intended to rescind his contract on the ground of mistake, he should have declined to receive the goods or pay the freight charges. He should have had nothing to do with them, except to reimburse the vendor for any expense it might have incurred before it was notified fully of the mistake and of his intention to rescind. As matter of fact, there was no offer to return the drills or to place the vendor in statu quo. Without this, there could be no rescission of the contract. Strickland stored and held the drills, and did not even notify the vendor that they were held subject to its order. He, instead, exercised acts of ownership and control, and dealt with the drills as his own, in a way that was totally inconsistent with an intention to rescind.

3. Assuming as true that the agent of the vendor furnished Strickland whisky, and made him drunk, for the purpose of procuring his signature to the notes, that did not render the notes absolutely void. The Code declares that "a drunkard, when actually intoxicated to such an extent as to deprive him of reason, can make no valid contract with any one cognizant of the fact of his condition. If the party contracting was at all instrumental in producing the state of intoxication, the contract is invalid, however partial the intoxication may be." Civ. Code 1895, § 3654. Contracts made under these conditions are like the contracts of infants or lunatics—not void, but voidable at the election of the party after he is rid of his disability. Like the contract of an infant or lunatic, such a contract may be ratified. Ratification may be express, or may be implied from the acts or from the silence of the party. In the present case the conduct and silence of Strickland resulted in a ratification of the execution of the notes. He testified that he remembered having signed them, and that he signed them after dinner. There is no evidence in this record that from the time he signed the notes, in December, 1898, up to the time he filed his pleas in this case, in March, 1902, he ever disaffirmed, or gave any notice that he would not be bound by, the notes, or that he was intoxicated when he signed them. On the contrary, there is evidence that, when one of the plaintiff's attorneys saw him in regard to the collection of the notes, he asked for indulgence, and made no reference to any defense to the notes on the ground of intoxication. There

is evidence that there was a former trial of a suit on one of the notes, but what was set up as a defense to that suit does not appear.

4. We are satisfied that the plaintiff in error was bound on these notes, whether he was drunk or sober at the time they were executed. The contract contained in the order for the purchase of the goods provided that he should give these notes, and that they should be received, not in settlement of the indebtedness, but merely as evidence thereof. If that contract was legal and binding—and we think it was—the vendee was bound, under the law, to give the notes. When he signed them he was only carrying out the specific agreement or contract previously made. He had already assented to the contract, and the notes were merely further evidence of the indebtedness. That being true, what difference does it make whether he signed the notes when he was drunk or when he was sober? They were for the purchase money of the goods which he had ordered. The debt was valid, and the contract binding; and, if he did no more than the law would have required of him under his contract, his condition at the time of signing could make no difference. For the reasons given, there was no error in directing a verdict for the plaintiff company.

Judgment affirmed by five Justices.

(118 Ga. 206)

#### **COLLINS v. CARR.**

(Supreme Court of Georgia. June 3, 1903.)

##### **VERDICT—RENDITION—ESTOPPEL TO OBJECT.**

1. When, in the trial of a case in equity, it becomes necessary for the jury to embrace in their verdict their findings as to several issues of fact, in order that the judge may render a proper decree, and counsel for both parties, on account of the complicated nature of the case, agree that the jury may return a verdict generally for one party or the other, and that after the verdict is returned the judge shall have power to put the verdict in proper form, and the jury returns a verdict for the plaintiff, and the judge directs counsel for the plaintiff how to write out a verdict to carry out the intention of the jury, and the jury is then directed to sign such verdict so framed, the defendant is estopped to ask a new trial because of the findings in the verdict, if the latter is legal, and embodies the findings proper, under the pleadings and evidence, to a verdict for the plaintiff.

2. The verdict so directed in this case was proper, and embraced all the findings necessary to enable the judge to base thereon a proper decree. The true meaning of a verdict that a trust "is void" is that the trust was void at the time the petition was filed and at the time of the trial; and a finding that the appointment of the trustee be annulled does not find that the trustee was not such up to the time of the verdict and decree.

3. The evidence was sufficient to warrant the verdict.

4. That the court erred in its judgment or decree is no ground for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Bill by J. H. Carr against J. G. Collins. Judgment for plaintiff, and defendant brings error. Affirmed.

Hunt & Merritt and Jas. A. Harley, for plaintiff in error. W. H. Burwell and R. H. Lewis, for defendant in error.

SIMMONS, C. J. Josiah Carr, of Hancock county, Ga., died, leaving a will, which was probated in January, 1897. By this will the testator devised all of his real property to a trustee in trust for his son for life. At the death of the son, this property was to go to the son's children, if he had any. If the son left no children, part of the property was to go to the son's widow for life. The remainder was to the testator's nephews and nieces. The testator seems to have considered his son a spendthrift, and by the trust attempted to prevent the son's squandering the estate. In October, 1899, the son filed an equitable petition, setting up that he was of sound mind, sui juris, and not laboring under any disability, on account of mental weakness, intemperate, wasteful, or profligate habits, which rendered him unfit to be intrusted with the care and management of property. He prayed the court to decree that the trust be annulled, and to order the trustee to turn the property over to him, as the life tenant. On the trial of the case the jury found for the plaintiff. The motion for new trial made by the trustee was overruled by the court. The trustee excepted.

1. After the case had been argued, and before the charge of the court, counsel for all parties agreed that the jury should return a general verdict for the plaintiff or for the defendant, as they found the facts to be, and that the court should instruct them to this effect, and that the verdict should afterwards be put in form under the direction of the court. After the charge of the court, the jury returned a verdict for the plaintiff. Thereupon the court, over the objection of counsel for the defendant, allowed plaintiff's counsel to prepare, and directed the jury to sign, the following verdict: "We, the jury, find that John H. Carr is of sound mind, and is not, on account of mental weakness, intemperate habits, wasteful and profligate habits, unfit to be intrusted with the right and management of property; that the trust sought to be created in the second item of the will of Josiah Carr is void; and that the appointment of Jno. G. Collins as trustee be annulled. We further find that the title to the life estate in the property described in said second item of said will to be in said John H. Carr, and that the property described in said second item be turned over to said John H. Carr, as the life tenant. October 14, 1902." Of the overruling of the objections, and of the direction that this verdict be signed, complaint was made in the motion for new trial. Counsel seem to have agreed that it would be difficult for the jurors, in

their room, without a form to guide them, to so frame their verdict as to include all the findings which should be expressed therein, and therefore agreed that the court might frame the verdict upon the return of a general verdict. We think that, after this agreement had been acted upon by the court and by counsel for the other side, counsel for the defendant were estopped to make objections to the court's directing the form of the verdict. The verdict would stand just as though it had been originally returned in that form by the jury. The only exception defendant could take to it would be that the court directed a verdict which would have been illegal or wrong, had it been returned by the jury of their own motion. Of course, the agreement did not bind either party to submit to a verdict which was violative of the law, or without evidence to support it.

2. One of the objections urged to the verdict was that it does not specify at what time the item of the will appointing the trustee became void. We think the proper construction of the verdict is that it was void at the time the petition was filed, and at the time of the trial. The father had a right to appoint the trustee upon his knowledge of the son's habits, and the presumption is that the son, at the time of the execution of the will, was, in the opinion of the father, not a fit person to take charge of the property. That presumption remained until rebutted by proof before the jury. Up to the time sufficient proof was made on the trial to authorize the finding that the trust was invalid, that item of the will was valid and binding upon the son and the trustee. When the jury, in their verdict, declared that the trust "is void," this meant that the trust was void at the time the petition was filed and at the time of the trial. Another exception taken to the verdict was that it discharges the trustee without making provision for his commissions, counsel fees, and other expenses incurred in the discharge of his duties as trustee. It is sufficient to say in answer to this that the record does not disclose, either in the answer of the trustee or in the evidence, that any such issue was made. If it was not made in the pleadings or supported by evidence, of course, the verdict is not defective in not dealing with it. However, as this issue has not been passed upon in this case, the trustee can make the issue in accounting with Carr, and may take credit for any expenses to which he may be legally entitled.

3. The evidence authorized the verdict.

4. Several grounds in the motion for new trial complained of error in the decree of the court. Such error, if it exists, does not constitute a ground for a new trial. No new trial is necessary to correct a judgment or decree. If a judgment or decree is erroneous or illegal, direct exception should be taken to it at the proper time.

Judgment affirmed by five Justices.

(118 Ga. 207)

### HADDEN v. THOMPSON et al.

(Supreme Court of Georgia. June 3, 1903.)

#### SPECIFIC PERFORMANCE—PAROL CONTRACT AS TO LAND—RIGHTS OF HEIRS—JUROR—DISQUALIFICATION.

1. Where a son, upon the faith of a promise by his mother to execute to him title to certain lands owned by her, enters into possession of the premises, and makes valuable improvements thereon, with her knowledge and assent, a court of equity has power to decree the performance of such promise. Civ. Code 1895, § 4039; *Hughes v. Hughes*, 72 Ga. 174; *Looney v. Watson*, 22 S. E. 935, 97 Ga. 235. And upon the death of the son, intestate, while still in possession of the lands, his heirs at law may maintain against the mother an action for specific performance, in the event she declines to make title to them, as such. *Simpson v. Fox*, 69 Ga. 753; *Peters v. Jones*, 85 Iowa, 512; *Downing v. Risley*, 15 N. J. Eq. 93; *House v. Dexter*, 9 Mich. 246; *Fry on Spec. Perf.* (3d Am. Ed.) § 195; 22 Am. & Eng. Enc. Law, 1065. The equitable petition filed in the present case was good, as against the general demurrer interposed thereto; and, while the evidence introduced on the trial of the case was decidedly conflicting, a finding in favor of the plaintiffs was fully warranted.

2. That one of the jurors was disqualified by reason of relationship to one of the prevailing parties afforded no reason for setting aside the verdict, it affirmatively appearing on the hearing of the motion for a new trial that the fact of such relationship was known to the losing party prior to and at the time of the trial.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by Amanda Thompson and others against Sallie Hadden. Judgment for plaintiffs. Defendant brings error. Affirmed.

B. F. Walker, for plaintiff in error. Matt W. Grass, for defendants in error.

PER CURIAM. Judgment affirmed.

(118 Ga. 173)

### CENTRAL OF GEORGIA RY. CO. v. WOOD.

(Supreme Court of Georgia. June 1, 1903.)

#### CARRIERS—CARRYING PASSENGER BEYOND STATION—DAMAGES.

1. In a suit for damages against a railroad company, based on alleged negligence of the defendant in carrying the plaintiff by the station of her destination, where the plaintiff's evidence fails to disclose that she suffered any physical injury, and the utmost damage proven is the inconvenience of several hours' delay and the missing of her dinner by the plaintiff; and where the conduct of the employees of the railroad company was not such as to authorize the grant of punitive damages, but, on the contrary, was in every respect courteous and accommodating, a verdict for the plaintiff for \$249.50 is unwarranted, and should be set aside by the trial judge as excessive.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

¶ 2. See *Jury*, vol. 21, Cent. Dig. § 500; *New Trial*, vol. 37, Cent. Dig. § 103.

Action by Minnie Wood against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. Branham, for plaintiff in error. M. B. Eubanks and R. T. Fouché, for defendant in error.

CANDLER, J. The plaintiff sued the railroad company for damages in the sum of \$499, and obtained a verdict for \$249.50. Her own evidence showed that she boarded a train of the defendant, accompanied by her infant child, who was sick, and presented the conductor with a ticket to a small station in Floyd county, near the city of Rome; her ultimate destination being the home of her parents, a short distance from the station for which she had a ticket. The train did not stop at her station, and she was carried on to Rome. Had she been put off at her station, she would have reached her parents' home in time for dinner. As it was, she did not get her dinner that day. The train reached Rome before noon, and shortly after alighting from the train the plaintiff met her father, who happened to be in Rome on business. About 4 o'clock in the afternoon he took her home with him on his wagon. Nothing is shown which would entitle the plaintiff to punitive damages, but, on the contrary, it appears that throughout the transaction she was treated with due courtesy and consideration. The evidence for the defendant was to the effect that, after having passed the plaintiff's station, the conductor offered to back his train and let her off, if she so desired, or to take her on to Rome, and give her free transportation back to her station, and that she expressed a desire to continue on to Rome. This, however, was denied by her. Be that as it may, there is an entire lack of evidence of any suffering or damage sustained by the plaintiff, beyond the inconvenience of being carried beyond her station, causing her to miss her dinner, and delaying her in reaching the home of her parents. While she missed her dinner, it does not appear from her evidence, even, that she suffered from hunger. The day was Christmas Eve, and the weather was cold, but the plaintiff does not say that she suffered the least unpleasantness from the severity of the weather. Her child was sick, and it was on that account that she was going to the home of her parents; but there is nothing to indicate that she was caused any mental anguish by reason of the suffering of the child, granting that the child suffered on account of the alleged negligence of the defendant.

Under all the circumstances, we are constrained to hold that a verdict for the plaintiff for \$249.50 was excessive, and should have been set aside on motion for a new trial. We are aware of the extreme difficulty of fixing a limit in cases of this char-

acter, beyond which the jury may not go without doing violence to the principles of justice. The plaintiff in the present case, however, does not claim to have suffered any substantial or permanent damage, and it would seem, to say the least, to be more than an ample recompense to allow her approximately \$250 for a few hours' delay in the progress of her journey, the loss of her dinner, and the slight inconvenience which she is shown to have suffered. The case of *Southern R. Co. v. Bryant*, 105 Ga. 318, 31 S. E. 182, we think, is very strongly in point. See, also, *Hughes v. Western R. Co.*, 61 Ga. 132, where, in a somewhat similar case to the one at bar, \$50 was held to be enough. While it is with great hesitancy that we interfere with the verdict of a jury duly approved by the trial judge, we cannot see our way clear to allow this verdict to stand.

Judgment reversed by five Justices.

(118 Ga. 348)

HAY et al. v. COLLINS (two cases).

(Supreme Court of Georgia. June 4, 1903.)

ERROR — BILLS OF EXCEPTIONS — PLEADING — DEMURRER — TRESPASS — EVIDENCE — VERDICT.

1. Where the losing party makes a motion for a new trial, and also a motion in arrest of judgment, both of which are overruled, he may bring to this court the questions thus raised by separate bills of exceptions, although both rulings might have been excepted to in one bill. It is the better practice, however, to embody in one bill of exceptions all questions which may be legally raised therein.

2. Where a petition contains three counts, one of which is voluntarily struck by the plaintiff, and a demurrer is filed to the petition as a whole, if either of the remaining counts sets forth a good cause of action the demurrer will be overruled.

3. The plaintiff's evidence was ample to withstand a motion to nonsuit.

4. In an action for damages against several defendants jointly for an alleged trespass upon property of the plaintiff, the jury may return a verdict in favor of the plaintiff for separate amounts against the different defendants; but, in a suit for damages for malicious abuse of legal process, the verdict returned for the plaintiff should be for the same sum against all the defendants jointly. Where, therefore, a petition for damages contains two counts, one sounding in trespass and the other for malicious abuse of legal process, it is error for the court to charge the jury that they may find a verdict for the plaintiff for different amounts against the different defendants, without charging also that such a verdict could only be found in the event they find for the plaintiff solely on the count in trespass.

5. The judgment and the record on which it was based were sufficient to withstand a motion in arrest of judgment.

(Syllabus by the Court.)

Error from City Court of Macon; W. D. Nottingham, Judge.

Action by Cella Collins against P. L. Hay and others. Judgment for plaintiff, and defendants brought error on separate bills of exception. Judgment on motion for new trial reversed; on motion in arrest, affirmed.

Daley, Moore & Cochran and Guerry & Hall, for plaintiffs in error. Hardeman, Davis, Turner & Jones, for defendant in error.

CANDLER, J. Cella Collins brought suit against Hay, Ford, and Odom; her petition, as originally filed, containing three counts, sounding respectively in trover, trespass, and malicious abuse of legal process. Subsequently to the filing of her petition she voluntarily struck the count in trover, and the suit proceeded as an action for damages on the other two counts. The petition sets out substantially the following facts: The plaintiff is the owner of certain described bedroom furniture. On a named day, Hay, through his agent, Ford, made an affidavit before a justice of the peace in Bibb county that Levi Collins, the plaintiff's husband, was indebted to the Central City Loan Company in a sum stated, and on that affidavit caused to be issued an execution against Levi Collins. This execution was placed in the hands of the defendant Odom, who was a constable of Bibb county, and, at Hay's instigation, was levied on the plaintiff's property, which was pointed out to the constable by Ford, as Hay's agent. The entry into the plaintiff's house and the seizure of her property were done in the early hours of the morning, and in the presence of her neighbors, and the plaintiff was put to great mortification and shame by reason of the impression which was created that she was illegally in the possession of the property. By reason of her poverty, the plaintiff was unable to replevy the property or to refund her house, and she was therefore compelled to endure great hardships. For the trespass set out, she prayed for damages in the sum of \$1,000. The count in malicious abuse of legal process alleged that the Central City Loan Company was neither a corporation nor a person, but was merely a mask behind which Hay concealed himself while pretending to purchase secondhand furniture; Hay in fact being engaged in the business of lending small sums of money to poor and ignorant negroes, charging them therefor, under the name of monthly rents, a most exorbitant and extortionate rate of usury. Ford is the agent of Hay, and holds himself out as the agent of the Central City Loan Company. At the time the proceedings heretofore mentioned were begun, the defendants knew that Levi Collins was not indebted to the Central City Loan Company; that, if he was ever indebted to it in any sum, there were incorporated therein large amounts of usury; "and that the said Levi had paid all of the said claims that ever had any existence, with legal interest thereon, many times over." The Central City Loan Company held no mortgage against Levi Collins, and the proceedings instituted were part of a scheme on the part of the defendants "to oppress and to coerce petitioner into paying said unjust exaction, and, on her failure so to do,

to convert to their own use petitioner's furniture as aforesaid; defendants well knowing that, owing to petitioner's poverty, she would be unable to replevy said property." The procuring the issuance of the process, the entrance into her house, and the seizure, carrying away, and retention of her property, were all malicious, and without probable cause on the part of the defendants, "and was a malicious abuse of legal process to coerce petitioner into paying an unjust exaction, whereby the defendants have injured, damaged, and become liable to petitioner in the just and full sum of five thousand dollars."

The defendants demurred generally, and on the ground of misjoinder of causes of action. The defendants Hay and Ford also joined in a demurrer on the grounds (1) that the petition set out no cause of action as against them; and (2) that the petition shows on its face an entire absence of liability on their part to the plaintiff. Both demurrers were overruled. They also filed an answer in which they denied liability to the plaintiff on any of the counts of the petition. They admitted that the property involved had been levied on, but denied that it was at the time in the possession of the plaintiff, and claimed that the levy was in pursuance of the foreclosure of a valid mortgage given to the Central City Loan Company by Levi Collins, and that he was in possession of the property and had title thereto at the time. They averred "that they have done nothing wrong, that they have merely sought their legal rights in the courts of this state to collect an indebtedness due them under a mortgage for borrowed money, and that they foreclosed the same as the law required, strictly adhering to all the conditions and requirements demanded by the law in mortgage foreclosures in this state." The case was tried before a jury, who returned the following verdict: "We, the jury, find for the plaintiff the sum of one thousand dollars, as follows, viz.: P. L. Hay, \$500; W. G. Ford, \$300; W. W. Odom, \$200." The defendants made a motion for a new trial on various grounds, which was overruled. To the overruling of their demurrers, their motion for a new trial, and a motion for nonsuit made by them at the conclusion of the plaintiff's evidence, they excepted. During the same term of court at which the case was tried, and before the filing of their motion for a new trial, the defendants made a motion in arrest of judgment on the grounds that the original petition set out no cause of action; that the verdict upon which the judgment was based was absolutely void, and no legal judgment could be rendered thereon; that any verdict rendered should have been either a general verdict for the plaintiff, or a finding generally for the defendants; and that the pleadings did not authorize the rendition of the judgment against the defendants. The motion in arrest was overruled, and the defendants

filed a separate bill of exceptions, assigning error thereon. As the questions involved in the two bills of exceptions are closely connected, and do not require separate treatment, they will be considered together.

1. Upon the call of the cases in this court, counsel for the defendant in error moved to dismiss both writs of error upon the grounds (1) that the judgment excepted to was no such final judgment in the court below as would authorize a writ of error to this court; (2) that the judge of the city court of Macon had prior thereto granted a bill of exceptions in said cause, and had therefore exhausted all power he had to deal with said cause; (3) that the court below had no power to grant to the same party two separate writs of error in one and the same case. After considering the questions raised by the motion to dismiss, we have reached the conclusion that there is no reason why a party may not, if he sees fit, bring to this court the overruling of a motion for a new trial in one bill of exceptions, and the refusal of a motion in arrest of judgment in another. They are separate and distinct remedies. One asks for another trial of an issue or issues which have been determined against the movant, and is designed to give the trial judge an opportunity to review the evidence, and pass upon the various questions raised on objections to evidence, exceptions to the charge, and the like; the other attacks the judgment for some defect apparent upon the face of the record. The motion in arrest is narrow and restricted in its province, and attacks conclusions reached by court or jury solely on the ground of illegality in form or substance, or because based upon insufficient pleadings, or such as are upon their face bad. The losing party to a ruling on a demurrer may bring that ruling before this court for review on a separate bill of exceptions, but that does not deprive the court of jurisdiction to proceed with the trial on the merits, when the same party may except to the overruling of a motion for a new trial, thus bringing up two bills of exceptions in the same case. So, in the present case, inasmuch as the arresting of the judgment by the court below would have been a final judgment, the moving party may, without reference to any other action taken by him to get rid of the effect of the verdict rendered against him, except to the judgment overruling the motion in arrest, and bring such ruling before this court for review. While this is true, we take this occasion to say that, in our opinion, the better practice is to bring in one bill of exceptions all questions which can legally be raised therein. In the case at bar there was no legal reason why the motion in arrest and the motion for a new trial should not have been brought up in the same bill of exceptions, and, in the interest of economy of costs and of labor of court and counsel, such would have been far the better mode of procedure; but at

the same time we are constrained to rule that, as the law now stands, counsel had the right to sever the questions made, and bring them up in separate bills of exceptions. The motion to dismiss is therefore overruled.

2. The defendants, by two sets of demurrers—one filed by all three of the defendants, and the other by Hay and Ford—attacked the petition on the ground that no cause of action was set out against them. These demurrers were aimed at the petition as a whole, and therefore, if any count in the declaration was good, the demurrers cannot stand. It will be recalled that the plaintiff struck the count sounding in trover, leaving two counts, sounding respectively in trespass and malicious abuse of legal process. In disposing of the demurrers, it is only necessary to say that the count in trespass set out a good cause of action, and that the court, therefore, did not err in overruling the demurrers. Whatever of merit there may have been in the demurrer on the ground of misjoinder of causes of action, the difficulty was removed when the plaintiff voluntarily struck her count in trover.

3. The evidence amply sustained the allegations made in the count in trespass, and the motion for a nonsuit was properly overruled.

4. As has already appeared, the case was tried on a petition containing two counts—one for a trespass alleged to have been participated in by all three of the defendants; the other claiming damages against the three for malicious abuse of legal process. Although it appeared from the petition that the process alleged to have been abused was directed against the husband of the plaintiff, the question whether one not a party to the process or action can maintain a suit of this character was not made by special demurrer, but was raised for the first time in this court, and we are therefore not called upon to decide that question. On the trial, evidence was introduced on both sides on the questions involved in both counts, and the charge of the court went to the exposition of the law applicable to suits both for trespass and for malicious abuse of legal process. Several of the exceptions to the charge complain that the court confused the law applicable to the one with that applicable to the other. For instance, in one ground of the motion it is complained that the court erred in charging the jury as follows: "If you find for the plaintiff, the form of your verdict would be, 'We, the jury, find for the plaintiff,' naming the amount, in dollars and cents, you find against each," while in another ground the following charge is assigned as error: "Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either; but the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in said cases may be entered severally." We have no hesitation in ruling that these



charges were erroneous. If the suit had been proceeding only upon the count for trespass, and for a trespass on the property of the plaintiff only, under the ruling of this court in the case of *McCalla v. Shaw*, 72 Ga. 458, neither of the charges complained of would have been objectionable, because it was there held that section 8073 of the Code (now Civ. Code 1895, § 3915), providing for the apportionment of damages by the jury where several trespassers are sued jointly, was applicable only to trespasses on property; but in the same case it was distinctly held that the section in question does not apply to cases where two or more are jointly sued for malicious arrest or false imprisonment, where the act on which the suit was predicated was the joint act of all the defendants. A verdict for \$300 against one of the defendants and \$100 against the other was set aside as illegal, and as one that should not have been received by the court. In the case of *Simpson v. Perry*, 9 Ga. 509, it was held that in such cases "the jury are to assess damages against all the defendants jointly, according to the amount which, in their judgment, the most culpable of the defendants ought to pay." Citing 2 Gr. Ev. § 277. That case was an action against two defendants for an assault and battery. In the case of *Hunter v. Wakefield*, 97 Ga. 543, 25 S. E. 347, 54 Am. St. Rep. 438, it was held that "if, in an action for a libel brought against several defendants, the plaintiff recovers at all, the damages awarded must be for the same amount as to all of the defendants found liable. In a case of this kind, different sums cannot be assessed against different defendants." This case, which was decided by a full bench, cites approvingly the case of *McCalla v. Shaw*, supra. In the case now under consideration, it will be noted that both of the charges complained of were right if the jury found for the plaintiff on the count which claimed damages on account of the alleged trespass on the plaintiff's property, but were erroneous if applied to the count claiming damages for the malicious abuse of legal process. We cannot presume that the jury did not consider the evidence offered in support of this latter count. In fact, we are inclined to think that its allegations have a greater tendency, if supported by evidence, to cause the jury to give damages to the plaintiff, than those contained in the count in trespass. The judge nowhere in his charge told the jury that such a verdict as was rendered could only be found under the count in trespass, and we therefore think that a new trial should have been granted on the grounds of the motion which complain of the charges which we have pointed out.

5. In view of the conclusion reached in the foregoing, it is hardly necessary for us to pass on the exception to the refusal of the court to sustain the motion in arrest of judgment. We think, however, that this judgment was not such a one as was sub-

ject to a motion in arrest. The verdict was a legal one under the second count in the declaration, and, it not appearing on what count the verdict was rendered, on motion in arrest the verdict would be held to be on the count upon which it was good; and if the allegations of any part of the petition furnished a legal basis for the verdict, and the judgment followed the verdict, the motion in arrest should not have been sustained.

Judgment on motion for new trial reversed; on motion in arrest, affirmed. By five Justices.

(118 Ga. 146)

#### D. M. FERRY & CO. v. MATTOX & TURNER.

(Supreme Court of Georgia. June 1, 1903.)

##### CERTIORARI TO JUSTICE—GRANT OF NEW TRIAL—REVIEW.

1. Where the verdict rendered in a justice's court was not demanded by the law and the evidence, the Supreme Court will not interfere with the first grant of a new trial, upon a petition for certiorari containing general grounds, when it does not appear that the certiorari was sustained and the new trial granted upon any special ground. *Cox v. Snell*, 77 Ga. 469; *Savannah Railway v. Fennell*, 28 S. E. 437, 100 Ga. 474; *Boggs Plow Co. v. Biggers*, 80 S. E. 656, 105 Ga. 471.

(Syllabus by the Court.)

Error from Superior Court, Elbert County H. M. Holden, Judge.

Action between D. M. Ferry & Co. and Mattox & Turner. From an order granting a new trial on certiorari of the justice, Ferry & Co. bring error. Affirmed.

Z. B. Rogers, for plaintiffs in error.

PER CURIAM. Judgment affirmed.

(118 Ga. 146)

#### AUGUSTA SOUTHERN R. CO. v. SNIDER.

(Supreme Court of Georgia. June 1, 1903.)

##### CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. It is not necessarily, as matter of law, negligence for a passenger to be upon the platform of a moving train. Whether it is negligence or not in a particular case must depend upon the circumstances of danger attending the act, and the reason which the passenger has for so placing himself. Ordinarily, in such cases, the question as to whether such an act is negligence is one for a jury; and unless the danger is obviously great, as where the train is moving at a rapid rate of speed, or the condition of the passenger is such as to make his presence upon the platform manifestly dangerous while the train is moving at any rate of speed, the court cannot hold, as matter of law, that the passenger's presence upon the platform is such negligence as would preclude a recovery for injuries received by being thrown from the platform by a sudden jerk of the train.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by F. M. Snider against the Augusta Southern Railroad Company. Judg-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1374.

ment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and B. F. Walker, for plaintiff in error. K. J. Hawkins and L. W. Hardwick, for defendant in error.

COBB, J. This case comes before us upon assignments of error complaining that the court erred in overruling a general demurrer to the plaintiff's petition, and in refusing to grant a new trial, the motion therefor being based solely upon the grounds that the verdict is contrary to law and the evidence. As the evidence authorized a finding that the material averments in the petition had been established, if such evidence was sufficient in law to authorize a recovery, of course there was no error either in refusing a new trial or in overruling the demurrer. There was a conflict in the evidence as to some of the material questions. Viewing the evidence most favorably for the plaintiff, the case presented is as follows: Plaintiff was a passenger upon a mixed train of the defendant. He was in his seat when the conductor announced the name of the station which was his destination. Seeing the conductor approach a lady passenger to help her to alight from the train, he arose from his seat while the train was in motion, and proceeded to the rear door of the car. He stepped upon the rear platform while the train was moving at the rate of about four miles an hour. Seeing that the train was going to pass the usual stopping place and that the speed was not decreasing, he turned to make his way back into the car, and, just as he turned, a sudden jerk of the train made him lose his balance, and in consequence he was thrown to the ground and received injuries resulting in a strangulated hernia. The jerk was sudden, violent, and unusual. The question is whether the plaintiff was guilty of such negligence as would defeat a recovery.

It cannot be held, as matter of law, that it is negligence on the part of a passenger to leave his seat while the train is in motion, and we do not understand that this is insisted on in this case. Neither can it be held, as matter of law, that it is negligence for a passenger to go upon the platform of a car propelled by steam, while it is in motion. *Macon & Western Railroad Co. v. Johnson*, 38 Ga. 437 (7). Whether going upon the platform while the train is in motion is such negligence as to defeat a recovery by one who is injured, depends upon the speed of the train, the age and physical condition of the party, and other circumstances. Where the train is moving at a rapid rate of speed, it would be negligence in a passenger to go unnecessarily upon the platform; and, even where the train is not moving rapidly, it would be negligence per se for an infirm

or enfeebled passenger to go unnecessarily upon the platform. In a case where there is nothing in the condition of the passenger to make his presence upon the platform a negligent act in itself, and where the speed of the train is not such that it would be necessarily dangerous for any one to be upon the platform, it would be a question for determination by the jury whether the presence of the passenger upon the platform was such an act of negligence on his part as would preclude a recovery by him for an injury resulting in part from his presence there. For a passenger to be unnecessarily upon the platform of a train, either standing still or in motion, might be such a negligent act on his part as would authorize the jury to reduce the damages to which he would have been entitled if he had been free from negligence. See *Macon R. Co. v. Johnson*, supra. But whether his presence upon the platform is such a negligent act as would entirely defeat his recovery, depends upon the circumstances above referred to, or others of a similar nature. See, in this connection, 5 Am. & Eng. Enc. L. (2d Ed.) 681, 682. The rule in such cases is similar to that which would be operative where one alights from a moving train. In *Suber v. Railway Co.*, 96 Ga. 42, 23 S. E. 887, Mr. Chief Justice Simmons says: "It is not necessarily, as matter of law, negligent for a person to leave a moving train. Whether it is negligent or not in a particular case must depend upon the circumstances of danger attending the act, and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury; and unless the danger is obviously great, as where the train is moving at full speed, the court cannot hold that leaving the train is, as matter of law, such negligence as should preclude a recovery." The *Suber* Case has been approved and followed in *Macon Railroad Co. v. Moore*, 108 Ga. 90, 33 S. E. 889; *Coursey v. Railway Co.*, 118 Ga. 299, 38 S. E. 866; *Travelers' Protective Ass'n v. Small*, 115 Ga. 457, 41 S. E. 628. The cases relied on by counsel for plaintiff in error are, we think, distinguishable from the present case. In *Blitch v. Central Railroad*, 76 Ga. 333, it was in the night, and the train was moving rapidly. In *Patterson v. Railroad Co.*, 85 Ga. 653, 11 S. E. 872, it was in the night, and the plaintiff had not only gone upon the platform, but was standing on the steps preparing to get off at a street crossing which was not a regular stopping place. In addition to this, the *Patterson* Case must be permitted to rest upon its own peculiar facts. It has not only never been followed, but has never been cited as authority in any subsequent case.

Judgment affirmed by five Justices.

## MEMORANDUM DECISIONS.

**SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. WILLIAMS.** (Supreme Court of Georgia. June 3, 1903.) Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge. Action by R. W. Williams against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed. Hooper & Dykes and Allen Fort & Son, for plaintiff in error. J. H. Lumpkin, for defendant in error.

**FISH, J.** This case is controlled by the decision this day rendered in *Southern Bell Telephone & Telegraph Company v. Harris*, 44 S. E. 885. Judgment reversed by five Justices.

**TRUSTEES OF BAPTIST FEMALE UNIVERSITY et al. v. BORDEN.** (Supreme Court of North Carolina. April 28, 1903.) Submission of controversy by the trustees of the Baptist Female University and others against E. B. Borden, as executor of the estate of W. T. Faircloth, deceased. From a decree in favor of the executor, the plaintiffs appeal. Reversed. W. N. Jones and Battle & Mordecai, for appellants. F. A. Daniels, for executor. W. C. Munroe, for widow. John M. Woodard and W. T. Dortch, for legatees.

**CONNOR, J.** This is the appeal of the plaintiffs, the trustees of the Baptist Female University and the trustees of the Thomasville Baptist Orphanage. The questions presented upon this appeal have been disposed of in the opinion filed in the appeal of the defendant executor. 44 S. E. 47. In accordance with the disposition of that appeal, the judgment rendered by his honor is reversed.

**EPSTEIN v. HARTER et ux.** (Supreme Court of South Carolina. April 16, 1903.) Appeals from Common Pleas Circuit Court of Barnwell County; Klugh, Judge. Action by I. Epstein against W. E. Harter and Julia E. Harter. From an order sustaining demurrer to the complaint, plaintiff appeals. Affirmed. Bellinger & Townsend, for appellant. I. L. Tobin, for respondents.

**POPE, C. J.** The complaint in this action had two causes of action, arising upon two transactions of the plaintiff with the defendant, W. E. Harter, as the agent of his codefendant, Julia E. Harter, in the purchase of goods and merchandise, in settlement for which the defendant W. E. Harter, under seal as agent, gave two notes, one due October 1, 1898, for \$228.84, and the other due on October 15, 1898; that, when said notes were given and goods purchased, W. E. Harter did not state for whom he was agent, though he signed the notes "Agent"; that at such dates he (W. E. Harter) was the agent of his codefendant, Julia E. Harter; that no part of such amounts has been paid, although past due. Upon reading the complaint, the defendant W. E. Harter interposed a demurrer to said complaint for failure to state a cause of action against said W. E. Harter. Judge Klugh sustained the demurrer as to the

defendant W. E. Harter, and ordered the complaint to be dismissed as to said defendant W. E. Harter. After entry of judgment, the plaintiff appealed to this court upon the single ground that the circuit judge erred in sustaining such demurrer. We sustain the judgment of the circuit court, upon the authority of the judgment of this court in the two cases of *Pope & Fleming, Appellants, v. W. R. Harter and Wife*, and *Rosenheim & Son v. W. E. Harter et al.* (decisions just filed) 44 S. E. 407, which were cases of precisely the same character with that now at the bar of this court. It is the judgment of this court that the judgment of the circuit court as to the defendant W. E. Harter be affirmed, and that the action be recommitted to the circuit court for trial as to the defendant Julia E. Harter.

**JACOB COHEN & SON v. HARTER et ux.** (Supreme Court of South Carolina. April 18, 1903.) Appeal from Common Pleas Circuit Court of Barnwell County; Klugh, Judge. Action by Jacob Cohen & Son against W. E. Harter and Julia E. Harter. From an order sustaining demurrer, plaintiff appeals. Reversed. Bellinger & Townsend, for appellants. I. L. Tobin, for respondents.

**POPE, C. J.** When this action by appeal came on for a hearing in this court from an order by Judge Klugh, as circuit judge, sustaining a demurrer to the complaint interposed by the defendant W. E. Harter, counsel for both appellants and respondents in writing agreed that a judgment should be entered by this court reversing the judgment of the circuit court, because the circuit judge had been led, by the representation of counsel for said appellants and the respondents that the facts of the complaint alleged that there was no promise by defendant W. E. Harter to pay the debt of appellants out of his own funds, to pass the order sustaining the demurrer as to W. E. Harter. Therefore it is the judgment of this court that the order of Judge Klugh sustaining the demurrer be, and the same is hereby, reversed, and the action be remitted to the circuit court for a new trial, and this without costs.

**GARY, A. J., and JONES, J.,** concur on the ground that the record shows that there was error.

**WASSON et al. v. FERGUSON et al.** (Supreme Court of South Carolina. May 18, 1903.) Petition by R. M. Wasson and others against W. L. Ferguson and others to enjoin defendants from levying a tax on Sullivan township to pay a judgment for interest on railroad aid bonds. Dismissed. Ferguson & Featherstone, for petitioners.

**PER CURIAM.** This case is ruled in all respects by the case of *McCullough v. Hicks*, 63 S. C. 542, 41 S. E. 761. It is therefore the judgment of this court that the application be refused and the petition dismissed.





